MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Troy David York,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 29, 2022

Court of Appeals Case No. 22A-CR-477

Appeal from the Fayette Circuit Court

The Honorable Hubert Branstetter, Judge

Trial Court Cause No. 21C01-2003-F2-131

Mathias, Judge.

[1] Troy David York pleaded guilty in the Fayette Circuit Court to Level 4 felony dealing in methamphetamine and was ordered to serve a ten-year sentence,

with eight years executed and two years suspended to probation. York appeals his sentence and argues that the trial court abused its discretion by failing to consider mitigating circumstances in its sentencing decision. However, York agreed to waive appellate review of his sentence in his plea agreement. York argues that his waiver is not valid, but we disagree and dismiss York's appeal.

[2] Dismissed.

Facts and Procedural History

[3] On February 2, 2020, York was shot and wounded after arguing with a man in the driveway of his residence. A neighbor reported the shooting. When the responding police officers arrived, they found York lying on the floor of his bedroom with two gunshot wounds to his right leg. The officers also observed drug paraphernalia and a substance that appeared to be marijuana in the bedroom. Thereafter, they obtained a search warrant. During execution of the warrant, officers found more marijuana, 10.8 grams of methamphetamine, and a handgun.

[4] The State charged York with Level 2 felony dealing in methamphetamine, Level 3 felony possession of methamphetamine, Level 6 felony dealing in marijuana, Level 5 felony carrying a handgun without a license, Level 5 felony criminal recklessness, and Class C misdemeanor possession of paraphernalia. The State also alleged that York was a habitual offender.

[5] In January 2022, the State and York entered into a plea agreement. York agreed to plead guilty to Level 4 felony dealing in methamphetamine in exchange for

dismissal of the remaining charges. The parties agreed that York would serve a ten-year sentence. But the plea agreement left to the trial court's discretion whether any portion of the sentence would be suspended and York's placement while serving any executed portion of the sentence. York also agreed to waive his right to appeal "the resulting sentence on the basis that it is erroneous or for any other reason so long as the sentence is within the terms of this plea agreement." Appellant's App. p. 58.

[6] The trial court accepted York's guilty plea on January 14, 2022. At the hearing, York acknowledged that he was waiving his right to appeal his conviction and sentence. Tr. p. 12. On February 11, 2022, the trial court sentenced York to ten years, with eight years executed and two years suspended to probation. After the trial court issued its sentencing statement, York's counsel informed the court that York wished to appeal his sentence and asked the court to appoint appellate counsel. Tr. p. 34. The trial court appointed appellate counsel, and York now appeals his sentence.

Discussion and Decision

[7] York argues the trial court abused its discretion when it failed to consider certain mitigating circumstances and ordered him to serve eight years of his ten-year sentence executed in the Department of Correction. In response, the State argues that York waived his right to appeal his sentence.

[8] It is well settled that a defendant may waive the right to appellate review of his sentence as part of a written plea agreement. *Creech v. State*, 887 N.E.2d 73, 75

(Ind. 2008). In *Creech*, the defendant entered into a plea agreement that contained a provision that read in relevant part: "I hereby waive my right to appeal my sentence so long as the Judge sentences me within the terms of my plea agreement." *Id.* at 74. Our supreme court held that this waiver was valid. *Id.*; *see also Archer v. State*, 81 N.E.3d 212, 216 (Ind. 2017) (reiterating that "[a] defendant may waive his or her right to appeal a sentence as part of a plea agreement and such waivers are valid and enforceable").

[9] "The content and language of the plea agreement itself, as well as the colloquy where necessary, govern [the] determination as to the validity of the waiver." *Creech,* 887 N.E.2d at 76 (quoting *United States v. Williams*, 184 F.3d 666, 668 (7th Cir. 1999)). In his plea agreement, York agreed to waive his right to appeal "the resulting sentence on the basis that it is erroneous or for any other reason so long as the sentence is within the terms of this plea agreement." Appellant's App. p. 58. And, at his plea hearing, York acknowledged that he was waiving his right to appeal his conviction and sentence. Tr. p. 12.

[10] York's waiver is not invalidated by the trial court's acquiescence to trial counsel's request to appoint appellate counsel so that York could appeal his sentence. In *Creech*, the trial court made statements at the close of the sentencing hearing that led the defendant to believe he had retained his right to appeal despite a contrary provision in his plea agreement. 887 N.E.2d at 76. However, those statements were "not grounds for allowing [defendant] to circumvent the terms of his plea agreement" because, "[b]y the time the trial

court erroneously advised [defendant] of the possibility of appeal, [defendant] had already pled guilty and received the benefit of his bargain." *Id*. at 76-77.

[11] Likewise, in this case, trial counsel's request and the trial court's appointment of appellate counsel occurred well after York had pleaded guilty, knowing that by doing so he was waiving his right to appeal his sentence.[1] York had already received the benefit of his bargain and his sentence had already been imposed. *See Starcher v. State*, 66 N.E.3d 621, 623 (Ind. Ct. App. 2016) (the defendant's waiver in his plea agreement remained valid where court's misstatement occurred at end of sentencing hearing and the defendant had already received the benefit of his bargain), *trans. denied*.

[12] Accordingly, we conclude that York waived his right to appeal his sentence and we dismiss his appeal.[2]

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[1] The State is not estopped from enforcing the waiver provisions of York's plea agreement because the State failed to object to the appointment of appellate counsel. *See Mechling v. State*, 16 N.E.3d 1015, 107-18 (Ind. Ct. App. 2014), *trans. denied*.

[2] York also claims that his waiver is invalid because his sentence is illegal, and, "[if] the sentencing court abused its discretion, then the defendant has a right to appeal, even if the defendant signed a plea agreement containing a waiver of that right." Appellant's Br. at 12. But a defendant can waive his right to appeal an illegal sentence where the sentence was "explicitly provided for in the plea agreement, and the defendant benefitted from the plea." *See Crider v. State*, 984 N.E.2d 618, 623-24 (Ind. 2013). Moreover, York's sentence is not illegal, and he was sentenced within the terms of his plea agreement. *See* Ind. Code § 35-50-2-5.5 (establishing the range of sentence for a Level 4 felony between two and twelve years); *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007) (explaining that when a sentence is within the statutory range, it is subject to review only for abuse of discretion); Appellant's App. p. 57 (York's plea agreement). A trial court's failure to consider proposed mitigating circumstances does not make the sentence illegal. *Brown v. State*, 160 N.E.3d 205, 219-20 (Ind. Ct. App. 2020) (citing *Weisheit v. State*, 26 N.E.3d 3, 9 (Ind. 2015)) (stating that a trial court is not obligated to accept the defendant's contentions as to what constitutes a mitigating circumstance or to give the proffered mitigating circumstances the same weight the defendant does).

[13] Dismissed.

Brown, J., and Molter, J., concur.