## MEMORANDUM DECISION




ATTORNEY FOR APPELLANT

Lisa M. Johnson
Brownsburg, Indiana

ATTORNEYS FOR APPELLEE

Theodore J. Rokita
Attorney General

Tina L. Mann
Deputy Attorney General
Indianapolis, Indiana

# IN THE COURT OF APPEALS OF INDIANA

Robert J. Penrose,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff*

June 3, 2021

Court of Appeals Case No. 21A-CR-427

Appeal from the Pulaski Superior Court

The Honorable Crystal A. Kocher, Judge

Trial Court Cause No. 66D01-2008-F6-51

**Vaidik, Judge.**

# Case Summary

[1] Robert J. Penrose appeals his sentence for resisting law enforcement, reckless driving, and driving while suspended. We affirm.

# Facts and Procedural History

[2] On July 16, 2020, Penrose led law enforcement on a pursuit from Starke County into Pulaski County on US 35, reaching speeds of 110 mph. At one point Penrose "crossed left of center almost causing a head on collision with northbound oncoming traffic." Appellant's App. Vol. II p. 27. He eventually drove off the road, and the car he was in rolled four times. Penrose later reported he was high on drugs at the time of the incident and wrecked the car on purpose to kill himself.

[3] The State charged Penrose with Level 6 felony resisting law enforcement, Class C misdemeanor reckless driving, and Class A infraction driving while suspended.[1] A jury trial was scheduled for November 16, 2020. That day, just before the trial was to begin, Penrose pled guilty, leaving sentencing to the discretion of the trial court. In sentencing Penrose, the court found one aggravating factor—his criminal history—and no mitigating factors. For resisting law enforcement, the court imposed a sentence of two-and-a-half

[1] The State also charged Penrose with speeding and driving left of center, but it later dismissed those counts, and they are not relevant to this appeal.

years, with two years to serve in the Pulaski County Jail and six months suspended to probation. The court imposed a concurrent term of sixty days for reckless driving and a fine of one dollar for driving while suspended.

[4] Penrose now appeals.

# Discussion and Decision

## I. Mitigating Factors

[5] Penrose first contends the trial court should have found several mitigating circumstances: his guilty plea; his mental-health issues (depression and ADD); his history of substance abuse; his intoxication at the time of these offenses; his history of childhood trauma; and the hardship to his one-year-old son. The finding of aggravators and mitigators rests within the sound discretion of the trial court, and we review such decisions only for an abuse of that discretion. *Wert v. State*, 121 N.E.3d 1079, 1084 (Ind. Ct. App. 2019), *trans. denied*. One way a trial court abuses its discretion is by not recognizing mitigators that are clearly supported by the record and advanced for consideration. *Id.* However, even if we find an abuse of discretion, "we need not remand for resentencing if we can say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." *Vega v. State*, 119 N.E.3d 193, 203 (Ind. Ct. App. 2019).

[6] We first note that of the six purported mitigators identified by Penrose, only two—his history of substance abuse and his intoxication at the time of these

offenses—were "advanced for consideration" in the trial court. *See* Tr. pp. 37-38. He does appear to have a history of substance abuse and mental illness, and his guilty plea was entitled to some mitigating weight, even though it was not entered until the day set for trial. *See Cotto v. State*, 829 N.E.2d 520, 525-26 (Ind. 2005). In any event, we can say with confidence that the trial court would have imposed the same sentence even had it found all six mitigators urged by Penrose. The primary basis for the court's chosen sentence was Penrose's criminal history, and that history is extensive. According to the presentence investigation report, which Penrose does not challenge on appeal, Penrose had at least ten felony convictions and six misdemeanor convictions between 2001 and 2019, along with multiple probation violations. He spent significant time in prison between 2006 and 2020. Given this history, we have no doubt the trial court would have sentenced Penrose to two years in jail regardless of the alleged mitigators.

# II. Inappropriate Sentence

[7] Penrose also argues that even if we don't reverse for an abuse of discretion, his sentence is inappropriate and should be reduced under Indiana Appellate Rule 7(B), which provides that an appellate 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." "Whether a sentence is inappropriate ultimately turns on the culpability of the defendant, the severity of the crime, the damage

done to others, and a myriad of other factors that come to light in a given case." *Thompson v. State*, 5 N.E.3d 383, 391 (Ind. Ct. App. 2014) (citing *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008)). Because we generally defer to the judgment of trial courts in sentencing matters, defendants have the burden of persuading us their sentences are inappropriate. *Schaaf v. State*, 54 N.E.3d 1041, 1044-45 (Ind. Ct. App. 2016). Our task under Rule 7(B) is to "leaven the outliers," not to "achieve a perceived 'correct' result in each case." *Cardwell*, 895 N.E.2d at 1225.

[8] Penrose's sentence is not an outlier. He faced a maximum sentence of two-and-a-half years for Level 6 felony resisting law enforcement. *See* Ind. Code § 35-50-2-7(b). The trial court imposed that sentence but suspended six months to probation. That decision is amply supported by both the nature of the offense and Penrose's criminal history. While high on drugs, Penrose led law enforcement on a pursuit at 110 mph, at one point crossing the center line and almost causing a head-on collision before driving off the road and crashing. These highly dangerous actions went beyond what is required to commit Level 6 felony resisting law enforcement. *See* Ind. Code § 35-44.1-3-1(c)(1)(A) (making resisting a Level 6 felony if "the person uses a vehicle to commit the offense"). And as already noted, Penrose had at least ten felony convictions and six misdemeanor convictions, along with multiple probation violations, before this incident. He has failed to convince us his sentence is inappropriate.

# III. Sentence-Modification Waiver

[9] When Penrose pled guilty, the court had him review and sign an Advisement of Rights form. That form includes a waiver of the right to seek a sentencing modification under Indiana Code section 35-38-1-17:

> The Defendant understands and waives the right to petition the court for modification of sentence pursuant to I.C. 35-38-1-17 or pursuant to any other basis and likewise waives any right to treatment as a drug or alcohol offender (if applicable). The defendant further understands that the sentence will be imposed as set out hereinabove.

Appellant's App. Vol. II p. 48. Penrose asks us to declare this provision "invalid and unenforceable." Appellant's Br. p. 30. He cites subsection (l) of the modification statute, which provides:

> **A person may not waive the right to sentence modification under this section as part of a plea agreement. Any purported waiver of the right to sentence modification under this section in a plea agreement is invalid and unenforceable as against public policy.** This subsection does not prohibit the finding of a waiver of the right to:
>
> > (1) have a court modify a sentence and impose a sentence not authorized by the plea agreement, as described under subsection (e); or
> >
> > (2) sentence modification for any other reason, including failure to comply with the provisions of this section.

Ind. Code § 35-38-1-17(l) (emphasis added).

[10] We decline to resolve this issue. As the State notes, because Penrose has not requested a sentence modification, the issue is not ripe, and Penrose is asking for an advisory opinion. We do not issue advisory opinions. *See Saylor v. State*, 81 N.E.3d 228, 232 (Ind. Ct. App. 2017), *trans. denied*.

[11] Affirmed.

Bradford, C.J., and Brown, J., concur.