

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Anthony Joseph Perez,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 25, 2021

Court of Appeals Case No.
20A-CR-1784

Appeal from the Tippecanoe
Superior Court

The Honorable Steven P. Meyer,
Judge

Trial Court Cause No.
79D02-1910-F5-167

Tavitas, Judge.

Case Summary

- [1] Anthony Joseph Perez was found in possession of methamphetamine and various paraphernalia, and the State charged Perez accordingly. Pursuant to a plea agreement, Perez pleaded guilty to Count I, possession of methamphetamine, and to being an habitual offender, and the other counts were dismissed. The trial court sentenced Perez to five years for Count I, enhanced by two years for his status as an habitual offender. The trial court ordered Perez to serve five of the years executed at the Department of Correction (“DOC”), and two years suspended to probation. Perez appeals, contending that his sentence is inappropriate in light of the nature of his offenses and his character. We disagree and, therefore, affirm.

Issue

- [2] Perez raises one issue, which we restate as whether his sentence was inappropriate in light of the nature of his offenses and his character.

Facts

- [3] On October 10, 2019, Perez was on probation for a felony domestic battery conviction. After Perez failed a drug screen, police and probation officers recovered the following from Perez’s residence: (1) syringes; (2) measuring spoons; (3) \$120.00 in cash; (4) a digital scale; (5) a glass pipe with residue; (6) a mirror with residue; and (7) several bags containing a substance that subsequently proved to be methamphetamine.

[4] The State charged Perez with Count I, possession of methamphetamine, a Level 5 felony; Count II, unlawful possession of a syringe, a Level 6 felony; Count III, possession of paraphernalia, a Class C misdemeanor; and Count IV, maintaining a common nuisance, a Level 6 Felony. The State further alleged that Perez was an habitual offender.

[5] Perez pleaded guilty pursuant to a plea agreement to Count I, possession of methamphetamine, a Level 5 felony, and being an habitual offender. At the guilty plea hearing, the trial court noted that the plea agreement read, in pertinent part:

Paragraph three provides you'll receive the sentence that this Court deems appropriate after hearing any evidence or argument of counsel with the following conditions: The initial executed Department of Correction portion of the sentence shall be no less than three years. Any sentence above three years but less than five years may be served in the Department of Correction[], Community Corrections, or on Probation. Any sentence above five years shall initially be served on Community Corrections and or Probation. If you fail to qualify for or are rejected from Tippecanoe County Community Corrections, you shall serve any remaining Community Corrections sentence in the Indiana Department of Correction[].

Tr. Vol. II p. 8.

[6] The trial court held a sentencing hearing on September 25, 2020. One character witness testified on Perez's behalf, as did Perez himself. The testimony reflected that, when sober, Perez was a hard worker who maintained employment and did his best to provide for his family, which included three

young children. Perez, who had been incarcerated for nearly a year at the time of the sentencing hearing, testified that he had been sober while incarcerated, and acknowledged that he was not ready to be released in an unmonitored fashion. Perez requested the court to sentence him to a work release program. Perez also testified regarding his mental health struggles and admitted that he only began taking those struggles seriously after he became sober in prison. The trial court noted that Perez seemed to have the support of his friends and family.

- [7] The trial court also considered the pre-sentence investigation report (“PSI”), which reflected that Perez had a juvenile criminal history, in addition to convictions for felony fraud, felony battery, and misdemeanor domestic battery. The PSI further reflected that three prior petitions to revoke Perez’s probation had been found true. The trial court sentenced Perez to five years on Count I, enhanced by an additional two years for Perez’s status as an habitual offender. The trial court ordered that Perez serve five years executed in the DOC and suspended two years to probation. Finally, the trial court stated:

But what I’m going to do here though is for that five years executed, I am going to recommend Recovery While Incarcerated,[¹] because you’ve really never have had a structured

¹ “Recovery While Incarcerated (RWI) [] is a multi-faceted approach aimed to improve the quality of addiction recovery services, increase access to care while incarcerated, implement updated evidence-based integrated care, and provide increased opportunities for collaboration and continuity with community-based services for those releasing.” <https://www.in.gov/idoc/about-idoc/programs> (last accessed March 12, 2021). “The Purposeful Incarceration (PI) initiative is a means by which a sentencing authority (a judge or the Indiana Parole Board) agrees to consider a modification to an offender’s sentence, provided that the

substance abuse program. And by completing that, that would be [sic] make you eligible to ask to modify that five years, at some point. But that's one [sic] you. You're gonna have to earn it. If you're able to successfully complete a program in prison, I want to know about it. You can ask the Court for a modification at that time and we'll take another look at it and determine what we do with that five years. So, what's different about this the Probation recommended five years with the last two years with Community Corrections. I'm not doing that. I'm ordering all five years executed. But you can earn your way to a different resolution if you successfully complete a program [] at the D.O.C.

