MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Michael J. Douglas,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

June 14, 2023

Court of Appeals Case No. 22A-CR-1838

Appeal from the Switzerland Circuit Court

The Honorable W. Gregory Coy, Judge

Trial Court Cause No. 78C01-1811-F5-464

Memorandum Decision by Judge Crone
Judge Kenworthy concurs.
Judge Robb dissents with separate opinion.

Crone, Judge.

Case Summary

[1] A jury found Michael J. Douglas guilty of level 5 felony child solicitation and level 6 felony dissemination of matter harmful to minors. The trial court imposed an aggregate sentence of two years executed. On appeal, Douglas contends that his sentence is inappropriate in light of the nature of the offenses and his character. Concluding that he has failed to meet his burden of establishing that his sentence is inappropriate, we affirm.

Facts and Procedural History

[2] "[T]o monitor Facebook[,]" the Switzerland County Sheriff's Office created a profile of a fictitious fifteen-year-old female, Kate Kingston (Kate), and "it was observed that [the profile] was receiving several messages from adult males." Tr. Vol. 2 at 12. "[O]nce it was observed that this [was] a huge problem within [the] community, the profile was turned over to [Detective Joseph Spilman] to monitor and see if any crimes [were] occurring." *Id*. Detective Spilman "[v]ery rarely" sent out friend requests from Kate's profile, but he exchanged messages with "close to a thousand" people. *Id*. at 13, 15. It was Detective Spilman's practice to make Kate's age known "very quickly" to "folks that [he was] messaging with," and "the majority […] cease[d] to message once they [found] out" that Kate was fifteen. *Id*. at 16.

[3] At 7:56 p.m. on November 12, 2018, Kate's "profile received a message or a wave on Facebook" from Douglas, who was then twenty-five years old. *Id*. Detective Spilman "happen[ed] to be on the computer" at that time, and, using

Kate's profile, he "waved back." *Id.* at 17. The two initially exchanged pleasantries about a television show and living in Vevay. Kate told Douglas that she was fifteen and lived with her grandmother. Douglas told Kate that he was twenty-four and warned her, "[J]ust don't temp [sic] me to anything cause people might frown on the age difference[.]" Ex. Vol. at 59. The exchange eventually became more flirtatious and sexual in nature. Douglas sent Kate several photos of his penis and asked her to send him a "full body" photo. *Id.* at 43. He also offered some extremely lewd and graphic suggestions about various sexual activities that they could engage in.[1] Douglas then sent Kate several photos of couples engaging in sexual activity and said, "These are the kind of things I wanna do to you[.]" *Id.* at 25. Douglas and Kate made plans to meet the following evening, and the chat ended at 11:46 p.m.

[4] On the afternoon of November 13, Kate asked if Douglas could bring some alcoholic beverages ("mikes hard") to their rendezvous, *id.* at 22, and he said that he could. Douglas then claimed that he was unable to meet Kate because of an obligation he had forgotten about, and he promised to let her know when he could "come over[.]" *Id.* at 15. Douglas did not contact Kate until 11:43 a.m. on November 15, and the two engaged in a sexually charged off-and-on conversation that ended at 6:06 p.m.

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[1] *See, e.g.*, Ex. Vol. at 32 ("we can go inside your grandma's lol then I'll push you down on the couch and eat your p***y and then stick my d**k in your mouth and let you suck it. Maybe flip you over and sc**w you and c*m inside your a** and then your p***y and then your face lol").

[5] On the morning of November 16, Kate asked Douglas, "where you at my gma is gone you can come over[.]" *Id*. at 4. Douglas replied, "I'm at work lol[.]" *Id*. At 10:21 a.m., Kate asked, "what timee [sic] you get off lol[.]" *Id*. Shortly thereafter, Detective Spilman called Douglas on the phone and said that he would "like [Douglas] to come down to the sheriff's office to talk to him about some things." Tr. Vol. 2 at 34. Douglas agreed to do so. Detective Spilman determined that Douglas blocked Kate's Facebook profile "right around the time that the phone call happened[.]" *Id*. at 61.

