

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Paul Francis Rose,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

April 25, 2023

Court of Appeals Case No.
22A-CR-2358

Appeal from the Shelby Superior
Court

The Honorable R. Kent Apsley,
Judge

Trial Court Cause Nos.
73D01-2109-F2-22, 73D01-2112-
F6-479

Memorandum Decision by Chief Judge Altice
Judges Riley and Pyle concur.

Altice, Chief Judge.

Case Summary

- [1] Paul Rose pleaded guilty, under two causes, to Level 5 felony possession of methamphetamine and Level 6 felony possession of methamphetamine, and the trial court imposed an aggregate sentence of six and one-half years. He contends his sentence is inappropriate in light of the nature of the offense and his character.
- [2] We affirm.

Facts & Procedural History

- [3] On September 19, 2021, police executed a search warrant at Rose's residence, and he was found to be in possession of methamphetamine. He also possessed a firearm. On September 20, 2021, the State charged Rose under cause number 73D01-2109-F2-22 (F2-022) with one count of Level 2 felony dealing in methamphetamine while in possession of a firearm.
- [4] Six days after the search of his home, and while out on bond in F2-022, Rose was arrested and charged with Class B misdemeanor possession of marijuana, for which he pleaded guilty in November 2021.
- [5] On December 14, 2021, while Rose was still out on bond in F2-022, police executed another search warrant at his residence. He was again found in possession of methamphetamine. On December 16, 2021, the State charged him under cause number 73D01-2112-F6-479 (F6-479) with Level 6 felony

possession of methamphetamine and Level 6 felony maintaining a common nuisance.

[6] In August 2022, the State requested and received permission to amend the charging information in F2-022 to change the offense from a Level 2 felony to a Level 3, based on lab results revealing a lesser quantity of methamphetamine, and to add a count of Level 5 felony possession of methamphetamine. Two days later, the State and Rose entered into a plea agreement in which Rose pleaded guilty to Level 5 felony possession of methamphetamine in cause F2-022 and to Level 6 felony possession of methamphetamine in cause F6-479. The agreement called for the two sentences to be served consecutively, with the terms of each to be left to the trial court's discretion.

[7] Rose testified at the September 14, 2022 sentencing hearing. He explained that after his wife passed away several years prior,¹ he became depressed and was abusing substances. He stated that if the court would sentence him to work release, he could resume working in construction, which he had been doing "all [his] life," and would have employment opportunities immediately available to him. *Transcript* at 87. Rose testified that his eighty-three-year-old father was counting on Rose to be available to continue to help care for him.

¹ The presentence investigation report (the PSI) indicated that Rose's wife passed in 2019 and that they had been married twenty-five years.

[8] In arguing sentencing, Rose’s counsel agreed that Rose had a history of substance abuse but urged that there had been a gap in the abuse for a few years and that Rose relapsed upon his wife’s death. Counsel requested that Rose be put on community corrections work release so that he could resume employment and help care for his father and father’s home, which Rose testified had fallen into disrepair. Counsel maintained this approach would be in the best interests of both Rose and the community.

[9] The State, on the other hand, emphasized that Rose had been given those sorts of less restrictive opportunities in the past, and they were not successful, with Rose having violated probation three times. The State pointed out that Rose also violated pre-trial release in the F2-022 case by committing more crimes. The State reviewed Rose’s criminal history and characterized Rose as “somebody that has developed or cultivated a lifetime of crime,” and it asked the trial court to impose four years of incarceration on F2-022 and one and one-half years in F6-479, all executed in the Indiana Department of Correction (the DOC). *Id.* at 90.

[10] The court found as mitigating that Rose pleaded guilty and accepted responsibility for his actions, but the court “temper[ed] that somewhat” by the fact that Rose received “an attractive” plea offer in F2-022, down to a Level 5 felony. *Id.* at 92. The court found several aggravating factors, including that Rose “has a substantial criminal history” with “numerous” arrests that have resulted in five felony and four misdemeanor convictions. *Id.* The court also observed that Rose “violated probation every time that he’s been on it.” *Id.*

The court considered as “a substantial aggravating circumstance” that Rose violated the terms of his pre-trial release. *Id.* at 93. Specifically, the court reminded Rose that it had imposed conditions of pre-trial release “and one that I really, really, really stress is that[] you [] do not commit another criminal offense while you’re on pre-trial release. And you did that not once, but twice.” *Id.* at 92-93. Lastly, the court noted that the PSI indicated that Rose was considered a high risk to reoffend.

[11] The court sentenced Rose on the Level 5 felony in F2-022 to four years at the DOC. For the Level 6 felony conviction in F6-479, the court imposed a consecutive sentence of two and one-half years at the DOC, of which one and one-half years were to be executed and the remaining year suspended to probation. The court explained that it was ordering one year to be served on probation because Rose, “has had a substance abuse problem his entire adult life” and the court wanted Rose “to have a period of reintegration back into the community, post release supervision and some services and monitoring while he’s on probation.” *Id.* at 93. The court declined Rose’s request to recommend him for the Purposeful Incarceration program but encouraged Rose to successfully participate in DOC programs, which in turn might present Rose with other options. Rose now appeals.

