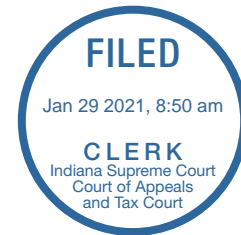


MEMORANDUM DECISION

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

Gary Joseph Hanney,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 29, 2021

Court of Appeals Case No.
20A-CR-1377

Appeal from the Porter Superior
Court

The Honorable Jeffrey W. Clymer,
Judge

Trial Court Cause No.
64D02-1708-F1-7258

Brown, Judge.

- [1] Gary Joseph Hanney appeals his sentence for neglect of a dependent resulting in death as a level 1 felony. We affirm.

Facts and Procedural History

- [2] In July 2017, Hanney, who was born in 1987, and Tamika Conley, the mother of C.B., who was born in 2015, G.A., who was born in 2011, and J.V., who was born in 2013, had been in a relationship for approximately seven months and resided together in Porter County.¹ During the periods of time that Conley worked, Hanney assumed the care of C.B., G.A., and J.V.
- [3] On July 18, 2017, after Conley left for work, Hanney became aware that C.B. was injured and in need of medical care. Hanney failed to promptly seek medical care and “delayed care by Googling information about head trauma, seizures, heart arrhythmia, and irregular breathing.” Appellant’s Appendix Volume II at 51. Hanney further delayed medical care and called Conley home from work and waited until she arrived home instead of promptly providing medical intervention. Hanney failed to seek medical care after Conley arrived home and waited another fifteen to twenty minutes before placing a call for help. At 10:12 p.m. and forty-four minutes after calling Conley to return home, Hanney placed a 911 call reporting that C.B. was not breathing and was unresponsive. Upon the arrival of emergency personnel, C.B. was not

¹ The following facts were included in the stipulated factual basis.

breathing and had no pulse. CPR was performed on C.B., and she was transported to the hospital.

[4] A head CT scan of C.B. showed global ischemia or brain death due to lack of oxygen and significant herniation of the brain. C.B. was airlifted to Riley Children's Hospital, where she was declared brain dead on July 21, 2017. C.B. was diagnosed with Abusive Head Trauma.

[5] An autopsy found the manner of death was homicide, the cause of death was multiple blunt force trauma, and the injuries included: subcutaneous and subgaleal hematoma, a three centimeter linear fracture of the left parietal bone, subdural hematoma in both hemispheres of the brain, bilateral perineural sheath hemorrhage of optic nerves, retinal hemorrhages, intraparenchymal and subarachnoid hemorrhage, and hypoxic changes to the brain secondary to trauma. The severity of the noted injuries would cause obvious symptomology, and a reasonable caregiver should have and would have known immediately that C.B. was in need of emergency medical care.

[6] On July 20, 2017, the State charged Hanney with: Count I, aggravated battery as a level 3 felony; Count II, neglect of a dependent as a level 3 felony; Count III, battery as a level 3 felony; Count IV, battery as a level 3 felony; Count V, battery as a level 3 felony; and Count VI, maintaining a common nuisance as a level 6 felony. On July 21, 2017, the State filed an amended information modifying Count I to allege aggravated battery as a level 1 felony, Count II to

allege neglect of a dependent as a level 1 felony, and Count III to allege battery as a level 2 felony.

- [7] On May 31, 2019, the State and Hanney filed a Change of Plea in which Hanney entered a plea of guilty to Count II, neglect of a dependent as a level 1 felony, and in which the parties filed a written recommendation of plea negotiation. On July 30, 2019, the State filed a verified motion to withdraw plea agreement asserting that Hanney provided an alternate version abdicating all criminal responsibility in the presentence investigation report. On August 23, 2019, the court granted the State's motion to withdraw the plea agreement.
- [8] On February 21, 2020, the State filed a second amended information charging Hanney with: Count I, aggravated battery as a level 1 felony; Count II, neglect of a dependent as a level 1 felony; Count III, neglect of a dependent as a level 1 felony; Count IV, battery as a level 2 felony; Count V, battery as a level 5 felony; Count VI, battery as a level 5 felony; and Count VII, maintaining a common nuisance as a level 6 felony.
- [9] On March 4, 2020, Hanney and the State filed a Change of Plea and a written recommendation of plea negotiation indicating that Hanney pled guilty to Count III, neglect of a dependent as a level 1 felony, and the State agreed to dismiss the remaining charges. The recommendation of plea negotiation stated that the parties were free to argue their respective positions as to sentencing. That same day, the court held a hearing and took the plea under advisement.

[10] On June 9, 2020, the court held a sentencing hearing. Dr. Shannon Thompson, an assistant clinical professor of pediatrics at Riley Hospital for Children, testified to the extent of C.B.'s injuries and that her ultimate diagnosis was "[c]hild abuse, non-accidental trauma." Transcript Volume II at 48. She also testified that her diagnosis fit within the statutory definition of shaken baby syndrome. Dr. Tarin Wolfe, a forensic pathologist, also testified as to C.B.'s injuries.

