MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Donald J. Frew
Ft. Wayne, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Caroline G. Templeton
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Levonuia Riley,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 28, 2022

Court of Appeals Case No. 21A-CR-1664

Appeal from the Allen Superior Court

The Honorable Frances C. Gull, Judge

Trial Court Cause Nos. 02D04-1703-F6-309 02D05-1802-F6-222

Tavitas, Judge.

Case Summary

[1] Levonuia Riley appeals the trial court's sentence imposed for his conviction for theft, a Level 6 felony, and the imposition of his previously suspended sentence as a result of his probation revocation in a previous case. Riley seeks to have the sentences revised under Indiana Appellate Rule 7(B) as inappropriate in light of the nature of his offenses and his character. We affirm.

Issues

[2] The issues before us are as follows:

I. Whether the sentence imposed by the trial court for Riley's theft conviction was inappropriate in light of the nature of the offense and Riley's character.

II. Whether the sanction imposed by the trial court for Riley's probation revocation was inappropriate in light of the nature of the offense and Riley's character.

Facts

[3] On March 18, 2017, law enforcement was dispatched to Kroger in response to a report of a theft in progress. Kroger's loss prevention specialist reported that Riley was in the liquor aisle and concealed ten bottles of liquor in his jacket. Riley fled from law enforcement by vehicle and then on foot. Riley later admitted that he exited the store with five bottles of liquor he did not purchase. The total value of the items stolen was $243.90.

[4] On March 23, 2017, the State charged Riley with theft, a Level 6 felony, and resisting law enforcement, a Class A misdemeanor, in Cause No. 02D04-1703-F6-309 ("Cause F6-309"). On May 11, 2017, pursuant to a plea agreement, Riley pleaded guilty to theft, and the State dismissed the resisting law enforcement charge. The State and Riley agreed to a two-and-one-half year sentence suspended to probation. In accordance with the plea agreement, the trial court sentenced Riley to two-and-one-half years suspended to probation.

[5] On October 12, 2017, the State filed a petition to revoke Riley's suspended sentence in Cause F6-309 and alleged that Riley violated his probation by testing positive for cocaine, codeine, morphine, and hydromorphone. Riley also admitted to using MDMA.[1] On December 29, 2017, Riley admitted to the probation violations, and the trial court revoked Riley's probation and transferred him to the drug court program.

[6] On February 28, 2018, the State charged Riley with theft, a Level 6 felony, in Cause No. 02D05-1802-F6-222 ("Cause F6-222") for stealing multiple bottles of alcohol from Kroger that had a total value of $1,979.32. Riley pleaded guilty on March 19, 2018, and was again placed in the drug court program.

[7] On November 28, 2018, the trial court issued an arrest warrant for Riley in both Cause F6-309 and Cause F6-222, because Riley violated the drug court rules by attempting to interfere with a drug test. The warrant was served on May 27,

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[1] MDMA is also commonly referred to as Ecstasy, a psychoactive drug often used for recreational purposes.

2021. In both Cause F6-309 and Cause F6-222, the State filed petitions to terminate Riley's participation in drug court.

[8] In Cause F6-309, the State filed an amended petition to revoke probation on June 11, 2021, alleging that Riley had failed to complete drug court. Riley admitted that he violated probation, and the trial court revoked Riley's probation and imposed the entirety of his previously suspended sentence on July 9, 2021.

[9] On June 14, 2021, in Cause F6-222, Riley admitted that he violated the terms of the drug court. At the sentencing hearing, the trial court found in mitigation that Riley: (1) pleaded guilty; (2) expressed remorse; and (3) made substantial progress in drug court. The trial court found that Riley's criminal history was an aggravating factor, noting that it contained failed efforts at rehabilitation, including shorter jail sentences, unsupervised probation, active probation, Indiana Department of Correction ("DOC") commitments, parole, home detention, and reentry programs. The trial court also noted that: (1) Riley was on probation in Cause F6-309 at the time he committed the offenses in Cause F6-222; (2) Riley absconded from drug court for approximately two years; and (3) Riley had other pending charges. The trial court sentenced Riley to two years in the DOC to be served consecutively to the balance of his previously suspended sentence in Cause F6-309. Riley now appeals.

Analysis

[10] 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)).

[11] "'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). Though we must consider both the nature of the offense and the character of the offender, an appellant need not prove that each prong independently renders a sentence inappropriate. *See, e.g., State v. Stidham*, 157 N.E.3d 1185, 1195 (Ind. 2020) (granting a sentence reduction based solely on an analysis of aspects of the defendant's character); *Connor v. State*, 58 N.E.3d 215, 219 (Ind. Ct. App. 2016); *see also Davis v. State*, 173 N.E.3d 700, 707-09 (Tavitas, J., concurring in result).

I. Theft Sentence in Cause F6-222

[12] 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 Cause F6-222, Riley was convicted of theft, as a Level 6 felony, due to his prior convictions for theft. Indiana Code Section 35-50-2-7(b) provides: "A person who commits a Level 6 felony shall be imprisoned for a fixed term of between six (6) months and two and one-half (2 ½) years, with the advisory sentence being one (1) year." The trial court sentenced Riley to two years in the DOC to be served consecutively to his previously suspended sentence in Cause F6-309.

[13] 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*. On eight separate days, Riley concealed liquor

bottles in his clothing and exited a store without paying for them. Any one of the shoplifting events would have been sufficient to sustain a conviction for theft, a Level 6 felony, because Riley had prior unrelated convictions for theft. *See* Ind. Code § 35-43-4-2(a)(1)(C). Thus, Riley committed seven additional felony-level thefts, which the State charged as only one offense. Due to the extent of Riley's theft activities, we cannot find that Riley has met his burden of demonstrating that the nature of his offense renders his two-year sentence inappropriate.