Discussion & Decision

[12] We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). The principal role of App. R. 7(B) review “should be to attempt to leaven the

outliers and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes.” *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). App. R. 7(B) analysis is not to determine whether another sentence is more appropriate but rather whether the sentence imposed is inappropriate. *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). Whether a sentence is inappropriate turns on the culpability of the defendant, the severity of the crime, the damage done to others, and a myriad of other factors that come to light in a given case. *Cardwell*, 895 N.E.2d at 1224. In assessing whether a sentence is inappropriate, appellate courts may consider whether a portion of the sentence is ordered suspended or is otherwise fashioned using any of the variety of sentencing tools available to the trial court. *Davidson v. State*, 926 N.E.2d 1023, 1025 (Ind. 2010).

[13] The defendant has the burden of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). More particularly, the defendant must show that his sentence is inappropriate with “compelling evidence portraying in a positive light the nature of the offense[s] (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).

[14] The advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. *Brown v. State*, 160 N.E.3d 205, 220 (Ind. Ct. App. 2020). The sentencing range for a Level 5 felony is one to six years with the advisory being three years. Ind. Code § 35-50-2-6. Here, the

trial court sentenced Rose in F2-022 to four years of incarceration, one year above the advisory. The sentencing range for a Level 6 felony is between six months and two and one-half years with the advisory being one year. Ind. Code § 35-50-2-7. The trial court sentenced Rose in F6-479 to two and one-half years, of which one was suspended to probation, with the F6-479 sentence to be served consecutive to F2-022. Rose acknowledges that the court’s sentence was “within the parameters of the plea agreement” but asserts that the executed portion “simply is too long” and that such incarceration “fails to[] address Rose’s real problems,” which by all accounts appears to be long-term substance abuse. *Appellant’s Brief* at 11, 12. Rose requests that we shorten his sentence.²

[15] When reviewing the nature of the offense, we look to the details and circumstances of the offense and the defendant’s participation therein. *Madden v. State*, 162 N.E.3d 549, 564 (Ind. Ct. App. 2021). Rose argues that the nature of his offenses “did not warrant an aggravated sentence,” emphasizing that his offenses “involved no victims.” *Id.* at 10. The PSI relied upon the two probable cause affidavits, which reflect that search warrants were executed at Rose’s residence – the first in September 2021 and then again three months later – and each time Rose was in possession of methamphetamine and a firearm.

² Rose also asks us to order the trial court to recommend him for the Purposeful Incarceration program. As the State observes, a trial court’s decision to not recommend a defendant for placement in a particular program is not subject to appellate review. *See Miller v. State*, 105 N.E.3d 194, 196-97 (Ind. Ct. App. 2018) (rejecting argument that sentence was inappropriate because trial court did not recommend him for Purposeful Incarceration program). Entry into the program is left to determination by the DOC, and “trial courts [] have no authority to require the DOC to place a [] defendant into a program.” *Id.*

Other narcotics and paraphernalia were located throughout the residence. In the September event, Rose had provided methamphetamine to another person who had come there to purchase methamphetamine from Rose and who used it before police arrived. In that sense, we do not agree that his crimes “involved no victims” and, regardless, we are not persuaded that offenses warrant a lesser sentence.

[16] Turning to assessment of a defendant’s character, we have described that character is found in what we learn of the offender’s life and conduct. *Perry v. State*, 78 N.E.3d 1, 13 (Ind. Ct. App. 2017). We conduct our review of a defendant’s character by engaging in a broad consideration of his qualities. *Madden*, 162 N.E.3d at 564. Rose argues that his sentence is too harsh, explaining that, after his wife’s passing, he resumed a pattern of self-destructive behaviors “that had been dormant” and that he “has attempted to address his struggles with substance abuse.” *Appellant’s Brief* at 10, 11.

[17] While we are not unsympathetic to personal struggles that Rose may have encountered after his wife’s death, the record does not establish, or even really indicate, that prior thereto he had eliminated his substance abuse and only resumed it after she passed away. Nor does it reveal that he had “attempted to address” his substance abuse, as he claims. *Id.* To the contrary, Rose made statements both to the court and to the probation officer who prepared his PSI that he did not believe he had any issues with substance use or that treatment was necessary. Regardless, even if Rose’s assertions are taken as true, it is well-settled that in assessing the character of an offender, one relevant factor is the

offender's criminal history. *Denham v. State*, 142 N.E.3d 514, 517 (Ind. Ct. App. 2020), *trans. denied*. The significance of a criminal history in assessing a defendant's character and an appropriate sentence varies based on the gravity, nature, and number of prior offenses in relation to the current offense. *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007).

[18] Rose's criminal history spans several decades. It began in 1986, and by 2017, he had amassed four misdemeanors and five felonies, most of which were related to alcohol or drugs. Indeed, he has six operating while intoxicated offenses. This behavior reflects poorly on his character. *See Heyen v. State*, 936 N.E.2d 294, 305 (Ind. Ct. App. 2010) (sentence not inappropriate where the defendant "continue[d] to commit the same crimes again and again"), *trans. denied*. Rose's convictions over the years escalated from misdemeanor operating a vehicle while intoxicated, to felonies related to the same, to possession of methamphetamine, to dealing in methamphetamine. Furthermore, Rose violated probation each time he was on it. The trial court found as a significant aggravator that, while out on bond in F2-022, and despite the trial court's explicit warnings to follow pretrial release conditions, Rose committed two offenses, Class B misdemeanor possession of marijuana and then Level 6 felony possession of methamphetamine. The PSI placed Rose at a high risk to reoffend. Rose's character does not warrant revision of his sentence.

[19] Accordingly, Rose has failed to establish that his aggregate sentence of six and one-half years, of which one year was suspended to probation, is inappropriate.

[20] Judgment affirmed.

Riley, J. and Pyle, J., concur.