

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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Richard Smith,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff,*

May 11, 2022

Court of Appeals Case No.  
21A-CR-2851

Appeal from the Wabash Circuit  
Court

The Honorable Robert R.  
McCallen III, Judge

Trial Court Cause No.  
85C01-2002-F6-248

**Robb, Judge.**

## Case Summary and Issues

- [1] Richard Smith pleaded guilty to possession of methamphetamine, illegal possession of a syringe, and possession of a narcotic drug, each a Level 6 felony; possession of a controlled substance, a Class A misdemeanor; and admitted to being an habitual offender. The trial court accepted Smith's plea and sentenced him to an aggregate term of eight years in the Indiana Department of Correction. Smith now appeals his sentence, raising multiple issues for our review, which we restate as: (1) whether the trial court abused its discretion in failing to consider mitigating circumstances; and (2) whether his sentence is inappropriate in light of the nature of the offenses and his character. Concluding the trial court did not abuse its discretion and Smith's sentence was not inappropriate, we affirm.

## Facts and Procedural History

- [2] In February 2020, Wabash County police received a complaint that a man in a mask with skulls was acting strangely and attempting to open a door inside the common area of a local apartment complex. An officer was dispatched and upon arrival, observed Smith sitting in a stairway of the apartment's common area with the mask at his side. Smith was known to be unpredictable and aggressive toward police and backup was called. Once backup arrived, the officers determined there was a warrant out for Smith's arrest and searched him. As a result of the search, officers found a black pouch containing a syringe, two plastic bags of a crystal-like substance, several plastic bags

containing an unknown white powder, five orange pills, measuring scoops, cotton swabs, and an empty plastic bag. In the responding officer's experience, the items in Smith's possession were consistent with the use and sale of illegal drugs. Smith was arrested and transported to the Wabash County Jail. Upon arrival at the jail, Smith admitted to one of the jail officers that he was found in possession of illegal substances, but he was unsure of the amount. *See* Appellant's Appendix, Volume II at 57.

[3] Subsequently, the crystal-like substance Smith was found with tested positive for methamphetamine, the unknown white powder tested positive for fentanyl, and the pills were determined to be Buprenorphine Naloxone, a Schedule III controlled substance. The State charged Smith with Count I, possession of methamphetamine, a Level 6 felony; Count II, illegal possession of a syringe, a Level 6 felony; Count III, possession of a controlled substance, a Class A misdemeanor; and Count IV possession of a narcotic drug, a Level 6 felony. The State also alleged Smith was an habitual offender. In November 2021, Smith pleaded guilty to all four counts and admitted to being an habitual offender. The trial court took Smith's plea under advisement and ordered a presentence investigation report.

[4] The report revealed that Smith, then thirty-one years of age, had been using alcohol, methamphetamine, and heroin since the age of sixteen. Although Smith had successfully graduated from the Wabash County Drug Court Program in 2019, he admitted to relapsing after the death of his brother. When asked whether he had a problem with alcohol and drug use, Smith said, "Yes,

because I turn[] to it whenever something bad happens[.]” *Id.* at 112. Smith further acknowledged that substance abuse has had a “harmful effect” on his social life, familial relationships, home life, finances, employment, and overall outlook on life. *Id.* Additionally, the report detailed Smith’s extensive criminal record dating back to the age of fifteen. As an adult, Smith has numerous misdemeanor convictions including battery resulting in bodily injury and intimidation, and felony convictions including theft, unlawful possession of a syringe, and resisting law enforcement. Moreover, at the time of the report, Smith had criminal charges pending in two unrelated cases in the trial court. Smith also has multiple failed probation attempts.

[5] In December 2021, a sentencing hearing was held. The trial court accepted Smith’s guilty plea and found Smith to be an habitual offender. Smith’s significant criminal history and past failed probations were determined to be aggravating circumstances. Smith’s guilty plea was found to be a mitigating circumstance. Accordingly, the trial court sentenced Smith to serve two and one-half years on each of Counts I, II, and IV, and one year on Count III. All counts were ordered to be served concurrently with one another. The sentence for Count IV was enhanced by an additional five and one-half years for Smith being an habitual offender. In aggregate, Smith was sentenced to eight years. Smith now appeals.

