

## 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

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Juan Roberto Rodriguez-Posas,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff,*

February 5, 2021

Court of Appeals Case No.  
20A-CR-1403

Appeal from the Tippecanoe  
Circuit Court

The Honorable Sean M. Persin,  
Judge

Trial Court Cause No.  
79C01-1910-F5-160

**Robb, Judge.**

## Case Summary and Issue

- [1] Juan Roberto Rodriguez-Posas pleaded guilty to domestic battery causing bodily injury to a pregnant family member, a Level 5 felony. The trial court found the mitigators outweighed the aggravators and sentenced him to a below-advisory sentence of two years executed in the Indiana Department of Correction (“DOC”). Rodriguez-Posas now appeals his sentence, arguing that it is inappropriate in light of the nature of his offense and of his character. Finding that a two-year executed sentence is inappropriate, we reverse and remand.

## Facts and Procedural History

- [2] Rodriguez-Posas lives with Claudia, his wife<sup>1</sup> of approximately twenty-five years, and four of their five children in Tippecanoe County. On October 3, 2019, Rodriguez-Posas learned that Claudia was pregnant with another man’s child. Angry, Rodriguez-Posas hit her. At the time, he was undocumented and had been living in the United States for two or three years.
- [3] The State charged Rodriguez-Posas with three counts, including domestic battery resulting in bodily injury to a pregnant family member. On May 1,

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<sup>1</sup> Rodriguez-Posas referred to Claudia as his wife at the guilty plea hearing, *see* Transcript at 15, but they may not in fact be married, *see* Appellant’s Appendix, Volume 2 at 54-55 (pre-sentence investigation report stating that Rodriguez-Posas reported he and Claudia had been “in a relationship” for approximately twenty-five years and referring to Claudia as his “girlfriend”).

2020, Rodriguez-Posas and the State entered into a plea agreement for Rodriguez-Posas to plead guilty to domestic battery resulting in bodily injury to a pregnant family member in exchange for the State dismissing the two other counts. Rodriguez-Posas' sentence would be whatever the trial court "deems appropriate after hearing any evidence or argument of counsel." Appellant's Appendix, Volume 2 at 40. The plea agreement also contained the following relevant provisions about sentencing:

3. That the Defendant understands that the sentence imposed by the Court may include an executed sentence to the [DOC], Tippecanoe County Community Corrections, and/or a suspended sentence on Probation. Further, the Defendant understands that if he fails to qualify for or is rejected from Tippecanoe County Community Corrections, he shall serve his remaining community corrections sentence in the [DOC].

\* \* \*

9. The Defendant states that he . . . is not a citizen of the United States. . . .

10. That the Defendant acknowledges that if he is not a U.S. citizen or legal resident alien, . . . [he] would not be eligible for community corrections or placement on probation.

*Id.* at 40-41. Sections 3 and 10 are on separate pages of the plea agreement and five unrelated substantive provisions appear between these two sections. Sections 3 and 10 therefore appear as entirely independent provisions rather than section 10 directly and obviously restricting section 3.

[4] At the guilty plea hearing, the trial court reviewed Rodriguez-Posas' rights with him and also reviewed the terms of the plea agreement, including the terms stating that "the sentence imposed by the Court could include an executed sentence to the DOC, Tippecanoe County Community Corrections and/or a suspended sentence onto probation" and that if he is not a United States citizen, he would not be eligible for community corrections or probation. Tr. at 10, 13. Rodriguez-Posas' attorney laid a factual basis for the plea which the trial court accepted, and the plea was taken under advisement.<sup>2</sup> The probation department completed a presentence investigation, determined Rodriguez-Posas was a low risk to reoffend, and recommended a sentence of three years in the DOC.

[5] The sentencing hearing was held on June 19, 2020. Claudia neither provided a victim impact statement nor appeared at the hearing. *See* Appellant's App., Vol. 2 at 54; Tr. at 18-27. The parties agreed Rodriguez-Posas was entitled to 260 actual days credit and 86.67 days good time credit toward his sentence. The State acknowledged Rodriguez-Posas has no criminal history but identified the presence of children during the incident as an aggravating factor and argued for a sentence of three and one-half years. Rodriguez-Posas' attorney also acknowledged "it's kind of a rare bird that we have in this courtroom" because Rodriguez-Posas has never had any contact with the criminal justice system.