[14] Secondly, we look to the character of the offender. 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). "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*).

[15] Riley has a lengthy criminal history comprised of two juvenile delinquency adjudications, twenty-two misdemeanor convictions, and seventeen felony

convictions. Riley's lengthy criminal history contains convictions for the same criminal behavior that Riley committed here. *See Merriweather v. State*, 128 N.E.3d 503, 519 (Ind. Ct. App. 2019) (noting that a history of committing offenses similar in nature to the current offense reflects poorly on a defendant's character). Additionally, at the time of sentencing in Cause F6-222, Riley had a pending charge for corrupt business influence. Accordingly, we conclude, after considering the nature of Riley's offense in Cause F6-222 and Riley's character, that a revision of the two-year sentence imposed by the trial court is not warranted.

II. Probation Revocation Sentence in Cause F6-309

[16] In Cause F6-309, Riley seems to request this court to review the trial court's decision to impose the balance of the previously suspended sentence in that cause using the Appellate Rule 7(B) standard. Riley however presents little, if any, cogent argument to support his argument. Indiana Appellate Rule 46(A)(8)(a) requires that the argument section of a brief "contain the contentions of the appellant on the issues presented, supported by cogent reasoning." When a party fails to submit cogent arguments supporting a party's claims, the claims are waived for purposes of appellate review. *See* Ind. Appellate Rule 46(A)(8)(a). "'We will not become an advocate for a party or address arguments that are inappropriate or too poorly developed or expressed to be understood.'" *Picket Fence Property Co. v. Davis*, 109 N.E.3d 1021, 1029 (Ind. Ct. App. 2018) (quoting *Basic v. Amouri*, 58 N.E.3d 980, 984 (Ind. Ct. App. 2016)). We conclude that Riley's claim is not supported by a cogent

argument. The claim is, therefore, waived for purposes of appellate review. *See* Ind. Appellate Rule 46(A)(8)(a).

[17] Waiver notwithstanding, Riley's argument that we review his probation revocation sentence pursuant to Appellate Rule 7(B) is without merit because Appellate Rule 7(B) does not apply to a sanction imposed as a result of a probation revocation. *Jones v. State*, 885 N.E.2d 1286, 1289 (Ind. 2008). The action taken by a trial court in a probation revocation hearing is not a sentencing, but a determination of "the extent to which the court's conditional suspension of the original sentence should be modified . . . ." *Trammell v. State*, 45 N.E.3d 1212, 1217 (Ind. Ct. App. 2015) (quoting *Jones*, 885 N.E.2d at 1289). Thus, the Appellate Rule 7(B) standard is not applicable. The correct review standard to apply to a sanction as a result of a probation revocation is the abuse of discretion standard. *Heaton v. State*, 984 N.E.2d 614, 616 (Ind. 2013). Riley, however, presents no argument that the trial court abused its discretion.

[18] Even if Riley presented a cogent argument that the trial court abused its discretion when it imposed the previously suspended sentence as a result of the probation revocation, Riley would not prevail. "For purposes of appellate review, we treat a hearing on a petition to revoke a placement in a community corrections program the same as we do a hearing on a petition to revoke probation." *Flowers v. State*, 101 N.E.3d 242, 247 (Ind. Ct. App. 2018) (quoting *Withers v. State*, 15 N.E.3d 660, 663-64 (Ind. Ct. App. 2014)). "'Probation is a matter of grace left to trial court discretion, not a right to which

a criminal defendant is entitled.'" *Heaton,* 984 N.E.2d at 616 (quoting *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007)).

[19] "It is within the discretion of the trial court to determine probation conditions and to revoke probation if the conditions are violated." *Id.* "In appeals from trial court probation violation determinations and sanctions, we review for abuse of discretion." *Id.* "An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances," *id.*, "or when the trial court misinterprets the law." *Id.* (citing *State v. Cozart*, 897 N.E.2d 478, 483 (Ind. 2008)). "We will consider all the evidence most favorable to supporting the judgment of the trial court without reweighing that evidence or judging the credibility of the witnesses." *Holmes v. State*, 923 N.E.2d 479, 483 (Ind. Ct. App. 2010) (quoting *Monroe v. State*, 899 N.E.2d 688, 691 (Ind. Ct. App. 2009)).

[20] "Probation revocation is a two-step process. First, the trial court must make a factual determination that a violation of a condition of probation actually occurred." *Heaton*, 984 N.E.2d at 616 (citing *Woods v. State*, 892 N.E.2d 637, 640 (Ind. 2008)). "Second, if a violation is found, then the trial court must determine the appropriate sanctions for the violation." *Id.*

> [If the trial court] finds that the person has violated a condition at any time before termination of the period, and the petition to revoke is filed within the probationary period, the court may: . . . order execution of all or part of the sentence that was suspended at the time of initial sentencing.

I.C § 35-38-2-3(h)(3).

[21] Riley admitted to violating his probation in Cause F6-309 by failing to complete the drug court program, a condition of his probation. Riley was also in drug court as a result of his convictions in Cause F6-222. Additionally, he has an extensive criminal history. The imposition of Riley's previously suspended sentence as a result of the revocation of Riley's probation was not an abuse of discretion.

Conclusion

[22] The nature of Riley's offense of theft, a Level 6 felony, and his character do not merit revision under the Appellate Rule 7(B) standard. Moreover, Riley's arguments fail regarding the sanction for his probation revocation. Accordingly, we affirm.

[23] Affirmed.

Bradford, C.J., and Crone, J., concur.