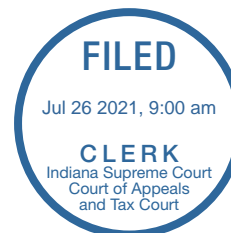


MEMORANDUM DECISION

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

Carlos James Donnivan Perkins,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 26, 2021

Court of Appeals Case No.
21A-CR-334

Appeal from the
Lake Superior Court

The Honorable
Natalie Bokota, Judge

Trial Court Cause No.
45G02-1911-F1-60

Kirsch, Judge.

[1] After Carlos James Donnivan Perkins (“Perkins”) pleaded guilty to child molesting¹ as a level 3 felony, the trial court sentenced him to ten years, suspended two years to probation and ordered Perkins to serve his executed time in the Indiana Department of Correction (“DOC”). Perkins raises one issue, which we restate as whether his ten-year sentence is inappropriate.

[2] We affirm.

Facts and Procedural History

[3] From early January to late August of 2019, Perkins worked at Charter Academy (“the School”) in Gary, Indiana as a technology assistant; he also assisted with student counseling. *Appellant’s Conf. App. Vol. Two* at 17-18, 85; *Tr. Vol. 2* at 24. A.R., a student at the School, had behavior problems, so the School asked Perkins to help A.R. curb her disruptive behavior. *Tr. Vol. 2* at 55, 71.

[4] Perkins began counseling A.R., and once A.R. told Perkins she was having suicidal thoughts, they began a sexual relationship that lasted eight months. *Id.* at 24-25; *Appellant’s Conf. App. Vol. Two* at 61. During the relationship, Perkins was thirty-one years old, and A.R. was thirteen years old. *Appellant’s Conf. App. Vol. Two* at 61, 67, 85. Perkins persuaded A.R. to perform oral sex on him at least five different times. *Id.* Perkins took A.R. to a hotel room at least once;

¹ See Ind. Code § 35-42-4-3(a).

he paid for the hotel room with A.R.'s mother's credit card. *Tr. Vol. 2* at 34, 36; *Appellant's Conf. App. Vol. Two* at 61. While at the hotel, Perkins attempted to have intercourse with A.R.; she pushed him off, so Perkins masturbated and ejaculated on A.R.'s back. *Appellant's Conf. App. Vol. Two* at 112. Perkins also touched A.R.'s chest, buttocks, and upper thighs. *Tr. Vol. 2* at 24, 78. He sent A.R. pictures of his genitals and received pictures of A.R. in her underwear. *Id.* at 25. Perkins recorded himself kissing A.R. in his vehicle. *Id.* at 25, 34. Perkins told A.R. that his wife and child had died in a car accident when, in fact, they were still alive. *Id.* at 41, 107-08. He also told A.R. he would commit suicide if she ended their relationship. *Id.* at 41. A.R. said that because of her relationship with Perkins, "suicide was always on my mind." *Id.* 40.

[5] After A.R.'s mother found inappropriate text messages between A.R. and Perkins on A.R.'s phone, A.R.'s mother contacted the police. *Appellant's Conf. App. Vol. Two* at 17-18. On November 22, 2019, the State charged Perkins with child molesting as a Level 1 felony, child molesting as a Level 4 felony, dissemination of material harmful to a minor, a Level 6 felony, battery by bodily waste, a Class B misdemeanor, and furnishing alcohol to a minor as a Class B misdemeanor. *Id.* at 16. On November 19, 2020, the State charged Perkins with child molesting as a Level 3 felony, and that same day, Perkins agreed to plead guilty to that new charge, and the State agreed to dismiss the remaining charges. *Id.* at 57, 59.

[6] At a December 10, 2020 hearing, Perkins pleaded guilty, and the trial court took the guilty plea under advisement. *Id.* at 66; *Tr. Vol. 2* at 13. Later at the

January 27, 2021, sentencing hearing, the trial court heard testimony and reviewed the Pre-Sentence Investigation Report (“PSI”) and other documents, including letters written on Perkins’s behalf by relatives, friends, and colleagues, which attested to Perkins’s good character. *Conf. Ex. Vol.* at 6-24. At the end of the hearing, the trial court found that Perkins lied to the evaluator during the psychosexual examination. *Tr. Vol. 2* at 106-07. The trial court also said the following to Perkins: 1) “I find that your character is manipulative. . . . [W]hen you cried . . . [y]ou cried for yourself. But there are no tears for A.R.”; *id.* at 104-05, and 2) “I find your character to be self-absorbed . . . and predatory.” *Id.* at 105. The trial court found that Perkins’s remorse was insincere and that he had not shown that he understood that his relationship with Perkins’s was inappropriate. *Id.* at 106-07. It also found there was an average risk that Perkins would recidivate. *Id.* at 105; *Appellant’s Conf. App. Vol. Two* at 74, 119-20, 124-25.