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<sup>2</sup> Rodriguez-Posas notes that the element of bodily injury was not addressed in the factual basis, but acknowledges that because he pleaded guilty, that is not an issue he can raise on direct appeal. *See* Appellant's Brief at 6 n.1.

Tr. at 21.<sup>3</sup> Rodriguez-Posas noted that he had maintained a long term stable relationship for over twenty years and supported his five children, he had uncharacteristically consumed alcohol the night of the incident and does not use illegal substances, he is “extremely sorry” and the circumstances are unlikely to recur, and he has already been incarcerated for “quite a period of time” and “lost a lot[,]” including his wife and family. Accordingly, Rodriguez-Posas asked for any sentence to be served on probation so he could “show the Court, show anybody, that he can do everything that they asked of him and do it perfectly[.]” *Id.* at 21-22.

[6] The trial court found the fact that minor children could see and hear the offense to be an aggravator; that Rodriguez-Posas took responsibility for his actions by pleading guilty, appears remorseful for his conduct, and has no criminal record to be mitigators; and found the mitigators outweigh the aggravators. With respect to the sentence, the trial court stated:

I agree with your attorney . . . and don't necessarily agree with the State or the Probation Department in this case. The Court's going to enter a sentence of two years. It's going to be fully executed. If I had the option for community corrections I'd put him on. It's just not viable. It's not something that's available to me at this time and I just don't like probation under these circumstances. The Court has considered one year but under

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<sup>3</sup> Rodriguez-Posas offered sworn testimony at the sentencing hearing that he had never been arrested before this, either in the two or three years he had been in the United States or when he lived in Honduras prior to coming here. *See id.* at 24.

these facts and these circumstances and the range that he's looking at the Court is not going to do that[.]

*Id.* at 26-27. The trial court's written sentencing order states:

[Rodriguez-Posas] shall execute two (2) years at the [DOC], fully executed. The Court notes that [he] is ineligible for community corrections and currently has an immigration hold/detainer, which would prevent him from residing in Tippecanoe County on probation.

Appealed Order at 2.

- [7] Rodriguez-Posas appeals his sentence. Additional facts will be provided as necessary.

## Discussion and Decision

### I. Standard of Review

- [8] Indiana Appellate Rule 7(B) provides this court the authority to revise a defendant's sentence "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 of the offender." Sentencing is "principally a discretionary function" of the trial court to which we afford great deference. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). "Such deference 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). It is the defendant who bears the burden of persuading this court his or her sentence is inappropriate under the standard. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

- [9] On review, the question is not whether another sentence is more appropriate; rather, the question is whether the sentence imposed is inappropriate. *Fonner v. State*, 876 N.E.2d 340, 344 (Ind. Ct. App. 2007). We may consider any factors appearing in the record in making this determination. *Stokes v. State*, 947 N.E.2d 1033, 1038 (Ind. Ct. App. 2011), *trans. denied*. Whether a defendant’s sentence is 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.” *Cardwell*, 895 N.E.2d at 1224. The trial court’s recognition and non-recognition of aggravators and mitigators serves as an initial guide in our determination. *Sanders v. State*, 71 N.E.3d 839, 844 (Ind. Ct. App. 2017), *trans. denied*.

## II. Inappropriate Sentence

- [10] Rodriguez-Posas argues his two-year executed sentence is inappropriate in light of the circumstances surrounding his offense and his character.
- [11] The advisory sentence is the starting point our legislature has selected as an appropriate sentence for the crime committed. *Childress*, 848 N.E.2d at 1081. The sentencing range for domestic battery as a Level 5 felony is between one and six years, with an advisory sentence of three years. Ind. Code § 35-50-2-

6(b). Finding the mitigators in this case outweighed the one aggravator, the trial court sentenced Rodriguez-Posas to a below-advisory sentence of two years, and further finding a placement in community corrections to be foreclosed and probation to be unworkable given Rodriguez-Posas' immigration status, ordered the sentence to be fully executed at the DOC.