[6] When Douglas entered the sheriff's office interview room later that day, Detective Spilman informed him of his *Miranda* rights and asked him to sign an advisement of rights form, which he did. The detective said that Kate's grandmother had seen Douglas's Facebook conversations with Kate on Kate's phone and "was really upset[.]" *Id*. at 44. Initially, Douglas denied knowing anything about the messages and claimed that his Facebook account had been hacked. But after Detective Spilman confronted Douglas with a printout of his Facebook conversations with Kate, including photos of what Douglas acknowledged was his penis,[2] Douglas admitted that the messages and photos came from him, that he knew that Kate was fifteen, and that sending such material to a fifteen-year-old was "completely wrong" and "kinda messed up, actually." State's Ex. 4 (18:08:29-18:08:34). Douglas also admitted that he

[2] Douglas's attempt to retract this acknowledgement on appeal is not well taken. *See, e.g.*, Appellant's Br. at 7 ("Eventually Douglas sen[t] what purports to be a photo of his erect penis ….").

blocked Kate's profile right after Detective Spilman called him. *Id*. (18:10:38). Detective Spilman asked Douglas if he wanted to write an apology letter to Kate's grandmother, and Douglas did so while sitting in the interview room.

[7] The State charged Douglas with level 5 felony child solicitation and level 6 felony dissemination of matter harmful to minors. *See* Appellant's App. Vol. 2 at 9 (alleging that Douglas, "a person at least twenty-one (21) years of age, and using a computer network, did knowingly or intentionally solicit an individual Douglas believed to be a child at least fourteen (14) years of age but less than sixteen (16) years of age, to wit: the fictitious Facebook profile of 15 Y/O female, to engage in sexual intercourse or other sexual activities"), 11 (alleging that Douglas "did knowingly or intentionally disseminate to a minor, to wit: the fictitious Facebook profile of 15 Y/O female, and said matter is harmful to minors, to wit: [Douglas] sent a photo of fully exposed male genitalia in a turgid state while engaged in conversation with Fictitious Facebook profile of a 15 Y/O female on Facebook instant messenger"). A two-day jury trial was held in June 2022. The jury was shown a printout of Douglas's Facebook conversations with Kate, Douglas's apology letter, and a video of Douglas's interview with Detective Spilman, who was the State's sole witness. Douglas testified and claimed that he knew all along that Kate's profile was "fake" and that he wrote the apology letter because he was lied to. Tr. Vol. 2 at 76. The jury found Douglas guilty as charged.

[8] At the July 2022 sentencing hearing, the trial court noted that the fake Facebook profile resulted in "over 20 people [being] apprehended" and that the

court had "kept sort of a running tally of what the dispositions of those cases have been in order that we would have some consistency" in sentencing. *Id*. at 138. In its written sentencing order, the court found no aggravating factors and several mitigating factors: the crime was the result of circumstances unlikely to recur; Douglas had no history of criminal or delinquent activity; he had custody of his then-four-year-old son, and imprisonment would result in hardship to the child; he is unlikely to commit another crime; he is an honorably discharged Marine Corps veteran, was gainfully employed, and did not drink or use controlled substances; and he "never actually made an attempt to meet the fake Facebook profile, Kate[.]" Appealed Order at 2. The court imposed concurrent fully executed sentences of two years on the level 5 felony conviction and one year on the level 6 felony conviction, credited Douglas with four days of actual time served, and indicated that he "may petition the court to modify the sentence … after serving six (6) actual months imprisonment." *Id*.[3] The court also noted that it had been "notified by Southeast Regional Community Corrections that [Douglas] is not eligible for placement on in home detention due to being a sex offender." *Id*. Douglas now appeals his sentence.

[3] At the sentencing hearing, the trial court said that Douglas would receive a six-month sentence on the level 6 felony conviction. Tr. Vol. 2 at 140. The State observes that "Douglas does not challenge this discrepancy, only his aggregate sentence[,]" Appellee's Br. at 8 n.2, which may not be reduced below one year. *See* Ind. Code § 35-50-2-6(b) (setting one-year minimum sentence for level 5 felony). Accordingly, we need not determine which statement more accurately reflects the trial court's sentencing decision.

Discussion and Decision

[9] Douglas asks us to revise his sentence pursuant to Indiana Appellate Rule 7(B), which states, "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Our supreme court has explained that "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). As we assess the nature of the offenses and the character of the offender, "we may look to any factors appearing in the record." *Boling v. State*, 982 N.E.2d 1055, 1060 (Ind. Ct. App. 2013). "[W]hether we regard a sentence as inappropriate at the end of the day 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.

