MEMORANDUM DECISION

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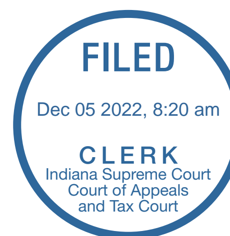

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IN THE COURT OF APPEALS OF INDIANA

Joseph Ray Varney,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 5, 2022

Court of Appeals Case No. 22A-CR-1186

Appeal from the Clark Circuit Court

The Honorable Bradley B. Jacobs, Judge

Trial Court Cause No. 10C02-1803-F3-10

Foley, Judge.

[1] Joseph Ray Varney ("Varney") pleaded guilty to Level 3 felony dealing in methamphetamine[1] ("Level 3 felony") and admitted to being a habitual offender.[2] Varney was sentenced to an aggregate fifteen year sentence with nine years executed and six years suspended to probation. Varney appeals his sentence and raises the following two issues for our review:

I. Whether the trial court abused its discretion in sentencing him because it failed to consider certain mitigating factors;

II. Whether his sentence is inappropriate in light of the nature of the offense and his character.

[2] Finding no error, we affirm.

Facts and Procedural History

[3] On March 22, 2018, a cooperating witness told two officers that Varney was going to deliver "approximately [one-half] ounce of crystal methamphetamine" to the cooperating witness's vehicle. Appellant's App. Vol. II p. 7. While conducting visual surveillance, one officer observed Varney enter a vehicle and "exit after a very short time." *Id*. Varney entered another vehicle and drove off. Another officer continued surveillance and observed two traffic infractions that eventually led to a traffic stop of the vehicle Varney was driving. When asked about the other officer's observations, Varney initially denied having

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[1] Ind. Code § 35-48-4-1.1(a)(1)(A), (d).

[2] Ind. Code § 35-50-2-8(i)(1).

anything to do with those observations. Subsequently, Varney admitted that he was paid $400 to deliver one-half ounce of methamphetamine to the vehicle. With the cooperating witness's consent, the officers searched the vehicle and found a bag containing a substance that later tested positive for methamphetamine with "an approximate total gross weight of 9.52 grams." *Id.* at 6.

[4] On March 29, 2018, the State charged Varney with two counts as follows: Count I, dealing in methamphetamine as a Level 3 felony; and Count II, possession of methamphetamine as a Level 5 felony. The State also sought habitual offender status. On June 24, 2021, Varney entered into a plea agreement, under which he agreed to plead guilty to Level 3 felony dealing in methamphetamine and to admit to being a habitual offender. In exchange, the remaining charge would be dismissed. Under the plea agreement, all terms of sentencing were left to the discretion of the trial court. On May 5, 2022, Varney was sentenced and thereafter appeals.

Discussion and Decision

A. Mitigating Factor

[5] Sentencing decisions are within the sound discretion of the trial court and this court reviews only for an abuse of discretion. *Anglemeyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (2007). 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." *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006) (quoting *In re L.J.M.*, 473 N.E.2d 637, 640 (Ind. Ct. App. 1985)). A trial court abuses its discretion when it: (1) relies on aggravating and mitigating factors not supported in the record; (2) omits reasons that are clearly supported in the record; (3) uses a legally improper reason to impose a sentence; or (4) fails to enter a sentencing statement entirely. *Anglemeyer*, 868 N.E.2d at 491–92. "An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." *Id.* at 493 (citing *Carter v. State*, 711 N.E.2d 835, 838 (Ind. 1999)).

