MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Robert Antonio Lesure, II,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 22, 2022

Court of Appeals Case No. 22A-CR-511

Appeal from the Shelby Superior Court

The Honorable R. Kent Apsley, Judge

Trial Court Cause No. 73D01-2011-F4-11

Molter, Judge.

[1] Robert Antonio Lesure, II pleaded guilty to operating a vehicle while intoxicated causing death as a Level 4 felony and admitted to being a habitual

offender, and he was sentenced to twenty-five years in the Indiana Department of Correction. Lesure appeals his sentence, arguing it is inappropriate in light of the nature of the offense and his character. We disagree and affirm his sentence. Lesure also argues his entire plea agreement is unenforceable because one of the agreement's provisions, which required him to waive his right to seek post-conviction relief, is void. The State concedes the provision is void, but that concession does not require the conviction and sentence to be set aside. Instead, we remand to the trial court for the limited purpose of severing the post-conviction waiver term from the agreement.

Facts and Procedural History

[2] At approximately 1:48 a.m. on October 30, 2020, Shelby County Sheriff Deputy Chris Abernathy observed Lesure driving westbound in the eastbound lanes of Interstate 74 ("I-74"). Deputy Abernathy drove parallel to the vehicle from the westbound side of I-74 and unsuccessfully tried to get Lesure's attention by flashing emergency lights and shining a spotlight on Lesure's vehicle. After two miles, he observed Lesure collide head-on with a vehicle driven by Kassandra Jenkins. Jenkins was pronounced dead at the scene, and Lesure was transferred to a local hospital, where he consented to a blood draw that revealed a blood alcohol content of 0.15%. Further, while at the hospital, Lesure exhibited signs of opioid overdose, which resolved upon the administration of Narcan. Lesure also told a medic that he had been drinking at a casino.

[3] After a few days in the hospital, Lesure "walked out . . . without being released by hospital staff" and tried to avoid police questioning. Tr. at 71. The State charged him with operating a vehicle while intoxicated causing death, a Level 4 felony, and reckless homicide, a Level 5 felony. The State also alleged that Lesure was a habitual offender. After hiding from the police for months, U.S. Marshals eventually apprehended Lesure in Kentucky based on the charges in this case.

[4] In January 2022, Lesure entered into a plea agreement with the State. He pleaded guilty to operating a vehicle while intoxicated causing death and admitted to being a habitual offender. In exchange, the State dismissed Lesure's remaining charge and set forth a sentencing cap of 25 years. The plea agreement also contained the following language: "Defendant waives the right to seek any type of post-conviction relief under Cause No. 49F09-9912-DF-216670 (Auto Theft), 49G02-0508-FB-135449 (Burglary), 49F25-0901-FC-000117 (Auto Theft), and 18C03-1107-FB-000019 (Armed Robbery)." Appellant's App. Vol. 2 at 67.

[5] The trial court accepted Lesure's guilty plea and sentenced him to twenty-five years in the Indiana Department of Correction. At the sentencing hearing, the trial court identified several aggravating and mitigating factors. As mitigators, it noted that a lengthy executed sentence on Lesure would work a hardship on his six minor children and that he pleaded guilty in this case and accepted responsibility. As aggravators, the trial court found that Lesure had an

extensive criminal history, that he had shown no remorse, and that previous attempts to rehabilitate him had failed. Lesure now appeals.

Discussion and Decision

I. Inappropriate Sentence

[6] The Indiana Constitution authorizes 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). "That authority is implemented through Appellate Rule 7(B), which permits an appellate court to revise a sentence if, after due consideration of the trial court's decision, the sentence is found to be inappropriate in light of the nature of the offense and the character of the offender." *Faith v. State*, 131 N.E.3d 158, 159 (Ind. 2019).

[7] Our role is only to "leaven the outliers," which means we exercise our authority only in "exceptional cases." *Id.* at 160. Thus, we generally defer to the trial court's decision, and our goal is to determine whether the defendant's sentence is inappropriate, not whether some other sentence would be more appropriate. *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). "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).

