MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Robert Cook,
Appellant-Defendant,

v.

State of Indiana
Appellee-Plaintiff.

January 21, 2022

Court of Appeals Case No. 21A-CR-1011

Appeal from the Blackford Circuit Court

The Honorable Brian Bade, Judge

Trial Court Cause No. 05C01-2011-F1-355

Bradford, Chief Judge.

Case Summary

[1] On October 2, 2020, Robert Cook smoked marijuana, ingested Vicodin, and consumed methamphetamine before leaving his home to pick up his children. On the way back to his home, Cook swerved head-on into a tractor-trailer. Both children died at the scene of the crash. Ultimately, Cook agreed to plead guilty to two counts of Level 4 felony operating a vehicle causing death with a schedule I or II controlled substance in the blood, Level 5 felony dealing in a narcotic drug, and two counts of Level 6 felony possession of methamphetamine. The trial court imposed an aggregated sentence of thirty one and a half years with one and a half years suspended to probation, which consisted, in part, of Cook's two Level 4 felonies running consecutively for twenty-four years. Cook argues that (1) his two Level 4 felonies do not qualify as "crimes of violence" and his sentence therefore violates the Indiana Code's maximum limit for consecutive sentences, (2) his sentence is inappropriate in light of the nature of his offense and his character as an offender, and (3) the trial court abused its discretion in failing to find his remorse to be a mitigating factor. We affirm.

Facts and Procedural History

[2] Cook and Michelle Barton were married in 2005, and had two children together. In October of 2020, Cook's daughter was five years old and his son was seven years old (collectively "the Children"). Cook and Barton were in the process of divorcing at that time.

[3] On the morning of October 2, 2020, Cook smoked marijuana, used Vicodin, and consumed methamphetamine before leaving his home for work. When Cook returned home, Barton communicated that she wanted him to buy Halloween costumes for the Children. Cook also needed to pick up the Children, as they were supposed to stay with him for the weekend. Before Cook left to pick up the Children and purchase Halloween costumes, he smoked more marijuana, ingested more Vicodin, and consumed more methamphetamine.

[4] After picking up the Children and going to the costume store, Cook took State Road 18 east to return home. The Children were both in the front seat of Cook's truck on the drive to Cook's home. Cook later reported that, despite the truck having backseats in the passenger compartment, the Children were in the front seat because "he wanted his kids next to him." Appellant's App. Vol. II p. 55. Jason Long, who was driving a tractor-trailer westbound on State Road 18 at the same time, observed Cook's vehicle swerve into the westbound lane and almost collide with the vehicle traveling in front of Long's truck. Despite Long's attempt to avoid a collision, Cook's vehicle then hit Long's truck "head on." Appellant's App. Vol. II p. 54.

[5] The engine compartment of Cook's truck was on fire when law enforcement officers arrived at the scene of the crash. Cook was outside of the vehicle when emergency responders arrived, though the Children were not. After the flames were extinguished officers were able to locate the Children. Cook's daughter "was discovered there hanging out of the vehicle still buckled in" and was

pronounced dead at the scene. Appellant's App. Vol. II p. 54. Cook's son had a pulse when he was discovered, "pinned in" the front seat of Cook's truck, but by the time he was able to be removed from the vehicle he no longer had a pulse. Appellant's App. Vol. II p. 53. Cook was taken to the hospital, where a blood draw was performed, and tested positive for methamphetamine and "THC-COOH."[1] Appellant's App. Vol. II p. 54, 65.

[6] On October 6, 2020, an officer spoke with Barton, who had gone to Cook's home with another officer to retrieve pictures of her children for their funeral. Barton reported that she saw, and took pictures of, drug paraphernalia in plain view while in Cook's home. One of Barton's pictures showed a "a child's Lego table with a glass smoking device that [is] commonly used to smoke methamphetamine." Appellant's App. Vol. II p. 58. When Cook's home was searched, officers discovered multiple plastic bags containing a "white crystal substance," multiple containers of hydrocodone, multiple devices for smoking, multiple digital scales, a book with white powder on its top, and a cigarette pack which contained marijuana sitting on a child's Lego table. Appellant's App. Vol. II p 58.