[6] Varney contends that the trial court abused its discretion when it failed to consider the loss of his son as a mitigating factor. Varney disclosed his struggle with the recent loss of his son after the close of evidence and during his allocution statement to the trial court. The trial court specified aggravating and mitigating circumstances in its sentencing statement. The trial court considered Varney's lengthy criminal record, which includes seven prior misdemeanors and six prior felonies, as an aggravating factor. Tr. Vol. II p. 18. In addition, the trial court identified the following mitigating factors: Varney (1) achieved sobriety; (2) has been out of trouble for almost two years; (3) accepted responsibility for his actions and signed a plea without the benefit of terms; and (4) suffered from a substance abuse disorder. *Id*. When the trial court weighed the aggravating and mitigating factors, it found that they "balanced," then sentenced Varney to the advisory sentence of nine years on the Level 3 felony,

with the minimum amount of three years executed and six years suspended to probation, and the minimum of six years on the habitual offender enhancement. The trial court also recommended Recovery While Intoxicated ("RWI") which allows for modification of Varney's sentence upon successful completion of the clinically appropriate substance abuse treatment program at the DOC. The trial court specifically advised Varney that "if you get to prison and get into the program [RWI] you do eighteen months maybe two years of the recovery program and come back and modify that . . . I would then, with the balance of the executed time onto Community Corrections, to be followed by probation. I think this is a good blend that covers everything." *Id.* at 19.

[7] The trial court acknowledged a number of mitigating factors but merely failed to specifically add the loss of Varney's son to that list. In spite of the trial court's failure, Varney has failed to demonstrate the significance of failing to include the loss of his son in light of all the mitigating factors considered by the trial court. Although the loss of Varney's son is tragic, we reiterate that a trial court is not obligated to accept a defendant's claim as to what constitutes a mitigating circumstance. *Roscoe v. State*, 736 N.E.2d 246, 249 (Ind. 2000). The trial court did not abuse its discretion in sentencing Varney.

B. Inappropriate Sentence

[8] The Indiana Constitution authorizes independent appellate review and revision of a trial court's sentencing decision. *See* Ind. Const. art. 7, §§ 4, 6; *Jackson v. State*, 145 N.E.3d 783, 784 (Ind. 2020). Our Supreme Court has implemented this authority through Indiana Appellate Rule 7(B), which allows this court to

revise a sentence when it is "inappropriate in light of the nature of the offense and the character of the offender." Our review of a sentence under Appellate Rule 7(B) is not an act of second guessing the trial court's sentence; rather, "[o]ur posture on appeal is [ ] deferential" to the trial court. *Bowman v. State*, 51 N.E.3d 1174, 1181 (Ind. 2016) (citing *Rice v. State*, 6 N.E.3d 940, 946 (Ind. 2014)). We exercise our authority under Appellate Rule 7(B) only in "exceptional cases, and its exercise 'boils down to our collective sense of what is appropriate.'" *Mullins v. State*, 148 N.E.3d 986, 987 (Ind. 2020) (per curiam) (quoting *Faith v. State*, 131 N.E.3d 158, 160 (Ind. 2019)).

[9] Varney argues that trial court's failure to sentence Varney to community corrections is inappropriate in light of the nature of the offense and his character. Varney faced a range of sentence of nine to thirty six years. Indiana Code section 35-50-2-5(b) provides that "[a] person who commits a Level 3 felony . . . shall be imprisoned for a fixed term of between three (3) and sixteen (16) years, with the advisory sentence being nine (9) years." As for the habitual offender enhancement, a trial court may impose "an additional fixed term that is between six (6) years and twenty (20) years" for a person convicted of a Level 3 felony. Ind. Code § 35-50-2-8(i)(1). The trial court has discretion to suspend any portion of the sentence and order a person be placed in a community corrections program as an alternative to commitment to the DOC for part of the sentence. Ind. Code § 35-38-2.6-3(a). However, a defendant is not entitled to serve a sentence in a community corrections program. *Cox v. State*, 706 N.E.2d 547, 549 (Ind. 1999). Placement in such a program is a "matter of grace" and a

"conditional liberty that is a favor, not a right." *Gilfillen v. State*, 582 N.E.2d 821, 824 (Ind. 1991).