[8] When determining whether a sentence is inappropriate, the advisory sentence is the starting point the legislature has selected as the appropriate sentence for the crime committed. *Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014). The sentencing range for a Level 4 felony is a fixed term of imprisonment between two and twelve years, with the advisory sentence being six years. Ind. Code § 35-50-2-5.5. The sentencing range for a habitual offender enhancement for a Level 4 felony is between six and twenty years. Ind. Code § 35-50-2-8(i). Here, Lesure's sentence enhancement for his habitual offender conviction was five years less than the maximum. Also, his ten-year sentence for Level 4 felony operating a vehicle while intoxicated causing death was two years less than the maximum and only four years more than the advisory sentence.

[9] Analyzing the nature of the offense requires us to 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*. Here, Lesure killed another person and endangered the lives of others on I-74. After receiving treatment at a local hospital, he tried to evade police questioning and fled to Kentucky for many months. Thus, we are not persuaded that the nature of Lesure's offense warrants revision of his aggregate sentence.

[10] Next, as to his character, Lesure acknowledges his criminal history but essentially argues it should not be used against him.[1] We disagree. The law is well-established that it is proper to consider a defendant's criminal history. *Johnson v. State*, 986 N.E.2d 852, 857 (Ind. Ct. App. 2013). Here, that history is extensive. Lesure was thirty-nine years old at sentencing, and his criminal history goes back to at least when he was fourteen years old. Omitting the offense at issue here, his criminal history includes nine referrals to the juvenile justice system and eleven other adult cases (including three cases that were waived from juvenile court) which resulted in four felony convictions and three misdemeanor convictions. Lesure has also been placed on probation four times with violations in three of those supervisions. Further, he has unsuccessfully been supervised on home detention and work release, and he has a long history of substance abuse. Lesure has also had multiple opportunities to change his behavior, but his attempts at rehabilitation have failed.

[11] We cannot say that Lesure has shown "substantial virtuous traits or persistent examples of good character" such that his requested reduction of his sentence is

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[1] Lesure also contends that "[t]he maximum possible sentences are generally most appropriate for the worst offenders." *Wells v. State*, 904 N.E.2d 265, 274 (Ind. Ct. App. 2009), *trans. denied*; Appellant's Br. at 10. However, this is "not an invitation to determine whether a worse offender could be imagined, as it is always possible to identify or hypothesize a significantly more despicable scenario, regardless of the nature of any particular offense and offender." *Id.* Instead, "[b]y stating that maximum sentences are ordinarily appropriate for the worst offenders, we refer generally to the class of offenses and offenders that warrant the maximum punishment." *Simmons v. State*, 962 N.E.2d 86, 92 (Ind. Ct. App. 2011). Thus, we focus less on "comparing the facts of this case to others, whether real or hypothetical, and more on . . . the nature, extent, and depravity of the offense for which the defendant is being sentenced and what it reveals about his character." *Id.* at 93.

warranted based on his character. *Stephenson*, 29 N.E.3d at 122. Therefore, Lesure has not shown that his sentence is inappropriate in light of the nature of the offense and his character.[2]

II. Waiver of Post-Conviction Relief

[12] Lesure next challenges the validity of his plea agreement, which included the following language: "Defendant waives the right to seek any type of post-conviction relief under Cause No. 49F09-9912-DF-216670 (Auto Theft), 49G02-0508-FB-135449 (Burglary), 49F25-0901-FC-000117 (Auto Theft), and 18C03-1107-FB-000019 (Armed Robbery)." Appellant's App. Vol. 2 at 67. He specifically argues the language in the challenged provision is invalid and therefore voids the entire plea agreement.

