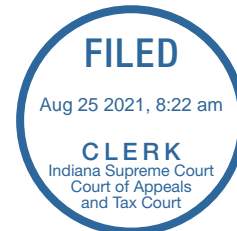


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Jennifer J. Dearborn,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 25, 2021

Court of Appeals Case No.
20A-CR-754

Appeal from the Washington
Circuit Court

The Honorable Larry W. Medlock,
Judge

Trial Court Cause No.
88C01-1704-F4-297

Brown, Judge.

- [1] Jennifer J. Dearborn appeals her sentence for possession of methamphetamine as a level 4 felony. We affirm.

Facts and Procedural History

- [2] On April 25, 2017, Dearborn possessed methamphetamine in an amount greater than ten grams but less than twenty-eight grams. On April 27, 2017, the State charged Dearborn with: Count I, operating a vehicle while intoxicated as a class C misdemeanor; Count II, operating a vehicle while intoxicated as a class A misdemeanor; Count III, possession of a schedule I, II, III, or IV controlled substance as a class A misdemeanor; Count IV, possession of marijuana as a class B misdemeanor; and Count V, possession of methamphetamine as a level 4 felony. On February 25, 2019, the State filed a motion to amend Count V to a level 3 felony and add Count VI, dealing in methamphetamine as a level 2 felony. The next day, Dearborn filed an objection to the additional charges.
- [3] On February 28, 2019, the court held a hearing at which it discussed the motion to amend the charges and indicated that it would allow the amended charges if it provided Dearborn with a continuance. After an off-record conference, the parties filed a plea agreement pursuant to which Dearborn agreed to plead guilty to Count V, possession of methamphetamine as a level 4 felony, and the State agreed to dismiss the remaining counts. The agreement also provided that Dearborn would receive an initial executed sentence of no more than six years. The court accepted the plea and dismissed the remaining counts.

[4] On August 5, 2019, the probation department filed a presentence investigation report. On February 3, 2020, the probation department filed a drug screen report indicating that a sample was collected from Dearborn on January 23, 2020, the laboratory received the sample the following day, the sample tested positive for amphetamine and methamphetamine, and the report was printed on January 27, 2020. The report listed “Screening Tests by IA” as positive for “Meth/Amphetamines (50 ng/ml).” Appellant’s Appendix Volume II at 36. Under the heading “Confirmation Tests,” the report indicated an “Amphetamine-OF Level” of 72 and a “Methamphetamine-OF Level” of 196. *Id.* (some capitalization omitted). The report stated: “Confirmation of a positive screen is recommended if legal action is anticipated.” *Id.* (capitalization omitted). It also stated: “Specimen placed in frozen storage for 12 months.” *Id.* On February 19, 2020, the probation department filed an amended presentence investigation report.

[5] On February 24, 2020, the court held a sentencing hearing. Dearborn’s counsel indicated that she had reviewed the presentence investigation report and stated “as far as . . . the information containing therein . . . we do not see any errors.” Transcript Volume II at 24. Bill Simpson, Dearborn’s boyfriend, testified that he had lived with Dearborn for twenty years, they had two children, and he had a criminal conviction.

[6] Dearborn’s counsel presented the testimony of Washington County Probation Officer Kristen Bennett who was assigned to prepare the presentence report. She testified that the positive drug screen led to an amended report and that she

did not speak with Dearborn prior to amending the report. She indicated she was aware that there are possibilities for false positives to occur in drug screens but had never seen one.

[7] On cross-examination, Officer Bennett testified that Dearborn had a new charge of false informing that she committed when she was out on bond in the present case. She testified that the drug screen was positive for methamphetamine and amphetamines. When asked if there were some medications that can cause a positive indication on drug screens, she answered: “There are . . . but our laboratory . . . has taken that information into account and they, when they receive our drug screens . . . they look for the exact drug fingerprint and . . . rule out . . . all of the possibilities for false positives.” *Id.* at 44. She indicated that some over the counter medications could cause a positive for amphetamine but not methamphetamine, and that Dearborn was asked on January 23, 2020, if she was on any prescription medications and if she had taken anything over the counter in the past ten days. She stated that Dearborn’s answer of Tylenol and ibuprofen were noted on the chain of custody. When asked if she believed Dearborn was not being truthful during her initial interview when Dearborn said she had never used illegal drugs and yet tested positive for methamphetamine, she answered affirmatively.

