

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Andre Powell,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 28, 2021

Court of Appeals Case No.
21A-CR-636

Appeal from the Elkhart Superior
Court

The Hon. Stephen R. Bowers,
Judge

Trial Court Cause Nos.
20D02-2007-F5-161
20D02-1201-FB-3

Bradford, Chief Judge.

Case Summary

- [1] In July of 2020, Andre Powell entered a residence without permission and put some items in a grocery bag. When discovered by the returning owner, Powell fled after a brief struggle and was soon apprehended in possession of the items. The State charged Powell with Level 5 felony burglary and alleged that he had violated the terms of probation in another case, and, after a jury convicted him of Class A misdemeanor theft, the trial court found that he had violated the terms of his probation and sentenced him to a maximum sentence of one year of incarceration for theft, to be served consecutively to two years of his previously-suspended sentence. Powell contends that his maximum one-year sentence for theft is inappropriately harsh in light of the nature of his offense and his character. We affirm.

Facts and Procedural History

- [2] In July of 2020, Powell was on probation following his conviction for burglary in cause number 20D02-1201-FB-3 (“Cause No. FB-3”). On the night of July 6, 2020, Powell unlocked the door of Alberto Cortez’s Elkhart residence, entered without permission, and put several items in a grocery bag. Cortez returned to the residence and found Powell standing in the hallway, holding the grocery bag. After a brief struggle, Powell fled with Cortez’s property and was apprehended within 600 feet of the residence with the grocery bag still in his hand.
- [3] On July 8, 2020, the State charged Powell with Level 5 felony burglary in cause number 20D02-2007-F5-161 (“Cause No. F5-161”). Shortly thereafter, the

State petitioned to revoke Powell's probation in Cause No. FB-3 for committing a new offense. Powell admitted at trial that he had entered the residence without permission and that he had taken a bag of items that were not his. He testified, however, that he had only entered the residence seeking shelter because he was homeless and had not decided to take anything until after he had been inside for approximately fifteen minutes.

[4] The jury acquitted Powell of burglary but found him guilty of Class A misdemeanor theft. The trial court found that Powell had violated the terms of his probation in Cause No. FB-3 by virtue of the new misdemeanor conviction. At sentencing, Powell addressed the trial court, and the trial court noted that Powell's comments focused only on "what this all meant to [him]" and that he did not "appear to have any real remorse here." Tr. Vol. II pp. 180, 181. The trial court noted that Powell had a "horrible" criminal record and was "somebody who poses a risk of committing additional crimes." Tr. Vol. II p. 181.

[5] The trial court found Powell's criminal history, probation violations, and addiction issues to be aggravating factors. The trial court did not find any mitigating factors. The trial court ordered Powell to serve his previously-suspended, two-year sentence in Cause No. FB-3, sentenced him to one year of incarceration for the theft conviction in Cause No. F5-161, and ordered that the sentences be served consecutively.

Discussion and Decision

[6] Powell contends that his one year maximum sentence for theft is inappropriately harsh. We “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.” Ind. Appellate Rule 7(B). “Although appellate review of sentences must give due consideration to the trial court’s sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied.” *Shouse v. State*, 849 N.E.2d 650, 660 (Ind. Ct. App. 2006) (citations and quotation marks omitted), *trans. denied*. “[W]hether we regard a sentence as appropriate at the end of the day 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 v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). In addition to the “due consideration” we are required to give to the trial court’s sentencing decision, “we understand and recognize the unique perspective a trial court brings to its sentencing decisions.” *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). As mentioned, the trial court sentenced Powell to a maximum sentence of one year of incarceration for Class A misdemeanor theft.

[7] The nature of Powell’s offense is somewhat more egregious than a typical theft, in that it involved what he admitted at trial was an unauthorized residential entry and at least a brief physical struggle. Although the jury did acquit Powell of burglary, Cortez nonetheless returned to his residence to find an intruder

inside, which makes this theft worse than usual. Moreover, even though it does not seem that Cortez was injured in the struggle with Powell, the potential was there. Under the circumstances, Powell has failed to cast the nature of his offense “in a positive light” such that a revision of his sentence is warranted. *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[8] Powell’s character also justifies his maximum sentence. As we have noted, a defendant’s criminal history is relevant in assessing his character, and the significance of a criminal history varies based on the gravity, nature, and number of prior offenses in relation to the present offense. *Rutherford*, 866 N.E.2d at 874, 875. Powell’s criminal history, which includes two misdemeanors and five felonies—of which three are burglaries—is significant and involves the sort of crime he committed in this case. Powell was first convicted of burglary in 1995, and within two years of his release from his sentence for that conviction, he was convicted of burglary a second time. Within one year of release in that case, Powell was convicted of burglary a third time in Cause No. FB-3. Powell had only been released from prison in Cause No. FB-3 for six months when he committed the theft at issue in this case. Powell’s repeated commission of the same types of offenses demonstrates an unwillingness to depart from a life of criminal behavior and conform his behavior to the norms of society. Moreover, Powell’s lack of remorse, as identified by the trial court at sentencing, does him no credit. Powell has failed to establish that his character warrants a reduced sentence.

[9] We affirm the judgment of the trial court.

Crone, J., and Tavitas, J., concur