

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Lindsay E. Grate,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 28, 2023

Court of Appeals Case No.
22A-CR-2224

Appeal from the LaGrange
Superior Court

The Honorable Lisa M. Bowen-
Slaven, Judge

Trial Court Cause No.
44D01-2105-F2-8

Memorandum Decision by Judge Robb
Judges Crone and Kenworthy concur.

Robb, Judge.

Case Summary and Issue

- [1] Lindsay Grate pleaded guilty to dealing in methamphetamine as a Level 2 felony and admitted to being an habitual offender. The trial court sentenced her to a total of forty-eight years. Grate appeals her sentence, arguing both the trial court abused its discretion in failing to acknowledge a significant mitigator and the sentence is inappropriate under Indiana Appellate Rule 7(B).¹ We conclude, however, that Grate waived her right to appeal her sentence as part of her written plea agreement, and therefore we dismiss.

Facts and Procedural History

- [2] Grate and the State entered into a plea agreement pursuant to which Grate would plead guilty to Level 2 dealing in methamphetamine and admit to being an habitual offender and the State would move to dismiss several other charges. The parties did not agree to a sentence; instead, the parties left the sentence to the trial court's discretion. The plea agreement also stated:

The Defendant waives his [sic] right to trial by this plea, and all constitutional rights accompanying that right Also, the right

¹ In her opening brief, Grate raised two additional issues: whether a factual basis was established to support the habitual offender enhancement and whether her guilty plea was knowingly made. The State argued in its brief that neither issue could be raised on direct appeal, and Grate conceded in her reply brief that she would pursue those claims in a post-conviction proceeding. *See* Reply Brief of Appellant at 4; *Hoskins v. State*, 143 N.E.3d 358, 360-61 (Ind. Ct. App. 2020) (stating the only exceptions to the general rule that a conviction based on a guilty plea may not be challenged on direct appeal are sentencing decisions and denial of a motion to withdraw a guilty plea prior to sentencing). We therefore do not discuss those additional issues herein.

to appeal, so long as the Judge sentences the Defendant within the terms of this plea agreement

Appellant's Appendix, Volume Two at 57.

- [3] On July 11, 2022, Grate appeared in court for a change of plea hearing. The trial court advised Grate of her rights if she were to go to trial, and Grate indicated she wished to enter a plea of guilty to the charge and admit to the habitual offender allegation. The trial court took the plea under advisement.
- [4] The parties returned to court in August for a sentencing hearing. At that time, the trial court sentenced Grate to twenty-eight years for the Level 2 felony dealing in methamphetamine conviction enhanced by twenty years for the habitual offender finding. After pronouncing the sentence, the trial court advised Grate that "you do have the right to appeal this sentence since it wasn't fixed in the terms of your plea agreement." Transcript of Evidence, Volume II at 52. The trial court further advised Grate that she had a right to be represented by counsel at all stages of the proceedings, "including any appeal which you may pursue. If you are unable to afford an attorney, I'm obligated to appoint one to represent you[.]" *Id.*

Discussion and Decision

- [5] Grate argues on appeal that her sentence is both an abuse of discretion and inappropriate. The State responds to those arguments, but first argues that Grate waived her right to appeal her sentence as part of the plea agreement.

Grate filed a reply brief that does not address the State’s waiver argument. In fact, Grate does not acknowledge the waiver provision at all in either of her briefs.²

[6] We agree with the State that Grate waived the right to appeal her sentence pursuant to the terms of the written plea agreement. Generally, a defendant “who pleads guilty is entitled to contest on direct appeal the merits of a trial court’s sentencing decision” unless he has agreed to a fixed sentence. *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004). But in *Creech v. State*, our supreme court held that a defendant may waive the right to appellate review of a sentence as part of a written plea agreement if the waiver is made knowingly and voluntarily. 887 N.E.2d 73, 75 (Ind. 2008). The court found a valid waiver in that case where the defendant’s plea agreement specifically waived the right to appeal the sentence. *Id.* at 76. Grate’s plea agreement provided that she waived her “right to appeal, so long as the Judge sentences [her] within the terms of this plea agreement[.]”³ Appellant’s App., Vol. Two at 57. The plea agreement left the sentence to the trial court’s discretion, and the trial court

² Grate made both abuse of discretion and Rule 7(B) arguments with regard to her sentence in her opening brief. In her reply brief, she advances only the 7(B) argument. If this was an attempt to circumvent the State’s waiver argument, we note that *all* sentencing challenges are foreclosed by the general waiver provision here. *Cf. Morris v. State*, 985 N.E.2d 364, 366 (Ind. Ct. App. 2013) (holding a provision providing that defendant waived right to appeal an “erroneous” sentence did not preclude a claim the sentence was inappropriate because “an ‘erroneous’ sentence is not the same as an ‘inappropriate sentence’”).

³ This is almost identical to the waiver provision that was upheld in *Creech*, which stated, “I hereby waive my right to appeal my sentence so long as the Judge sentences me within the terms of my plea agreement.” 887 N.E.2d at 74. Grate’s plea agreement does not specifically state she waives the right to appeal *her sentence*, but given the limited circumstances in which a defendant can appeal from a guilty plea at all, and the language immediately following that references the sentence, we believe the subject of the waiver is clear.

sentenced Grate to a term within the statutory range;⁴ therefore, the waiver provision of the plea agreement was satisfied.

[7] Although the trial court incorrectly advised Grate that she had the right to appeal her sentence and that it would appoint appellate counsel if she was unable to afford an attorney,⁵ it did so only *after* Grate had entered her plea of guilty and *after* the trial court had pronounced a sentence. Thus, by the time the trial court erroneously advised Grate of the possibility of appeal, she “had already pled guilty and received the benefit of [her] bargain. Being told at the close of the hearing that [she] could appeal presumably had no effect on that transaction.” *Creech*, 887 N.E.2d at 77; *cf. Ricci v. State*, 894 N.E.2d 1089, 1093-94 (Ind. Ct. App. 2008) (holding where trial court advised defendant *at the guilty plea hearing* that he had the right to appeal his sentence, the waiver provision in the plea agreement was a nullity), *trans. denied*.

Conclusion

⁴ A Level 2 felony is punishable by imprisonment for a fixed term between ten and thirty years, with an advisory sentence of seventeen and one-half years. Ind. Code § 35-50-2-4.5. The trial court sentenced Grate to twenty-eight years for her Level 2 felony conviction. And a person convicted of a Level 1 through Level 4 felony and found to be an habitual offender shall be sentenced to an additional fixed term of between six and twenty years. Ind. Code § 35-50-2-8(i)(1). Grate’s sentence was enhanced by an additional twenty years under this provision.

⁵ As our supreme court did in *Creech* and as our appellate courts have done many times since, “we take this opportunity to emphasize the importance of avoiding confusing remarks in a plea colloquy[.]” 887 N.E.2d at 76. Trial courts should be aware of *all* the terms of a plea agreement they accept and should take care not to make remarks that conflict with those provisions.

[8] Grate waived her right to appeal her sentence as part of her plea agreement and this appeal is therefore dismissed.

[9] Dismissed.

Crone, J., and Kenworthy, J., concur.