[8] On redirect examination, Dearborn’s counsel asked if the test was sent for confirmation, and Officer Bennett answered: “It’s sent to our laboratory in Arizona. . . . I believe they do all the confirmation testing there . . . at the

laboratory itself. [B]ut I know that there are other documents that you can receive that would further go into the . . . confirmatory testing.” *Id.* at 47.

[9] On recross-examination, Officer Bennett indicated it was her understanding that if any of the panels had a positive result then the lab would conduct a confirmatory test. She testified that a collection was taken from Dearborn on January 23, 2020, the laboratory received the collection on January 24, 2020, a screening test returned positive for methamphetamine and amphetamines, the sample must be at least fifty nanograms per milliliter to reach a positive result, the amphetamine test showed a result of 72, and the methamphetamine test showed a result of 196. When asked if they did a confirmation test and if “it was confirmed in their lab,” she answered affirmatively. *Id.* at 50.

[10] Dearborn testified that she was truthful when she stated she had never been a drug user and that she would do another drug screen to prove her innocence on her last screen. She testified that she was sick when she was asked if she was on any medications and did not think about mentioning that she had taken Sudafed. She also stated that she took Tylenol the night before the drug screen and ibuprofen that morning. She acknowledged she had methamphetamine in her purse when she was arrested. She stated that she was arrested for false informing during the previous month and her mother bonded her out that night. On redirect examination, Dearborn testified that someone was arrested with her and she knew the other person had prior drug charges.

[11] Dearborn’s counsel stated:

I would ask the Court to take that frozen drug screen and see if it can be independently I don't think of a conformation [sic] test being the same lab, the same date, the same group of testing. That to me is not confirmation. It needs to be a second independent lab that is not part of this same lab and it specifically says on that paperwork that confirmation testing needs to be done if this is going to be used in a Court of law.

Id. at 84. The prosecutor argued in part that defense counsel had no expert regarding the argument of a false positive, the case had been going on long enough, and it had been continued for a year since the plea. Dearborn's counsel stated: "I know this has been pending forever so I didn't want to ask for another continuance either." *Id.* at 86-87.

[12] With respect to hardship due to incarceration, the court stated:

I've been asked to consider that this will cause an undue hardship upon your family. I'll be honest with you, I, I'm, I have great concerns for your children, for your daughters. I don't feel like I'm capable of teaching, homeschooling children. I've got three degrees and you don't even know what level your children are at. I have great concerns that they're far behind other children of their age. Maybe they're not and I hope they're not. I truly hope they're not. And, and this new crime, a crime of dishonesty. What kind of example, I mean if you did these things that were alleged, what kind of example are, are you setting for your daughters? So, I can't find that incarceration would cause undue hardship. I, I wish I could. But I can't.

Id. at 88. The court found Dearborn's violation of the terms and conditions of pretrial release and her lack of remorse as aggravating factors. It found her lack of criminal history and history of mental health issues and learning disabilities

as mitigating factors. The court sentenced Dearborn to six years with three years executed and three years suspended to probation. The court stated:

And here's where you get to make a choice. [Your counsel] asked that the test that you took be reevaluated by an independent lab. You're, you or somebody, you or your family is willing to pay for that, I'll grant that request. If it turns out that it's negative, I will subtract a year and half from your sentence. If it's positive and you've lied to me, I'm going to add a year and a half to your sentence. So, you can tell, you can talk to [your counsel] after this and decide how you wish to proceed with that offer.

Id. at 89.

[13] On February 26, 2020, the court entered a sentencing order which states:

At the Defendant's request during sentencing argument, if she chooses and pays for an independent lab to retest the urine sample and the results return a positive drug screen, the Court will modify the Judgment of Conviction and sentence and add 1 ½ years to the defendant's sentence. However, if the results return a negative drug screen, the Court will modify the Judgment of Conviction and Sentence and subtract 1 ½ years to the defendant's sentence.