[10] When reviewing a sentence, our principal role is to leaven the outliers rather than necessarily achieve what is perceived as the correct result in each case. *Id.* at 1225.[4] "[A]ppellate review should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count." *Id.* "Ultimately the length of

[4] The trial court's observation that it had been keeping a "running tally" of the dispositions in the other Facebook-related cases for consistency's sake indicates that it was proactively attempting to avoid imposing any "outlier" sentences.

the aggregate sentence and how it is to be served are the issues that matter." *Id.* at 1224. "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).

[11] Douglas bears the burden to show that his sentence is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g* 875 N.E.2d 218. Although Rule 7(B) requires us to consider both the nature of the offense and the character of the offender, the appellant is not required to prove that each of those prongs independently renders his sentence inappropriate. *Connor v. State*, 58 N.E.3d 215, 218 (Ind. Ct. App. 2016). Rather, the two prongs are separate inquiries that we ultimately balance to determine whether a sentence is inappropriate. *Id.* at 219. Exercising our authority to revise a sentence under Rule 7(B) is reserved "for rare and exceptional case[s]." *Livingston v. State*, 113 N.E.3d 611, 612 (Ind. 2018) (per curiam).

[12] Turning first to the nature of the offense, we observe that "the advisory sentence is the starting point the Legislature selected as appropriate for the crime committed." *Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014). "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*. The advisory sentence for a

level 5 felony is three years, with a range of one to six years, Ind. Code § 35-50-2-6(b), and the advisory sentence for a level 6 felony is one year, with a range of six months to two and a half years. Ind. Code § 35-50-2-7(b). Here, Douglas received a two-year executed sentence for his level 5 felony conviction and a concurrent one-year executed sentence for his level 6 felony conviction.

[13] We have said that an appellate court is "unlikely to consider an advisory sentence inappropriate[,]" *Shelby v. State*, 986 N.E.2d 345, 371 (Ind. Ct. App. 2013), *trans. denied*, and that "a defendant bears a particularly heavy burden in persuading us that his sentence is inappropriate when the trial court imposes the advisory sentence." *Fernbach v. State*, 954 N.E.2d 1080, 1089 (Ind. Ct. App. 2011), *trans. denied*. It stands to reason that the same is even more true for a sentence below the advisory term. We have also said that "it will be quite difficult for a defendant to prevail on a claim that the placement of his sentence is inappropriate[,]" in part because "trial courts know the feasibility of alternative placements in particular counties or communities." *King v. State*, 894 N.E.2d 265, 267, 268 (Ind. Ct. App. 2008). As indicated above, in-home detention was not available for Douglas at his then-current address because he is a sex offender.[5]

[14] Douglas argues that he "should have received the minimum sentence fully probated[,]" Appellant's Br. at 8, claiming that he "never acted on any of his

[5] The record suggests that Douglas resided within 1,000 feet of school property, which would constitute a sex offender residency offense under Indiana Code Section 35-42-4-11(c).

solicitations and voluntarily terminated the communication after a few days." *Id*. at 10. Although it is true that Douglas did not actually attempt to meet the fictional Kate before he terminated the communication, the evidence indicates that the termination occurred right after the phone call from Detective Spilman, i.e., when he might have had reason to believe that he was being investigated by law enforcement. Douglas further argues that "[s]ince this was actually not a real fifteen (15) year old girl to whom these solicitations and graphic pictures were sent, nobody was harmed by the receipt of these messages." *Id*. But the fact that the intended victim was a juvenile is relevant to the nature of the offense, and our supreme court has held that crimes against children are particularly contemptible. *Harris v. State*, 897 N.E.2d 927, 929 (Ind. 2008). Although Douglas's crimes may be less egregious than the same crimes committed against an actual child, that is accounted for by the below-advisory aggregate sentence imposed by the trial court. The insistency and depravity of Douglas's online solicitation of an apparent fifteen-year-old to engage in sexual intercourse and other sexual activities does not support the reduction of his sentence even further below the advisory term or suspending it to probation.