[13] The State concedes the provision purporting to waive Lesure's right to seek post-conviction relief is invalid. Our Supreme Court has held that provisions in plea agreements waiving a defendant's right to seek post-conviction relief are

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[2] We note that while Lesure raises the issue of whether his sentence is inappropriate, he appears to conflate two separate sentencing standards: whether the trial court abused its discretion in identifying mitigating and aggravating factors and whether his sentence is inappropriate pursuant to Indiana Appellate Rule 7. "As our Supreme Court has made clear, 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). Accordingly, "an inappropriate sentence analysis does not involve an argument that the trial court abused its discretion in sentencing the defendant." *Id.* To the extent Lesure argues the trial court abused its discretion, we need not address this issue because we find that his 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 Indiana Appellate Rule 7(B))), *trans. denied*. Even if we were to address Lesure's abuse of discretion argument, we would not find it persuasive in light of the record.

void and unenforceable. *Creech v. State*, 887 N.E.2d 73, 75–76 (Ind. 2008). However, we are unconvinced that this single unenforceable provision voids the entire plea agreement.

[14] Our courts have long held that plea agreements are in the nature of contracts entered into between the defendant and the State. *Lee v. State*, 816 N.E.2d 35, 38 (Ind. 2004). That is:

> [a] plea agreement is contractual in nature, binding the defendant, the state and the trial court. The prosecutor and the defendant are the contracting parties, and the trial court[']s role with respect to their agreement is described by statute: If the court accepts a plea agreement, it shall be bound by its terms.

Id. As such, we look to principles of contract law when construing plea agreements to determine what is reasonably due to the defendant. *Id.* Relevant here, while one part of a plea agreement may be void or unenforceable, that does not mean the entire agreement is rendered void if the prohibited and valid provisions are severable. *State v. Arnold*, 27 N.E.3d 315, 321 (Ind. Ct. App. 2015), *trans. denied*; *Clay v. State*, 888 N.E.2d 773, 776 n.3 (Ind. Ct. App. 2008). As our Supreme Court has explained: "if a contract contains an illegal provision that can be eliminated without frustrating the basic purpose of the contract, the court will enforce the remainder of the contract." *Lee*, 816 N.E.2d at 39; *see also Heritage Dev. of Ind., Inc. v. Opportunity Options, Inc.*, 773 N.E.2d 881, 890 (Ind. Ct. App. 2002) ("As a general rule, the failure of a distinct part of a contract does not void valid, severable provisions.").

[15] Here, the basic purpose of the plea agreement was to reduce Lesure's punishment in exchange for foregoing a trial. In exchange for the State's agreement to dismiss his remaining charges and set forth a sentencing cap of 25 years, Lesure pleaded guilty to Level 4 felony operating a vehicle while intoxicated causing death and admitted to being a habitual offender. Thus, severing the challenged provision, which pertains to his ability to waive his right to post-conviction relief under four other criminal causes, does not frustrate the basic purpose of the plea agreement.[3] *See, e.g.*, *Lee*, 816 N.E.2d at 39 (concluding that an illegal sentencing provision in a plea agreement did not eviscerate the entire plea agreement); *see also Harbour v. Arelco, Inc.*, 678 N.E.2d 381, 385 (Ind. 1997) (concluding that an illegal attorney fee provision in a rental agreement did not render the entire contract invalid). Moreover, recognizing the unenforceability of that single provision works only to the detriment of the State, which is the party proposing that remedy. Accordingly, we conclude that the single void provision at issue does not invalidate the entire plea agreement.

[16] In sum, we reject Lesure's arguments that his sentence was inappropriate in light of the nature of the offense and his character and that the void provision renders the entire plea agreement unenforceable. We remand to the trial court

[3] To the extent Lesure argues "[t]here can be nothing knowing and voluntary about a plea that requires one to set aside their right to post conviction challenge," Appellant's Reply Br. at 6, he has waived this issue for our review. *See* Ind. Appellate Rule 46(A)(8)(a) ("The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on . . . .").

for the limited purpose of severing the unenforceable provision of the plea agreement waiving the right to post-conviction relief.

[17] Affirmed and remanded.

Mathias, J., and Brown, J., concur.