[7] The trial court found several other aggravating factors, including that Perkins: 1) caused significant harm to A.R. that was greater than the elements necessary to prove the commission of the offense, partly because Perkins victimized A.R. for eight months; 2) was in a position of trust with A.R. because he was supposed to help her overcome her behavioral problems, and he violated that position of trust; and 3) manipulated A.R. by threatening to commit suicide if she ended their relationship and preying on her by telling her that his wife and children had died, even though he knew that A.R. was a troubled, suicidal child. *Tr. Vol. 2* at 18; *Appellant’s App. Vol. Two* at 135. As mitigating factors,

the trial court found: 1) Perkins had no history of delinquency or criminal activity, and 2) imprisonment would impose a hardship on Perkins and his wife and children. *Appellant's App. Vol. Two* at 135-36. The trial court assigned low weight to these mitigating factors. *Id.* at 136. It imposed a ten-year sentence on Perkins, suspended two years to probation and ordered Perkins to serve his executed time in DOC. *Id.* at 11, 134-36, 139; *Tr. Vol. 2* at 108. Perkins now appeals. We will provide additional facts as necessary.

Discussion and Decision

- [8] Perkins contends his sentence is inappropriate considering the nature of his offense and his character. He asks us to reduce his sentence to the advisory sentence of nine years, with three years to be served in DOC and the remainder to be served either on probation or through Lake County Community Corrections.
- [9] Under Indiana Appellate Rule 7(B), we may revise a sentence if we find the sentence is inappropriate considering the nature of the offense and the character of the offender. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (2007). The “nature of offense” compares the defendant’s actions with the required showing to sustain a conviction, *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008), while the “character of the offender” permits for a broader consideration of the defendant’s character. *Anderson v. State*, 989 N.E.2d 823, 827 (Ind. Ct. App. 2013), *trans. denied*. Whether a sentence is inappropriate turns on the culpability of the defendant, the severity of the crime,

the damage done to others, and other factors that come to light. *Cardwell*, 895 N.E.2d at 1224.

- [10] We defer to the trial court’s decision; our goal is to determine whether the appellant’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). “[W]e reserve our 7(B) authority for exceptional cases.” *Faith v. State*, 131 N.E.3d 158, 160 (Ind. 2019)

Nature of Offense

- [11] Perkins contends his sentence is inappropriate considering the nature of his offense. The sum total of Perkins’s argument is that “even the most execrable events come with an advisory sentence subject to reduction or enhancement within the statutory offense within the statutory range.” *Appellant’s Br.* at 10. Because Perkins’s conclusory, one-sentence argument provides no substantive analysis, he has waived this issue for failure to make a cogent argument. *See* Ind. Appellate Rule 46(A)(8)(a) (argument section of appellant’s brief “must contain the contentions of the appellant on the issues presented, supported by cogent reasoning”); *see also Jarman v. State*, 114 N.E.3d 911, 915 n.2 (Ind. Ct. App. 2018), *trans. denied*. Nonetheless, we will address this issue on the merits.

[12] The nature of the offense is found in the details and circumstances of the commission of the offense and the defendant's participation. *Perry v. State*, 78 N.E.3d 1, 13 (Ind. Ct. App. 2017). The nature of the offense refers to a defendant's actions in comparison with the elements of the offense. *Cardwell*, 895 N.E.2d at 1224. The advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. *Kunberger v. State*, 46 N.E.3d 966, 973 (Ind. Ct. App. 2015). Here, Perkins pleaded guilty child molesting as a Level 3 felony. The sentencing range for a Level 3 felony is three years to sixteen years with an advisory sentence of nine years. Ind. Code § 35-50-2-5(b). Thus, Perkins's ten-year sentence is six years less than the maximum sentence and only one year more than the advisory sentence.

