MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Phillip Smith,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

September 27, 2021

Court of Appeals Case No. 21A-CR-609

Appeal from the Knox Superior Court

The Honorable Gara U. Lee, Judge

Trial Court Cause No. 42D01-1904-F5-23

Crone, Judge.

Case Summary

[1] While serial convicted drug dealer Phillip Smith was on parole for felony delivery of methamphetamine, police found over sixteen pounds of marijuana in his home. Smith pled guilty to level 5 felony dealing in marijuana and was sentenced to five years, with three years executed and two years suspended to probation. On appeal, Smith argues that his sentence is inappropriate in light of the nature of the offense and his character. We affirm.

Facts and Procedural History

[2] In April 2019, Smith was living in Wheatland while on parole for a felony delivery of methamphetamine conviction out of Illinois. Law enforcement officers performing a compliance check smelled an "overwhelming" odor of marijuana emanating from Smith's home. Appellant's App. Vol. 2 at 72.[1] The officers retrieved Smith from his place of business and brought him to the home. Smith consented to a search, which uncovered more than thirty bags of packaged marijuana totaling over sixteen pounds, three scales, "bags of seeds, and numerous plastic bags for distribution purposes[.]" *Id*. Officers also found drug paraphernalia, cocaine, THC products, and hydrocodone pills.

[3] The State charged Smith with level 5 felony dealing in marijuana (knowing or intentional possession with intent to deliver at least ten pounds of marijuana)

[1] The facts are taken from the probable cause affidavit, which was attached to the presentence investigation report.

and class A misdemeanor possession of a controlled substance (hydrocodone). In November 2020, pursuant to a plea agreement, Smith pled guilty to the felony charge, and the State dismissed the misdemeanor charge. The agreement capped any executed portion of the sentence at five years. In March 2021, after a hearing, the trial court sentenced Smith to five years, with three years executed and two years suspended to probation. Smith now appeals.

Discussion and Decision

[4] Smith requests a reduction of his sentence pursuant to Indiana Appellate Rule 7(B), which 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." "Sentencing is principally a discretionary function in which the trial court's judgment should receive considerable deference." *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). In conducting our review, our principal role is to leaven the outliers, focusing on the length of the sentence and how it is to be served. *Foutch v. State*, 53 N.E.3d 577, 580 (Ind. Ct. App. 2016). "We do not look to determine if the sentence was appropriate; instead we look to make sure the sentence was not inappropriate." *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). Ultimately, whether a sentence should be deemed inappropriate "turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." *Cardwell*, 895 N.E.2d at 1224. Smith bears the burden of persuading us that his sentence is inappropriate. *Foutch*, 53 N.E.3d at 581.

[5] "When assessing the nature of an offense, the advisory sentence is the starting point that the legislature selected as an appropriate sentence for the particular crime committed." *Shepherd v. State*, 157 N.E.3d 1209, 1224 (Ind. Ct. App. 2020), *trans. denied* (2021). The sentencing range for a level 5 felony is one to six years, with an advisory sentence of three years. Ind. Code § 35-50-2-6. We have emphasized that "'a defendant's conscious choice to enter a plea agreement that limits the trial court's discretion to a sentence less than the statutory maximum should usually be understood as strong and persuasive evidence of sentence reasonableness and appropriateness' and appellate relief should be granted 'only in the most rare, exceptional cases.'" *Merriweather v. State*, 151 N.E.3d 1281, 1286 n.2 (Ind. Ct. App. 2020) (quoting *Childress v. State*, 848 N.E.2d 1073, 1081 (Ind. 2006) (Dickson, J., concurring)). Here, Smith chose to enter a plea agreement that limited the executed portion of his sentence to five years, which should be understood as strong and persuasive evidence of reasonableness and appropriateness as to that portion of his sentence. Because his total sentence is five years, Smith has an especially tough row to hoe in persuading us that his sentence is inappropriate.

[6] "When determining the appropriateness of a sentence that deviates from an advisory sentence, we consider whether there is anything more or less egregious about the offense as committed by the defendant that 'makes it different from the typical offense accounted for by the legislature when it set the advisory sentence.'" *Moyer v. State*, 83 N.E.3d 136, 142 (Ind. Ct. App. 2017) (quoting *Holloway v. State*, 950 N.E.2d 803, 807 (Ind. Ct. App. 2011)), *trans. denied*. In

this case, Smith possessed six more pounds of marijuana than the statutory minimum to commit the charged offense, Ind. Code § 35-48-4-10(d)(2), as well as three scales, "bags of seeds, and numerous plastic bags for distribution purposes[.]" Appellant's App. Vol. 2 at 72. Smith argues that his sentence is "inappropriate, especially considering the marijuana was found in [his] home during a parole search and not distributed on the street during an actual drug sale." Appellant's Br. at 9. But selling the marijuana on the street was obviously Smith's ultimate goal, and he is not entitled to leniency based on fortunate timing and good police work. Moreover, the fact that Smith committed the offense while on parole clearly supports a sentence above the advisory term with significant executed time.

[7] We review Smith's character by engaging in a broad consideration of his qualities. *Elliott v. State*, 152 N.E.3d 27, 40 (Ind. Ct. App. 2020), *trans. denied*. An offender's character is shown by his "life and conduct." *Adams v. State*, 120 N.E.3d 1058, 1065 (Ind. Ct. App. 2019). "When considering the character of the offender, one relevant fact is the defendant's criminal history." *Garcia v. State*, 47 N.E.3d 1249, 1251 (Ind. Ct. App. 2015), *trans. denied* (2016). Smith, who was born in 1969, has a criminal history stretching back to 1992 that includes seven prior felony convictions, six of which are for dealing in or delivery of marijuana and other illegal drugs. Smith was on parole for an Illinois meth delivery conviction when police found the marijuana-dealing operation in his home, tipped off by an "overwhelming" odor outside the residence. Appellant's App. Vol. 2 at 72. At sentencing, Smith offered

generally favorable testimony from several character witnesses and claimed that incarceration would doom his recently established flea-market and pallet-recycling businesses. But the only remorse he expressed about his latest marijuana-dealing venture is that "the only way to really get the money out of it is to go big," and "you can't have that much of that stuff around and not get caught with it because it stinks." Tr. Vol. 2 at 57. Smith's three decades of involvement with the criminal justice system, whether in prison or on parole, have failed to rehabilitate his lawless character, and he has failed to persuade us that his sentence of three years executed and two years suspended to probation is inappropriate. Therefore, we affirm.

[8] Affirmed.

Bailey, J., and Pyle, J., concur.