Appellant's Appendix Volume II at 80. The order also states: "The Court will consider modification of the sentence after [Dearborn] has served 1 actual year of incarceration with no violations." *Id.*

[14] On March 17, 2020, Dearborn filed a notice of appeal.¹ On January 19, 2021, this Court entered an order remanding the case to the trial court while retaining jurisdiction and ordered the trial court to determine whether Dearborn wished to have pauper appellate counsel appointed and whether she was entitled to pauper counsel. On February 11, 2021, the trial court found Dearborn indigent and appointed appellate counsel, and Dearborn filed an amended notice of appeal. On April 26, 2021, the trial court ordered the Department of Correction to assign Dearborn to the Community Transition Program.

Discussion

I.

[15] Dearborn first argues her due process rights were violated and the trial court abused its discretion by denying her the ability to present confirmation testing of a positive drug screen at her sentencing hearing. She asserts that the court “violated due process by considering a positive drug screen that had not been proved at the time of sentencing” and the court improperly “aggravated the sentence after considering a misdemeanor false informing criminal case that [the] state did not prove by a preponderance of the evidence.” Appellant’s Brief at 7. She contends that no person testified from the testing agency and Officer Bennett inappropriately testified about her experience. She asserts that it is

¹ Indiana’s Odyssey Case Management System indicates that Dearborn filed correspondence with the trial court requesting to be released and asserting: “My family and I were unable to afford to have the swab test unfrozen and retested.” December 4, 2020 Correspondence. On December 17, 2020, the trial court denied Dearborn’s request for modification.

possible that due process considerations would be satisfied if the trial court's confirmatory testing order would serve to either stay or reduce her sentence but further aggravation was impermissible. Dearborn also argues that the trial court was required to provide funds for confirmatory drug analysis and interpretation due to her indigency.

[16] The State argues that Dearborn waived her constitutional claims by failing to object on due process grounds below or raise them as fundamental error on appeal, and that her challenge regarding the potential for an additional sentence is not ripe. It asserts her request for a new sentencing hearing to be held after another confirmatory test is moot because the specimen expired after twelve months. It also argues this Court should not find that the trial court fundamentally erred by not pausing a sentencing hearing based on a defendant's self-serving and unsupported claim that another test result would be different than the preliminary and confirmatory tests already provided by the State.

[17] The Indiana Supreme Court has held that "a defendant is entitled to be sentenced only on the basis of accurate information" and "[t]he sentence based on materially untrue assumptions violates due process." *Lang v. State*, 461 N.E.2d 1110, 1114 (Ind. 1984) (quoting *Gardner v. State*, 270 Ind. 627, 638, 388 N.E.2d 513, 520 (1979)). Ind. Code § 35-38-1-12(b) provides that "[t]he court shall furnish the factual contents of the presentence investigation or a copy of the presentence report sufficiently in advance of sentencing so that the defendant will be afforded a fair opportunity to controvert the material included." "The requirements of [Ind. Code § 35-38-1-12(b)] are clearly based

upon the fundamental premise that the sentencing process be objective and fair to each individual defendant.” *Lang*, 461 N.E.2d at 1114. “In setting a particular sentence, the trial court must consider all the circumstances of the particular crime and the background of the individual offender and may rely upon relevant information which was not admissible at trial.” *Id.* “The defendant retains the right to refute any inaccurate or improper information.” *Id.*

[18] The record reveals that Dearborn called Officer Bennett as a witness and did not object to her testimony regarding the drug screen test or result. Dearborn does not assert that she requested the State to fund an additional test after the February 3, 2020 filing of the drug screen report and before the February 24, 2020 sentencing hearing. At the end of the sentencing hearing, Dearborn’s counsel asked the court “to take that frozen drug screen and see if it can be independently,” but did not request that the State pay for the testing. Transcript Volume II at 84. After the court indicated that it would grant Dearborn’s request for an independent lab to retest the sample if she or her family was willing to pay for the test, Dearborn’s counsel did not object or make an argument that the State should pay for the test. Dearborn does not assert that she had insufficient time to review the drug screen report or presentence investigation report. Her counsel stated at the sentencing hearing that “this has been pending forever so I didn’t want to ask for another continuance” *Id.* at 86-87. With respect to the confirmatory testing, more than one year passed since the January 27, 2020 drug screen report which