[1] "The presence of tetrahydrocannabinol carboxylic acid (THC-COOH), a major metabolite of delta-9-tetrahydrocannabinol, in urine at concentrations greater than 15.0 ng/mL is a strong indicator that the patient has used marijuana." Carboxy-Tetrahydrocannabinol (THC) Confirmation, Random, Urine, MAYO CLINIC LABORATORIES, https://www.mayocliniclabs.com/test-catalog/Clinical+and+Interpretive/8898 (last visited January 4, 2022).

[7] Cook's cellular phone was also searched, and the officer who searched Cook's phone found a number of messages which, "coupled with the evidence collected" at Cook's home, indicated that he was dealing methamphetamine. Appellant's App. Vol. II. p. 60. For example, before the crash a person reached out to Cook asking him "for more when that comes up." Appellant's App. Vol. II p. 60. A few days after that correspondence, Cook wrote to that person, "Tomorrow big deal up," and that he "needed" more than $900.00 for the deal. Appellant's App. Vol. II p. 60. In a conversation with another person, Cook arranged to sell "go go."[2] Appellant's App. Vol. II p. 61.

[8] When Officers spoke with Cook following the search of his home and phone, he told them that

> anything […] found was planted by [Barton]." Appellant's App. Vol. II p. 62. Cook also stated that Barton was out to hurt me, get me in trouble. And to be honest with you, I think she drugged me when I was in Muncie to get the kid's costumes, because I don't know how I go from driving 80,000-pound trucks to not being able to drive my own pickup truck and getting into an accident.

Appellant's App. Vol. II p. 62–63. Cook also stated, when asked about the open paraphernalia and drugs officers found in his home, that "I did not leave a bunch of [f***ing] meth and [s***] laying around the house. There's no way I would leave that [s***] out for anybody," though he did admit there was a

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[2] "Go go" is slang for methamphetamine. Slang Terms and Code Words: A Reference for Law Enforcement Personnel, DEA https://www.dea.gov/sites/default/files/2018-07/DIR-022-18.pdf (last visited January 5, 2022).

"good possibility" that his fingerprints would be found on a pipe used to smoke methamphetamine seized during the search. Appellant's App. Vol. II p. 64.

[9] Cook was arrested after officers received the results of his blood test. On the way to the jail, Cook asked the officer transporting him, "it probably does me no good to say [Barton] was smoking weed and doing pills with me, right along?" Appellant's App. Vol. II p. 66. Cook also continued to insist that Barton "had to [have] drugged him" before the crash. Appellant's App. Vol. II p. 66. Cook did admit that "all" of the methamphetamine found at his home was his. Appellant's App. Vol. II p. 66. The day after his arrest, Cook admitted to consuming marijuana, Vicodin, and methamphetamine multiple times on the day of the crash. Cook also admitted to dealing methamphetamine, but only "to just a couple of people," and to dealing hydrocodone. Appellant's App. Vol. II p. 68.

[10] Ultimately, Cook agreed to plead guilty to two counts of Level 4 felony operating a vehicle causing death with a schedule I or II controlled substance in the blood, Level 5 felony dealing in a narcotic drug, and two counts of Level 6 felony possession of methamphetamine. The trial court imposed an aggregate sentence of thirty-one and a half years with one and a half years suspended to probation, which consisted, in part, of Cook's two operating a vehicle causing death sentences running consecutively for twenty-four years.

Discussion and Decision

[11] We review a trial court's sentencing order for an abuse of discretion, which occurs only 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).