[11] Portage Police Sergeant Janis Crafton testified that Conley had a very unstable childhood, ran away at the age of fourteen, moved around from place to place, and had been kicked out of several apartments for marijuana use. She stated that "Hanney was probably the most stable thing that these children ever had." *Id.* at 55. She testified that the home was barren and filthy with very little food and there was evidence of drug use. She stated that Hanney was driving around "seemingly attempting to score some type of either the heroin that was found in his system or Xanax" before Conley told him she would leave the children alone if he did not come home. *Id.* at 60-61. She testified that intermixed with Hanney's messages to a dealer to obtain Xanax were internet searches for head injuries, breathing issues, and heart rate issues for a two-year-old. She indicated that Hanney sent a text message to his dealer at some point that stated that Conley was on her way home and that he could go and obtain the Xanax. She testified that she thought it was "wholly sad that Mr. Hanney was probably the only one that cared for these children" "and in seven months was thrown into a situation with three basically feral children who had no boundaries, no idea

what to do, and which ultimately led – I can only assume – to the frustration that caused her death.” *Id.* at 65.

[12] Hanney’s father testified that Hanney had substance abuse problems and, when asked for Hanney’s substance of choice, answered: “It was either opiates, and then later on for the last six years, it was heroin.” *Id.* at 110. He testified that he had never found Hanney to be abusive or have a temper. He stated that Hanney was “always paying attention to” the children and Conley “just sat in the back room,” was verbally abusive, and never had a normal conversation with her children. *Id.* at 116. He stated that Hanney had lived with him since he bonded out, “[i]t’s been the cleanest time of his adult life,” and he worked at his auto parts store. *Id.* at 121.

[13] Hanney’s mother testified that Hanney’s drug abuse began when a family member gave him a pill and that he struggled with his addiction. When asked for her opinion of Conley’s parenting ability, she answered “None.” *Id.* at 141. She described Hanney’s interactions with the three children as “[w]onderful.” *Id.* She also testified: “Violence is not in my son’s DNA. It’s not him.” *Id.* at 142.

[14] Hanney’s sister testified that Hanney was very caring with Conley’s children. When asked if she ever knew Hanney to be violent, she answered: “Never. That’s not him.” *Id.* at 150. Ashley Daily, the best friend of Hanney’s sister, testified that Hanney was “the most sweetest loving person.” *Id.* at 157. Ivan

Anderson testified that he knew Hanney from the store, looks at him as a nephew, and thought he was a “very loving, kind person.” *Id.* at 159.

- [15] Hanney testified that “[t]o say that I feel sorry is a complete understatement” and that he feels remorse every day. *Id.* at 165. He testified that he was not using drugs that night and that the drugs detected in his blood were from four days earlier. He stated:

I regret every day of my life not calling child services, not calling 9-1-1 for previous incidents that have already happened at the house prior to all this. I wish – I wish so many different things but everything from the very beginning, I fell in love with those kids immediately because I could see how much pain they were in every day, every day.

Id. at 167-168. He stated that the only reason he stayed with Conley was because he thought she was pregnant. He also stated: “I’m really not a violent person. I’ve always tried to do the right things, and I’m sorry for the choices I made and I take full responsibility for my actions.” *Id.* at 169.

- [16] The probation officer who completed the presentence investigation report (“PSI”) recommended a sentence of thirty-five years with five years suspended. Hanney’s counsel requested a sentence of twenty-five years with five years suspended.

- [17] The court accepted the plea and dismissed the remaining counts. The court found Hanney’s acceptance of responsibility, the fact he had not been rearrested or charged, and that he was no longer using drugs as mitigating circumstances.

With respect to aggravating circumstances, the court stated that Hanney had a criminal history arising out of drug use but noted that there were no crimes of violence or crimes involving children. The court stated that “[w]ith regard to shaken baby syndrome, which is an aggravator, Dr. Thompson testified . . . she believed that the cause of death was, in part, shaken baby syndrome” and “the forensic pathologist, Dr. Wolfe . . . said he doesn’t use those words but it was blunt force trauma and it was to use his word, ‘homicide.’” *Id.* at 184. It also stated that “[w]hat both doctors said was that Mr. Hanney’s explanation was, to paraphrase Dr. Thompson, ‘not plausible.’” *Id.* The court stated that it did not think Hanney was an ongoing risk to children. The court also mentioned C.B.’s injuries and that “[b]asically, she was injured, arguably, from head to knee” *Id.* at 186. The court sentenced Hanney to thirty years in the Department of Correction and stated that he would be required to serve seventy-five percent of the sentence.