[12] The nature of the offense is found in the details and circumstances surrounding the offense and the defendant's participation therein. *Perry v. State*, 78 N.E.3d 1, 13 (Ind. Ct. App. 2017). When evaluating a defendant's sentence that deviates from the advisory sentence, we consider whether there is anything more or less egregious about the offense as committed by the defendant that distinguishes it from the typical offense accounted for by our legislature when it set the advisory sentence. *Moyer v. State*, 83 N.E.3d 136, 142 (Ind. Ct. App. 2017), *trans. denied*.

[13] Our review of the record reveals that the offense occurred under a combination of factors unlikely to recur. Rodriguez-Posas and Claudia had been together for nearly twenty-five years and had five children together. They left Honduras with their four youngest children because their sixteen-year-old son was being recruited by a gang and made to sell drugs. They had been living in the United States for two or three years at the time of this incident. Rodriguez-Posas described the night of the incident as the "very first time I ever drank" and admitted he was drunk when he was arrested. Appellant's App., Vol. 2 at 55. Rodriguez-Posas and Claudia began arguing and Rodriguez-Posas learned "at that moment" that Claudia was pregnant with another man's child. Tr. at 16.



Rodriguez-Posas briefly put his hands around Claudia's neck, making it hard for her to breathe and causing her pain.<sup>4</sup> He then grabbed Claudia's arm and struck her in the back. When police arrived, Rodriguez-Posas admitted to touching Claudia in anger. Claudia had no "definitive marks or injuries" and declined medical treatment. Exhibit Volume, Volume 1 at 7. She did not submit a victim impact statement to the probation department and did not appear in court at Rodriguez-Posas' sentencing hearing despite receiving notice of the date and time.

[14] The "character of the offender" portion of the Rule 7(B) standard refers to general sentencing considerations and relevant aggravating and mitigating factors, *Williams v. State*, 782 N.E.2d 1039, 1051 (Ind. Ct. App. 2003), *trans. denied*, and permits a broader consideration of the defendant's character, *Anderson v. State*, 989 N.E.2d 823, 827 (Ind. Ct. App. 2013), *trans. denied*. "A defendant's life and conduct are illustrative of his or her character." *Morris v. State*, 114 N.E.3d 531, 539 (Ind. Ct. App. 2018), *trans. denied*.

[15] A typical factor to be considered in examining a defendant's character is his or her criminal history. *Johnson v. State*, 986 N.E.2d 852, 857 (Ind. Ct. App. 2013). A defendant's age is relevant in determining the weight to be given to a defendant's criminal history or lack thereof. *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007). Rodriguez-Posas was forty-three years of age at the

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<sup>4</sup> A charge of strangulation, a Level 5 felony, was dismissed as part of the plea agreement.

time of this incident and he has no prior criminal history, including no history of arrests. The Indiana Risk Assessment System Community Supervision Tool completed by the probation department indicated Rodriguez-Posas was at a low risk to reoffend and should be subject to minimum or non-reporting supervision. As for other aspects of his character, he has supported his family for over twenty years, most recently working as a roofer. He earned \$2,400 per month and considered himself financially stable. He does not use illegal substances and said the night of the incident was the “very first time I ever drank” and he acknowledged that it got him into trouble. Appellant’s App., Vol. 2 at 55; *see also id.* at 56 (stating he “didn’t decide or planed [sic] anything. I was drunk and acted out on it.”). He was remorseful for his actions, stating he was “very sorry” and feels “really bad.” *Id.* at 56. Obviously, even an isolated incident of domestic violence is troubling. But Rodriguez-Posas has an otherwise clean record.