## Discussion and Decision

## I. Abuse of Discretion in Sentencing

[6] Sentencing decisions rest within the sound discretion of the trial court.

*Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218 (Ind. 2007). When a sentence is within the statutory range, it is subject to review only for abuse of discretion. *Id.* An abuse of discretion occurs if the decision is “clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.” *Id.* (citation omitted). An example of how the trial court may abuse its sentencing discretion is when it enters a sentencing statement that “omits reasons that are clearly supported by the record and advanced for consideration[.]” *Id.* at 490-91.

[7] Smith argues that the trial court abused its discretion when it did not identify his significant drug history as a mitigating circumstance. *See* Appellant’s Brief at 19.<sup>1</sup> Here, the trial court found Smith’s substance abuse problem to be an aggravating circumstance. Although we acknowledge that a history of substance abuse may be a valid mitigating circumstance, the trial court does not abuse its discretion in finding that a defendant’s substance abuse is not a mitigating circumstance when a defendant is aware of his substance abuse problem but has not taken the appropriate steps to treat it. *Hape v. State*, 903

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<sup>1</sup> Smith did not state this as a separate issue for our consideration. However, he did briefly incorporate an abuse of discretion discussion into his argument that his sentence is inappropriate in light of the nature of his offenses and his character and so we address his abuse of discretion argument separately here.

N.E.2d 977, 1002 (Ind. Ct. App. 2009), *trans. denied*. Smith has been using alcohol, heroin, and methamphetamine since the age of sixteen. He admitted that he has a drug and alcohol problem and “turn[s] to it whenever something bad happens[.]” Appellant’s App., Vol. II at 112. Smith further acknowledged that his substance abuse has had a “harmful effect” on numerous aspects of his life. *Id.* Although Smith briefly achieved sobriety in 2019, he has been unable to keep his substance abuse problem under control and relapsed following the death of his brother. Accordingly, we cannot say that the trial court abused its discretion in not identifying Smith’s drug history as a mitigating circumstance.

[8] Smith also contends that his guilty plea should have been granted more significance as a mitigating circumstance. *See* Appellant’s Br. at 19. The significance of a guilty plea as a mitigating circumstance varies from case to case. *Francis v. State*, 817 N.E.2d 235, 238 n.3 (Ind. 2004). However, where there is substantial evidence of guilt, a guilty plea may be considered less significant. *Primmer v. State*, 857 N.E.2d 11, 16 (Ind. Ct. App. 2006), *trans. denied*. In the present case, the police found Smith with multiple drugs in his possession and after his arrest Smith admitted to a jail officer that he had been found with an unknown quantity of illegal substances in his possession. Therefore, the trial court did not abuse its discretion by not placing more significance on Smith’s guilty plea as a mitigating circumstance.

## II. Inappropriate Sentence

- [9] Indiana Appellate Rule 7(B) permits us to revise a sentence “if, after due consideration of the trial court’s decision, [we] find[ ] that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Sentencing is “principally a discretionary function” of the trial court to which we afford great deference. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). “Such deference should prevail unless overcome by compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant’s character (such as substantial virtuous traits or persistent examples of good character).” *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015). An evaluation of the nature of the offense and character of the offender are separate inquiries that are ultimately balanced to determine whether a sentence is inappropriate. *Reis v. State*, 88 N.E.3d 1099, 1102 (Ind. Ct. App. 2017).
- [10] The defendant carries the burden of persuading us that the sentence imposed by the trial court is inappropriate, *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006), and we may consider any factors appearing in the record in making such a determination, *Reis*, 88 N.E.3d at 1102. The question under Rule 7(B) is “not whether another sentence is *more* appropriate; rather, the question is whether the sentence imposed is inappropriate.” *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008). “The principal role of appellate review should be to attempt to leaven the outliers . . . but not to achieve a perceived ‘correct’ result in each case.” *Cardwell*, 895 N.E.2d at 1225.