[10] This court notes that Varney requests a sentence of direct placement to community corrections. Varney's sentence for the Level 3 felony is a suspendable sentence, and therefore Varney is not eligible for direct placement to community corrections. *See Russell v. State*, 189 N.E.3d 1160, 1163 (Ind. Ct. App. 2022); Ind. Code § 35-38-2.6-1. In order to sentence Varney to community corrections, the trial court would have had to suspend Varney's remaining sentence and place Varney on home detention as a condition of probation. Under these circumstances, the maximum placement term on home detention is three years, the minimum sentence for a Level 3 felony. Ind. Code § 35-38-2.5-5. The six year sentence for the habitual offender enhancement is non-suspendable, and therefore subject to a direct placement on community corrections. I.C. 35-38-2.6-3. We must evaluate the trial court's sentence in light of the sentencing options available to the trial court, not what is requested by appellant.

[11] Varney contends that the nature of the offense and the manner in which the dealing offense took place deem placement in the DOC inappropriate. When analyzing the nature of the offense, 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*. Here, Varney argues that the sentence is inappropriate because dealing in methamphetamine is "neither a crime of violence nor a serious offense"; Varney further claims that his offense was atypical because he left the methamphetamine in a vehicle instead of the inherently dangerous hand-to-hand methamphetamine transaction. Appellant's Br. at 8. No matter how it is phrased; Varney committed a textbook dealing offense. The statute under which Varney was convicted states that "a person who knowingly or intentionally delivers methamphetamine, pure or adulterated, commits dealing in methamphetamine, a Level 3 felony, if the amount of the drug involved is at least five (5) grams but less than ten (10) grams." Ind. Code § 35-48-4-1.1(a)(1)(A), (d). Varney was not only paid $400 to deliver 9.53 grams of methamphetamine; he took it upon himself to deliver the 9.53 grams of methamphetamine to the intended recipient. Further, the amount of methamphetamine delivered by Varney was 9.53 grams, which was very close to ten grams, the amount eligible for a Level 2 felony.

[12] Because no facts compel this court to view Varney's offense as anything other than a textbook dealing offense, his sentence is not inappropriate. As stated by the trial court, "[t]his wasn't just a possession case; this was a dealing case. There are people in the community that are harmed by your actions and your criminal history justifies DOC in this thing."

[13] Varney also maintains that his character makes the sentence inappropriate. When considering the character of the offender, one relevant fact is the defendant's criminal history. *Johnson v. State*, 986 N.E.2d 852, 856 (Ind. Ct.

App. 2013). The significance of the criminal history varies based on the gravity, nature, and number of prior offenses in relation to the current offense. *Id.* Here, Varney has seven prior misdemeanor and six prior felony convictions, consisting of: (1) domestic battery; (2) invasion of privacy; (3) expired registration plates, no insurance, failure to wear seatbelt, and operating on suspended or revoked operator's license; (4) attempted theft; (5) nonsupport of dependent child; (6) theft; (7) possession or use of legend drug or precursor and possession of methamphetamine; (8) possession or use of legend drug or precursor and possession of paraphernalia; and (9) theft. Appellant's App. Vol. II p. 132–34. The record reflects criminal behavior that not only spans over fifteen years, but also lies outside of Varney's substance abuse issues. Continuing to commit crimes after frequent contacts with the judicial system is a poor reflection on Varney's character. *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007); *see also Connor v. State*, 58 N.E.3d 215, 221 (Ind. Ct. App. 2016) (continued crimes indicate a failure to take full responsibility for one's actions).

[14] The trial court fully considered Varney's substance abuse struggles and recent sobriety when sentencing Varney. Varney's sentence recommends substance abuse treatment and programming at the DOC, followed by a willingness by the trial court to modify Varney's sentence upon successful completion of the programming. We conclude that Varney's sentence is not inappropriate.

Conclusion

[15] Based on the foregoing, we conclude that the trial court acted within its discretion in sentencing Varney, and his sentence is not inappropriate in light of the nature of the offense and his character.

[16] Affirmed.

Robb, J., and Mathias, J., concur