Discussion

[18] The issue is whether Hanney’s sentence is inappropriate in light of the nature of the offense and his character.² Hanney acknowledges that this was a serious offense with a horrific consequence and that he deserves to be punished. He does not contest the number of years of his sentence but asserts that an

² We note that Hanney does not challenge the trial court’s aggravator that C.B. died from shaken baby syndrome or blunt force trauma. Rather, he contends that his sentence is inappropriate in light of the nature of the offense and his character.

appropriate sentence would be the advisory term of thirty years with ten years suspended to probation. He argues that his addiction, remorse, and acceptance of responsibility warrant a suspended sentence. He also points to the trial court's statement that it did not think a similar offense would occur again if he were put in charge of other young children.

[19] Ind. Appellate Rule 7(B) provides that we “may revise a sentence authorized by statute 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.” Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

[20] Ind. Code § 35-50-2-4 provides that a person who commits a level 1 felony shall be imprisoned for a fixed term of between twenty and forty years, with the advisory sentence being thirty years.

[21] Our review of the nature of the offenses reveals that Hanney assumed the care of C.B., G.A., and J.V., became aware that C.B. was injured and in need of medical care, failed to promptly seek medical care, and “delayed care by Googling information about head trauma, seizures, heart arrhythmia, and irregular breathing.” Appellant’s Appendix Volume II at 51. Hanney called Conley home from work, waited until she arrived home, and waited another fifteen to twenty minutes before placing a call for help, which occurred forty-four minutes after calling Conley to return home. C.B. was diagnosed with

Abusive Head Trauma. An autopsy found that the manner of death was homicide and the cause of death was multiple blunt force trauma. The severity of the injuries would cause obvious symptomology, and a reasonable caregiver should have and would have known immediately that C.B. was in need of emergency medical care.³

[22] Our review of the character of the offender reveals that Hanney pled guilty to neglect of a dependent as a level 1 felony, and the State dismissed Count I, aggravated battery as a level 1 felony; Count II, neglect of a dependent as a level 1 felony; Count IV, battery as a level 2 felony; Count V, battery as a level 5 felony; Count VI, battery as a level 5 felony; and Count VII, maintaining a common nuisance as a level 6 felony.

[23] The PSI indicates that Hanney described experiencing suicidal ideations approximately two years earlier due to coping with his addiction and the facts of the instant offense. It states that Hanney was in a car accident between 2002 and 2005 and prescribed hydrocodone. Hanney described having to move to stronger opioids such as Oxycontin and Percocet and eventually heroin. From 2001 to 2018, Hanney smoked marijuana daily. Between 2007 and 2015, he

³ The PSI states that police officers found C.B. to be unconscious and that Hanney “initially advised officers that C.B. was sitting on the edge of the bed when he ‘plopped’ down onto the bed beside her, which resulted in C.B. bouncing from the bed and onto the floor.” Appellant’s Appendix Volume II at 54. Dr. Thompson testified that the only explanation she was given was that C.B. was sitting on a bed when Hanney sat next to her which launched her off the bed and onto the floor and that the bruising on her back was explained as hitting her back in order to try to resuscitate her later. When asked if that was a plausible explanation for the injuries she saw, she answered: “No.” Transcript Volume II at 48.

took “one bar of unprescribed Xanax two to three times a week to reduce his anxiety.” *Id.* at 62. He also described the experimental use of synthetic marijuana, cocaine, ecstasy, methamphetamine, mushrooms, LSD/acid, and hashish. He reported using these substances one to five times throughout his life. He recalled completing substance abuse treatment in 2012 and Frontline Foundations in 2018. He asserted he had been sober since his release from custody in November 2017.

[24] The PSI states that Hanney had been employed at his parent’s business since October 2005. It also states that he reported being in the United States Army and was medically discharged in 2005 and 2014, but he did not have copies of his DD-214 papers and no records were located by the Indiana Department of Veterans Affairs.

[25] Hanney has convictions for possession of a narcotic drug as a class A misdemeanor in 2014 and possession of a narcotic drug as a level 6 felony in 2016. While on probation for his 2014 conviction, the State filed multiple petitions to revoke probation alleging that Hanney failed to complete substance abuse programming and tested positive for: opiates on April 16, 2015; marijuana on September 25, 2015, November 6, 2015, and March 18, 2016; and morphine and hydromorphone on January 22, 2016. Hanney was unsatisfactorily discharged from probation under the first cause and satisfactorily discharged from probation under the second cause. The PSI notes that Hanney “obtained the instant offense 54 days after being released satisfactorily from probation” *Id.* at 58. The PSI indicates Hanney’s

overall risk assessment score using the Indiana Risk Assessment System places him in the moderate risk to reoffend category.

[26] After due consideration, we conclude that Hanney has not sustained his burden of establishing that his advisory sentence is inappropriate in light of the nature of the offense and his character.

[27] For the foregoing reasons, we affirm Hanney's sentence.

[28] Affirmed.

Vaidik, J., and Pyle, J., concur.