indicated “Specimen placed in frozen storage for 12 months.” Appellant’s Appendix Volume II at 36. Dearborn did not file a reply brief to respond to the State’s argument. To the extent Dearborn argues that the trial court improperly considered her pending charge of false informing, we note that the Indiana Supreme Court has held that a trial court can consider pending charges at a sentencing hearing. *Ashby v. State*, 486 N.E.2d 469, 477 (Ind. 1985), *reh’g denied*. We cannot say that reversal is warranted under the circumstances.

II.

[19] Dearborn next argues that her sentence is inappropriate in light of the nature of the offense and her character. She asserts that she has no criminal history and her sentence should be reduced or a larger portion of the sentence should be suspended.²

[20] Ind. Appellate Rule 7(B) provides that we “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character

² To the extent Dearborn argues the court abused its discretion by failing to account for certain proposed mitigators including the hardship incarceration would have on her mother and children, we need not address this issue because we find that her sentence is not inappropriate. See *Chappell v. State*, 966 N.E.2d 124, 134 n.10 (Ind. Ct. App. 2012) (noting that any error in failing to consider the defendant’s guilty plea as a mitigating factor is harmless if the sentence is not inappropriate) (citing *Windhorst v. State*, 868 N.E.2d 504, 507 (Ind. 2007) (holding that, in the absence of a proper sentencing order, Indiana appellate courts may either remand for resentencing or exercise their authority to review the sentence pursuant to Ind. Appellate Rule 7(B)), *reh’g denied*; *Mendoza v. State*, 869 N.E.2d 546, 556 (Ind. Ct. App. 2007) (noting that, “even if the trial court is found to have abused its discretion in the process it used to sentence the defendant, the error is harmless if the sentence imposed was not inappropriate”), *trans. denied*), *trans. denied*. Even if we were to address Dearborn’s abuse of discretion arguments, we would not find them persuasive in light of the record and the trial court’s comments at the sentencing hearing.

of the offender.” Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

[21] Ind. Code § 35-50-2-5.5 provides that a person who commits a level 4 felony shall be imprisoned for a fixed term of between two and twelve years, with the advisory sentence being six years.

[22] Our review of the nature of the offense reveals that Dearborn possessed methamphetamine in an amount greater than ten grams but less than twenty-eight grams. Our review of the character of the offender reveals that Dearborn pled guilty to possession of methamphetamine as a level 4 felony and in exchange the State agreed to dismiss four other counts, and the plea agreement indicated that the State agreed that Dearborn would receive an initial executed sentence of no more than six years.

[23] The amended presentence investigation report indicates that Dearborn stated she has anxiety, claustrophobia, three bulging discs in her back, degenerative disc disease, and high blood pressure. It states she reported that she does not use illegal drugs, she was ordered to submit to a drug screen on January 23, 2020, and the results of the drug screen were positive for methamphetamine and amphetamine. The report indicates Dearborn has no prior criminal history but was charged with false informing as a class B misdemeanor in February 2020 and that case was pending. It states she reported that no one in her family has a criminal background; however, Simpson, Dearborn’s boyfriend, acknowledged

at the sentencing hearing that he had a criminal case for transportation of a controlled substance and that he pled guilty in 2003. Dearborn also testified that her brother is a convicted felon and registered sex offender.

[24] Dearborn testified that she completed the eleventh grade, had never held down a long-term job because she could not “work fast enough to their standards,” and has two children whom she homeschools. Transcript Volume II at 57. The report provides that Dearborn’s overall risk assessment score using the Indiana Risk Assessment System places her in the low risk to reoffend category.

[25] After due consideration, we conclude that Dearborn has not sustained her burden of establishing that her advisory sentence of six years with three years suspended to probation is inappropriate in light of the nature of the offense and her character.

[26] For the foregoing reasons, we affirm.

[27] Affirmed.

Najam, J., and Riley, J., concur.