[11] Our analysis of the nature of the offense starts with the advisory sentence. *Reis*, 88 N.E.3d at 1104. The advisory sentence is the starting point selected by the legislature as an appropriate sentence for the crime committed. *Childress*, 848 N.E.2d at 1081. Pursuant to Indiana Code section 35-50-2-7, a person who commits a Level 6 felony shall be imprisoned for a fixed term between six months and two and one-half years, with the advisory sentence being one year. Additionally, if found to be a habitual offender, a person who commits a Level 6 felony shall be sentenced to an additional fixed term between two and six years. *See* Ind. Code § 35-50-2-8(i)(2). Pursuant to Indiana Code section 35-50-3-2, a person who commits a Class A misdemeanor shall be imprisoned for a fixed term of not more than one year, with no advisory sentence. Here, Smith was sentenced to the maximum sentence of two and one-half years for Counts I, II, and IV, each a Level 6 felony. On Count III, a Class A misdemeanor, Smith was sentenced to the maximum sentence of one year. Count IV was enhanced by an additional sentence of five and one-half years due to the habitual offender finding. Smith was ordered to serve sentences in excess of the Level 6 felony advisory sentence. When evaluating a defendant's sentence that deviates from the advisory sentence, we consider whether there is anything more or less egregious about the offense as committed by the defendant that distinguishes it from the typical offense accounted for by our legislature when it set the advisory sentence. *Moyer v. State*, 83 N.E.3d 136, 142 (Ind. Ct. App. 2017), *trans. denied*.



[12] Smith contends that he received an “almost maximum sentence” and “near or at maximum punishments[] should be reserved for the ‘worst of the worst’ offenders.” Appellant’s Br. at 17. Further, he argues the nature of his offenses are “indicative of someone that is suffering from untreated chemical dependency” which is “not particularly egregious” and is “victimless.” *Id.* at 16. Accordingly, Smith argues that his near maximum sentence is inappropriate. However, Smith provides no case law to support his argument and Smith ignores the fact that his offenses were the result of his public actions, which shows a lack of restraint. Smith was reported to police by a member of the community due to concerning behavior in the common area of an apartment complex. When police arrived, Smith was not in an individual apartment, but rather he was in a common stairwell used by the complex’s residents. Further, Smith was found in possession of not just one illegal substance, but three separate illegal substances, methamphetamine, fentanyl, and Buprenorphine Naloxone, in addition to a syringe. Therefore, the nature of his offenses does not render his sentence inappropriate.

[13] Smith also alleges that his character does not support the “nearly maximum sentence” he received. *Id.* at 18. We conduct our review of a defendant’s character by engaging in a broad consideration of his or her qualities. *Madden v. State*, 162 N.E.3d 549, 564 (Ind. Ct. App. 2021). A defendant’s life and conduct are illustrative of his or her character. *Id.* When considering the character of the offender, one relevant consideration is the defendant’s criminal

history, *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007), and even a minor criminal record is indicative of poor character, *Reis*, 88 N.E.3d at 1105.

[14] Smith's criminal record began at the age of fifteen and is extensive. His record includes numerous misdemeanor and felony convictions as well as multiple failed attempts at probation. Several of his prior convictions are violence and drug related. Further, at the time of sentencing, Smith had additional criminal charges pending in two separate cases. Smith's criminal record is reflective of poor character.

[15] Smith also has an extensive history of substance abuse. Smith, who was thirty-one years old at the time of sentencing, has been abusing a number of substances since the age of sixteen. *See Vega v. State*, 119 N.E.3d 193, 204 (Ind. Ct. App. 2019) (holding that a long history of substance use reflected poorly on a defendant's character). Despite an attempt to achieve sobriety, Smith has been unable to successfully address his alcohol and drug related problems, graduating from Wabash County Drug Court Program in 2019, but later relapsing following the death of his brother. As Smith acknowledged, he has a substance abuse problem and seeks refuge in drugs and alcohol "whenever something bad happens[.]" Appellant's App., Vol. II at 112. Accordingly, Smith's approximately fifteen years of substance abuse and inability to address this problem are persistent examples of poor character.

[16] Therefore, given the nature of the offense and the character of the offender, we cannot say Smith has persuaded us that his sentence is inappropriate.

## Conclusion

[17] We conclude that the trial court did not abuse its discretion by failing to consider certain mitigating circumstances and that Smith's sentence is not inappropriate in light of the nature of his offenses or his character. Consequently, we affirm Smith's sentence.

[18] Affirmed.

Pyle, J., and Weissmann, J., concur.