I. Consecutive Sentences

[12] Cook argues that the trial court erred in imposing consecutive sentences which, together, exceed the statutory maximum set by Indiana Code section 35-50-1-2. When "an alleged error also involves claims of legal error," we review those questions of law *de novo*. *Anderson v. State*, 833 N.E.2d 119, 123 (Ind. Ct. App. 2005) (citing *Hill v. Ebbets Partners Ltd.*, 812 N.E.2d 1060, 1063 (Ind. Ct. App. 2004).

[13] Indiana Code section 35-50-1-2 governs the upper limit for consecutive sentences arising out of a single episode of criminal conduct. However, Indiana Code section 35-50-1-2 imposes no such limit on the length of consecutive sentences for statutorily-defined crimes of violence. Indiana Code section 35-50-1-2(a)(16) states that "[o]perating a vehicle while intoxicated causing death or catastrophic injury ([Indiana Code section] 9-30-5-5[3])" is a crime of violence.

[3] Indiana Code section 9-30-5-5(a) states:

[14] Cook was charged with and pled guilty to two counts of Level 4 felony operating a vehicle causing death with a schedule I or schedule II controlled substance in his blood. Cook argues that "In the case at bar, [he] was not charged with Operating a Vehicle While Intoxicated Causing Death or Catastrophic Injury but rather he was charged with 2 counts of Operating a Vehicle Causing Death with a Scheduled (sic) I or Schedule II Controlled Substance in his blood. Thus, the issue is whether or not the Level 4 offenses Cook was charged with qualify under Indiana Code [section] 35-50-1-2(a)(16)." Appellant's Br. p. 11 (internal citations omitted). Cook argues that because his charged crimes differ from those in Indiana Code section 35-50-1-2(a)(16), they do not qualify as crimes of violence and therefore must comply with statutory consecutive-sentence limits. Cook cites *Mi.D. v. State*, 57 N.E.3d 809, 812 (Ind. 2016) in which the Indiana Supreme Court stated

> When interpreting a statute, our primary goal is to fulfill the legislature's intent. And the "best evidence" of that intent is the statute's language. If that language is clear and unambiguous,

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> (a) A person who causes the death or catastrophic injury of another person when operating a vehicle:
>
> (1) with an alcohol concentration equivalent to at least eight-hundredths (0.08) gram of alcohol per:
>
> (A) one hundred (100) milliliters of the person's blood; or
>
> (B) two hundred ten (210) liters of the person's breath;
>
> (2) with a controlled substance listed in schedule I or II of [Indiana Code chapter] 35-48-2 or its metabolite in the person's blood; or
>
> (3) while intoxicated;
>
> commits a Level 4 felony.

> we simply apply its plain and ordinary meaning, heeding both what it "does say" and what it "does not say."

Cook argues that given the Supreme Court's decision in *Mi.D.*, we may not consider his charged crimes as identical to Indiana Code section 35-50-1-2(a)(16) because by doing so we would be, effectively, adding an additional crime of violence to the statute without the consent of the legislature.

[15] Cook's charging information shows that he was charged with, in relevant part, the following: "Count 3: Causing Death When Operating Vehicle with Sched. I or II Controlled Substance in the Blood [Indiana Code section] 9-30-5-5(a)(2) a Level 4 Felony" and "Count 4: Causing Death When Operating Vehicle with Sched. I or II Controlled Substance in the Blood [Indiana Code section] 9-30-5-5(a)(2) a Level 4 Felony." Appellant's App. Vol. II p. 14. Indiana Code section 9-30-5-5 provides three methods in which one may operate a vehicle unlawfully, two of which are if they are operating "with a controlled substance listed in schedule I or II of [Indiana Code chapter 35-48-2] or its metabolite in the person's blood" or while "intoxicated." Counts 3 and 4 are merely a specific subsection of the crime described in Indiana Code section 35-50-1-2(a)(16), and therefore qualify as crimes of violence under the statute. The trial court therefore did not abuse its discretion in this regard.