[15] As for his character, Douglas points to the mitigating factors found by the trial court, including his lack of criminal or delinquent history, his abstention from drugs and alcohol, his veteran and employment status, his custodial relationship with his young son, the unlikelihood that he will commit another crime, and that he did not actually make an attempt to meet with Kate. The State points out that "Douglas's character also includes that he initially lied to

police about his crime before admitting, and then told the jury a different story altogether while seemingly telling them that sending pornographic messages and photos to a 'fake' 15-year-old was not a problem." Appellee's Br. at 12. That being said, Douglas does possess more positive attributes than many criminal defendants; but just as with the nature of his crimes, this was accounted for by the below-advisory aggregate sentence, and the trial court further indicated a willingness to entertain a modification to Douglas's benefit. On balance, Douglas has failed to convince us that this is one of the rare and exceptional cases that merit the exercise of our authority to revise an already near-minimum executed sentence pursuant to Appellate Rule 7(B). Therefore, we affirm.

[16] Affirmed.

Kenworthy, J., concurs.

Robb, J., dissents with separate opinion.

Robb, Judge, dissenting.

[17] I believe Douglas has met the burden of showing his two-year executed sentence is inappropriate and therefore, I respectfully dissent.

[18] I acknowledge an appellate court is unlikely to consider an advisory sentence inappropriate, and even more so a below-advisory sentence. *See* slip op. at ¶ 13. Similarly, it is difficult for a defendant to prevail when asking for an alternate placement. *See id.* As Douglas argues for both a further reduced sentence *and* a fully suspended sentence, Douglas bears a "particularly heavy burden" in persuading us that his sentence is inappropriate. *See id.* (quoting *Fernbach*, 954 N.E.2d at 1089). But nothing in Rule 7(B) states or implies that we may *not* revise an advisory or below-advisory sentence in a suitable case. If our power to review sentences under 7(B) is to be meaningful, sentence revision must be available whenever circumstances warrant it, without arbitrary restrictions.

[19] I agree with the majority's analysis of the nature of Douglas's offense. Although Douglas points out no actual child was involved in this case, the fact that Douglas believed the victim was a child is relevant to the nature of the offense. Moreover, the fact his crime may be less egregious than the same crime committed against an actual child is accounted for by the below-advisory sentence imposed by the trial court.

[20] The nature of Douglas' character, however, is such that I conclude he has met his "particularly heavy burden" of showing a two-year fully executed sentence is inappropriate. The record contains compelling evidence portraying Douglas'

character in a positive light. *See Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015). Douglas has no juvenile adjudications, and at twenty-nine years old, has no adult convictions or a history of arrests. Douglas is a veteran, has custody of his son, has steady employment, and does not drink alcohol or use drugs. Douglas' father wrote the trial court a letter that was admitted at the sentencing hearing describing Douglas as "always . . . helpful [and] a great Father" and expressing his belief that Douglas "would never do anything so stupid again." Ex., Vol. 3 at 67-68. And the Indiana Risk Assessment System Community Supervision Screening Tool assessed Douglas in the "low risk category to reoffend" and a full risk assessment was not conducted. App. of Appellant, Vol. Two at 64. The majority assesses Douglas to have "more positive attributes than many criminal defendants[.]" Slip op. at ¶ 15.

[21] I recognize the importance of deferring to the trial court's sentencing discretion, but overall, I agree with Douglas that a fully executed sentence is inappropriate. Even the trial court signaled that a shorter period of incarceration would likely be sufficient, expressing its willingness to entertain a petition to modify the sentence to probation after Douglas served six months.[6] Based on the positive

[6] When sentencing Douglas, the trial court noted this fake Facebook profile resulted in numerous people being apprehended and it had tried to keep sentencing consistent across those cases. In exercising our review and revise powers to leaven sentencing outliers, we, too, can and should compare sentences among those convicted of the same or similar offenses. Another case arising from interaction with this Facebook profile was appealed to this court, wherein the trial court sentenced a twenty-nine-year-old defendant who pleaded guilty to Level 5 felony child solicitation for conversing with "Kate" for three and one-half weeks, had a criminal history and other pending charges, and a history of substance abuse to serve less executed time than Douglas—imposing the advisory sentence of three years but with eighteen months suspended to probation. *See Smith v. State*, No. 21A-CR-459, 2021 WL 4448790 (Ind. Ct. App. Sept. 29, 2021) (holding the sentence

aspects of Douglas' life and character, I would hold a fully executed sentence–even one below the advisory–is inappropriate, and I would revise Douglas' sentence to two years with all but six months suspended to probation.

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was not inappropriate). If the trial court was striving for consistency, Douglas' sentence appears to be an outlier.