[16] We acknowledge Rodriguez-Posas received a below-advisory sentence, but a fully executed sentence in the DOC is inappropriate in this case. The plea agreement, while on the one hand granting the trial court discretion to impose a range of placements, on the other hand restricted that discretion for a non-U.S. citizen. Plea agreements are contractual in nature, and the general rule is that any ambiguities in such agreements must be construed against the State because the State ordinarily drafts them. *Morris v. State*, 985 N.E.2d 364, 367 (Ind. Ct. App. 2013). It would have been easy for the State to excise paragraph 3 from the plea agreement such that the only provision regarding placement was that

Rodriguez-Posas, as a non-citizen, was not eligible for community corrections or probation. Instead, the contradictory provisions in the boilerplate plea agreement introduced an element of ambiguity into the plea that make it difficult to know what Rodriguez-Posas' expectations as to his sentence were. *See* Tr. at 13 (Rodriguez-Posas' counsel stating at the guilty plea hearing that non-citizens "can go to probation") and at 21-22 (arguing at the sentencing hearing that Rodriguez-Posas had agreed to abide by the probation terms and would respond affirmatively to probation). It is clear from the trial court's statements at the sentencing hearing and in the sentencing order that but for the rules of the Tippecanoe County Community Corrections program denying non-citizens eligibility, the trial court would have ordered a community corrections placement.

- [17] Article 1, section 18 of the Indiana Constitution mandates that "[t]he penal code shall be founded on the principles of reformation, and not of vindictive justice." Incarceration is not generally inconsistent with the principle that our criminal justice system is based upon rehabilitation, where possible. *See Fointno v. State*, 487 N.E.2d 140, 143-44 (Ind. 1986). But incarceration *is* inconsistent with rehabilitation in this case, given Rodriguez-Posas' lack of criminal history in his forty-three years, his low risk to reoffend, the fact that the trial court did not want to send him to the DOC but did not have any other viable options, and the fact that Rodriguez-Posas had already been incarcerated for nearly a year at the time of his sentencing.

[18] Because of the contradictions in the plea agreement, Rodriguez-Posas' generally good character, the trial court's clear preference for a community corrections' placement, and the fact that incarceration serves no rehabilitative purpose here, we conclude the two-year executed sentence in the DOC is inappropriate and revise his sentence to time served. A time served sentence at this point will amount to more than ninety percent of the ordered executed sentence.<sup>5</sup> We remand to the trial court to amend its sentencing order consistent with this opinion.

## Conclusion

[19] Rodriguez-Posas' fully executed sentence at the DOC is inappropriate in light of the nature of his offense and his character. We accordingly revise his sentence to time served and remand to the trial court for further proceedings.

[20] Reversed and remanded.

Bailey, J., concurs.

Tavitas, J., dissents with opinion.

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<sup>5</sup> No matter the resolution of this state criminal sentencing matter, however, we are unable to do anything about the federal ICE hold.

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Juan Roberto Rodriguez-Posas,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

Court of Appeals Case No.  
20A-CR-1403

**Tavitas, Judge, dissenting.**

[21] I respectfully dissent from the majority’s revision of Rodriguez-Posas’ below-advisory-two-year sentence to time already served. It is well-settled that, in 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). A defendant, thus, “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*, and a reviewing court is “unlikely to consider an advisory sentence inappropriate.” *Shelby v. State*, 986 N.E.2d 345, 371 (Ind. Ct. App. 2013), *trans. denied*. The

same applies where the defendant alleges that a below-advisory sentence is inappropriate.

[22] The advisory sentence for a Level 5 felony is three years. Finding the mitigating factors outweighed the lone aggravating factor, the trial court sentenced Rodriguez-Posas to a below-advisory sentence of two years. In so doing, the trial court accounted for Rodriguez-Posas' "generally good character[,]” encompassing his lack of criminal history, his low risk to reoffend, and his time already served. Isolated incident or not, the fact remains that Rodriguez-Posas battered Claudia, who was pregnant, in the presence of their four children. Nothing about these circumstances warrants further downward revision of Rodriguez-Posas' below-advisory sentence. Rodriguez-Posas has not carried his “particularly heavy burden.” *See Fernbach*, 954 N.E.2d at 1089. For this reason, I would affirm the trial court.