II. Appropriateness

[16] Indiana Appellate Rule 7(B) provides that "[t]he 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." In reviewing such claims, "[t]he principal role should be to leaven the outliers, [. . .] but not to achieve a perceived 'correct' result in each case." *Cardwell v. State,* 895 N.E.2d 1219, 1225 (Ind 2008). Ultimately, we "do not look to see whether the defendant's sentence is appropriate or if another sentence might be more appropriate; rather, the test is whether the sentence is inappropriate." *Barker v. State*, 994 N.E.2d 306, 315 (Ind. Ct. App. 2013) (internal quotations omitted). The defendant bears the burden of persuading us that his sentence is inappropriate. *Sanchez v. State,* 891 N.E.2d 174, 176 (Ind. Ct. App. 2008).

[17] Cook argues that his sentence was inappropriate considering the nature of his offense and his character.[4] (Appellant's Br. p. 12) Cook's character and the nature of his offense do not warrant a sentence modification. Concerning his character, Cook has two prior misdemeanor convictions for reckless driving and "criminal recklessness-use of a vehicle." Appellant's App. Vol. II p. 36. "Even a minor criminal record reflects poorly on a defendant's character." *Reis v.* State, 88 N.E.3d 1099, 1195 (Ind. Ct. App. 2017) (citing *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007). The trial court also found that Cook displayed little remorse during the course of proceedings, despite causing the deaths of his children. Further, although Cook makes no argument concerning the nature of his offense, it does not warrant a sentence reduction. Cook, while

[4] Although the State argues that Cook waived this argument we will review on the merits.

under the influence of several drugs, drove head on into a semi-truck while the Children occupied the front seat of his vehicle resulting in their death. Cook's sentence is not inappropriate in light of the nature of his character and his offense.

III. Abuse of Discretion

[18] While Cook frames one of his arguments on appeal as an appropriateness challenge, a significant portion of that argument more closely resembles an argument that the trial court abused its discretion in sentencing him by failing to find his remorse to be a mitigating factor. We have previously concluded that "inappropriate sentence and abuse of discretion claims are to be analyzed separately." *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008).

[19] A trial court is neither required to find the presence of mitigating factors, *Fugate v. State*, 608 N.E.2d 1370, 1374 (Ind. 1993), nor obligated to explain why it did not find a factor to be significantly mitigating. *Sherwood v. State*, 749 N.E.2d 36, 38 (Ind. 2001). "A court does not err in failing to find mitigation when a mitigation claim is highly disputable in nature, weight, or significance." *Henderson v. State*, 769 N.E.2d 172, 179 (Ind. 2002) (internal quotations omitted).

[20] While Indiana law "mandates that the trial judge not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them[.]" *Sherwood*, 749 N.E.2d at 38. An allegation that the

trial court failed to find a mitigating factor "requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." *Carter v. State*, 711 N.E.2d 835, 838 (Ind. 1999). Furthermore, "the trial court is not required to weigh or credit the mitigating evidence the way appellant suggests it should be credited or weighed." *Fugate*, 608 N.E.2d at 1374.

[21] The trial noted that Cook displayed a "severe lack of remorse throughout the entirety of the proceedings." Tr. p. 36. Specifically, the trial court told Cook at sentencing that "not at one time during these proceedings have I seen one ounce of emotion from you" and that "you showed more emotion during your initial interview with the officer in the hospital over the fact that you had just spent $140.00 on their Halloween costumes" as an example of Cook's focus on financial and divorce-related issues rather than the death of his children. Tr. p. 37. Cook's bare assertion that he was, in fact, remorseful is insufficient to establish that the trial court abused its discretion in failing to consider his remorse as a mitigating circumstance. *Carter*, 711 N.E.2d at 838 (stating that an allegation that the trial court failed to find a mitigating factor "requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record").

[22] The judgment of the trial court is affirmed.

Crone, J., and Tavitas, J., concur.