Tr. Vol. II pp. 55-6. Perez now appeals.

Analysis

- [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.

offender successfully completes the RWI addiction recovery program during their incarceration.” <https://www.in.gov/idoc/medical/addiction-recovery> (last accessed March 12, 2021).

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) (quoting *Faith v. State*, 131 N.E.3d 158, 160 (Ind. 2019)).

[9] “‘The principal role of appellate review is to attempt to leaven the outliers.’” *McCain v. State*, 148 N.E.3d 977, 985 (Ind. 2020) (quoting *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008)). The point is “not to achieve a perceived correct sentence.” *Id.* “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.’” *Id.* (quoting *Cardwell*, 895 N.E.2d at 1224). Deference to the trial court’s sentence “should prevail unless overcome by compelling evidence portraying in a positive light the nature of the offense (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).

[10] When determining whether a sentence is inappropriate, the advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. *Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014). In the case at bar, Perez pleaded guilty to possession of methamphetamine, a Level 5 felony, as well as being an habitual offender. Indiana Code Section 35-50-2-6(b) establishes that the sentencing range for a Level 5 felony is one to six years, with an advisory sentence of three years. Furthermore, under Indiana Code

Section 35-50-2-8(i), a court shall sentence an habitual offender to an additional fixed term between two and six years if, as here, a defendant is convicted of a Level 5 felony. Thus, Perez faced a sentence of anywhere from three to twelve years and received a sentence of seven years.

[11] Perez, however, contends that the seven-year sentence, only five of which was to be executed in the DOC, and which was subject to the “Recovery While Incarcerated” program, was inappropriate in light of the nature of the offense and Perez’s character. Our analysis of the “nature of the offense” requires us to look at the nature, extent, and depravity of the offense. *Sorenson v. State*, 133 N.E.3d 717, 729 (Ind. Ct. App. 2019), *trans. denied*. While the nature of this offense was not egregious, Perez appears to have been actively involved in the consumption of methamphetamine. That the offense occurred while Perez was on probation for a prior felony, and that this was not the first time Perez had violated his probation—including prior violations via drug use—lend significantly more gravity to the offense. Moreover, Perez was found to be an habitual offender. These were crimes of a recurring nature, wherein Perez chose to feed his addiction, rather than seek assistance for his recovery.

[12] Our analysis of the character of the offender involves a “broad consideration of a defendant’s qualities,” *Adams v. State*, 120 N.E.3d 1058, 1065 (Ind. Ct. App. 2019), including the defendant’s age, criminal history, background, and remorse. *James v. State*, 868 N.E.2d 543, 548-59 (Ind. Ct. App. 2007). We are not unsympathetic to those suffering from addiction. Perez’s testimony seems to indicate genuine remorse. He is a young man with a young family.

Moreover, he appears to suffer from mental health difficulties. Perez argues “that the mitigated treatment of hi[s] mental health was err [sic].” Appellant’s Br. p. 17. Perez appears to argue that the trial court gave the evidence of Perez’s mental health difficulties short shrift. We disagree with Perez’s characterization of the analysis performed by the trial court as “perfunctory.” *Id.* The trial court balanced Perez’s self-reported mental health issues against the fact that Perez never attempted to seek treatment. Perez offers no recognizable argument as to why that is insufficient.

[13] “The significance of a criminal history in assessing a defendant’s character and an appropriate sentence varies based on the gravity, nature, proximity, and number of prior offenses in relation to the current offense.” *Sandleben v. State*, 29 N.E.3d 126, 137 (Ind. Ct. App. 2015) (citing *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006)), *trans. denied*. “Even a minor criminal history is a poor reflection of a defendant’s character.” *Prince v. State*, 148 N.E.3d 1171, 1174 (Ind. Ct. App. 2020) (citing *Moss v. State*, 13 N.E.3d 440, 448 (Ind. Ct. App. 2014), *trans. denied*).

[14] By the time of his sentencing in this case, twenty-seven-year-old Perez had two prior felony convictions, one for battery with a prior conviction and the other for fraud, as well as a misdemeanor battery conviction. We are further cognizant of the three petitions previously filed to revoke Perez’s probation, which were based on factual allegations found true. The charges in the instant case resulted in Perez being unsuccessfully discharged from his probation for felony battery. We consider the trial court’s order that Perez be placed in the

“Recovery While Incarcerated” program, thereby giving Perez an opportunity to earn a possible sentence reduction, to be well-tailored to the circumstances. Accordingly, we cannot say that the sentence was inappropriate in light of the nature of the offense and Perez’s character. We affirm the decision of the trial court.

Conclusion

[15] Given the recurring nature of Perez’s crimes, as well as his criminal history, we cannot say that Perez’s sentence was inappropriate in light of the nature of his offenses and his character. We affirm.

Affirmed.

Bailey, J., and Robb, J., concur.