[13] When determining whether a sentence that exceeds the advisory sentence is inappropriate, "we 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*. Perkins was convicted of Level 3 felony child molesting, and the elements of that offense are that a person who, with a child under fourteen years of age, knowingly or intentionally performed or submitted to other sexual conduct. *See* Ind. Code § 35-42-4-3(a). "Other sexual conduct" is defined, in part, as an act involving a sex organ of one person and the mouth or anus of another person. *See* Ind. Code § 35-31.5-2-221.5(1). Here, besides committing the elements of

Level 3 felony child molesting, Perkins committed other acts that made his offense more egregious and justified a sentence exceeding the nine-year advisory sentence. Perkins's relationship with A.R. lasted eight months. *Tr. Vol. 2* at 24-25; *Appellant's App. Vol. Two* at 61. As an employee of the School who was tasked with counseling A.R., Perkins violated his position of trust by having a sexual relationship with A.R. Abusing a position of trust will support even a maximum sentence for child molesting. *See Hart v. State*, 829 N.E.2d 541, 544 (Ind. Ct. App. 2005). During the course of his sexual relationship with A.R., Perkins engaged in other egregious behavior when he: 1) threatened to commit suicide if A.R. ended their relationship; 2) sought to induce A.R.'s sympathy by telling her that his wife and children had died in a car accident when they were actually still alive; 3) ejaculating on A.R.'s back; 4) sending pictures of his genitals to A.R. and receiving pictures of A.R. in her underwear; and 5) paying for a hotel room with A.R.'s mother's credit card. *Tr. Vol. 2* at 34, 36; *Appellant's Conf. App. Vol. Two* at 61. Perkins has failed to present compelling evidence that portrays the nature of his offense in a positive light. *See Stephenson*, 29 N.E.3d at 122. His ten-year sentence is not inappropriate considering the nature of his offense.

Character of Offender

[14] Perkins contends his sentence is inappropriate considering his character because: 1) he has no criminal record; 2) he is unlikely to recidivate; 3) he does not use illegal drugs; and 4) the outpouring of support produced at his sentencing hearing -- from letters written on his behalf by friends and colleagues

-- shows his remorse, desire to “right the wrong that he had committed,” and his dedication as a good employee and good father. *See Appellant’s Br.* at 6.

[15] The character of the offender refers to general sentencing considerations and relevant aggravating and mitigating factors. *Woodcock v. State*, 163 N.E.3d 863, 878 (Ind. Ct. App. 2021), *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*. Here, the trial court acknowledged the validity of many of Perkins’s proposed mitigating factors but assigned little weight to them, which was its prerogative. *See Pitts v. State*, 904 N.E.2d 313, 320 (Ind. Ct. App. 2009) (the weight assigned by the trial court to aggravating or mitigating factors is not subject to appellate review), *trans. denied*. For instance, “[m]any people are gainfully employed such that this would not require the trial court to note [employment] as a mitigating factor or afford it the same weight as [the defendant] proposes.” *Newsome v. State*, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003), *trans. denied*.

[16] Several factors show that Perkins’s sentence is not inappropriate considering his character. First, while Perkins contends that his risk to recidivate is low, the trial court found and the record shows that on two scales of the psychosexual assessment, Perkins showed an average risk to reoffend in the future with a sexual offense. *Tr. Vol. 2* at 105; *Appellant’s Conf. App. Vol. Two* at 74, 119-20, 124-25. Perkins does not challenge the trial court’s finding that he lied to the evaluator during the psychosexual examination, and this deception reflects poorly on his character. *See Guillen v. State*, 829 N.E.2d 142, 149 (Ind. Ct. App.

2005), (sentence not inappropriate where trial court described defendant as dishonest and delusional), *trans. denied*. Likewise, Perkins has given us no reason to reject the trial court's finding that his expression of remorse was not sincere, other than asking us to give more weight to his purported remorse, and this too reflects poorly on his character. *See Gibson v. State*, 51 N.E.3d 204, 216 (Ind. 2016) (sentence not inappropriate, partly because defendant's remorse was not genuine). Similarly, Perkins does not show that he understood the gravity of his offense. *Tr. Vol. 2* at 106-07. Thus, Perkins has not presented compelling evidence of substantial virtuous traits or persistent examples of good character that would support a reduction of his sentence based on his character. *See Stephenson*, 29 N.E.3d at 122. His ten-year sentence is not inappropriate considering his character.

[17] Perkins's arguments do not portray the nature of his crime and his character in a positive light, which is his burden under Indiana Appellate Rule 7(B). *See id.* We find that Perkins's ten-year sentence with two years suspended to probation is not inappropriate. Accordingly, we decline his request to reduce his sentence and affirm the sentence imposed by the trial court.

[18] Affirmed.

Altice, J., and Weissmann, J., concur.