MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Quincy E. Wade,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 17, 2023

Court of Appeals Case No. 22A-CR-1783

Appeal from the Allen Superior Court

The Honorable David M. Zent, Judge

Trial Court Cause No. 02D06-2202-F5-40

Memorandum Decision by Judge Riley
Chief Judge Altice and Judge Pyle concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Quincy E. Wade (Wade), appeals his convictions and sentence for burglary, a Level 5 felony, Ind. Code § 35-43-2-1; false informing, a Class B misdemeanor, I.C. § 35-44.1-2-3(d)(1); and his adjudication as an habitual offender, I.C. § 35-50-2-8(a).

[2] We affirm.

ISSUES

[3] Wade presents this court with two issues, which we restate as:

(1) Whether the trial court violated Wade's right to a speedy trial pursuant to Criminal Rule 4(B); and

(2) Whether Wade's sentence is inappropriate in light of the nature of the offenses and his character.

FACTS AND PROCEDURAL HISTORY

[4] Around 3:00 a.m. on February 14, 2022, Javier Villa Gomez-Romero (Romero) was awoken in his apartment's bedroom at River Pointe Town Homes in Fort Wayne, Indiana, by someone banging on a door. Thinking someone was trying to open his apartment door, Romero looked out the window and noticed two individuals trying to open the door of the next-door apartment. After they kicked in the door, Romero observed the two individuals enter the apartment and, about two minutes later, exit the apartment while pulling a handcart with two boxes on it. Romero called 911.

[5] Within three minutes of receiving Romero's 911 call, Officer Michael Diaz of the Fort Wayne Police Department (Officer Diaz) arrived on the scene. Upon his arrival, the officer noticed two people walking and dragging something behind them. After briefly losing sight of them, Officer Diaz observed that they no longer were dragging anything. The officer approached the two persons, who identified themselves as Jason Wade, but who was later determined to be Wade, and Uniqua Harris. When Officer Nathan Beagle arrived, he found the door to the apartment cracked open, with damage to the deadbolt and doorknob. He entered the apartment and noticed that it was used as storage for maintenance supplies, refrigerators, stoves, microwaves, paint tools, and general maintenance items by the property management company. Following a trail in the snow, an officer found "a dolly car that was loaded with appliances." (Transcript Vol. III, p. 84). There were two brand-new microwaves on the car that were still in the box and had never been opened.

[6] On February 17, 2022, the State filed an Information, charging Wade with Level 5 felony burglary, Class B misdemeanor false informing, and Class C misdemeanor possession of paraphernalia. The State also alleged Wade to be an habitual offender. On March 7, 2022, Wade requested a speedy trial pursuant to Criminal Rule 4(B). On March 14, 2022, Wade repeated his request. At the March 14, 2022 hearing, the trial court set Wade's trial for May 31, 2022, through June 2, 2022. On its "Trial Setting/Omnibus Hearing" order the trial court noted that "Defendant accept[ed] dates." (Appellant's App. Vol. II, p. 26). During the pre-trial hearings on April 18, 2022, April 25, 2022, and

May 27, 2022, Wade objected to the trial being set beyond the seventy days, in violation of Criminal rule 4(B).

[7] At Wade's jury trial on May 31, 2022, Wade requested the charges against him to be dismissed for failure to comply with Criminal Rule 4(B), which was denied by the trial court. At the close of the evidence, the jury found Wade guilty of Level 5 felony burglary and Class B misdemeanor false informing, and determined him to be an habitual offender. On June 27, 2022, the trial court conducted a sentencing hearing, at which it again considered Wade's speedy trial request and noted that:

> The speedy was requested March 14, that would've put a seventy (70) [days] at May 23. That was a Monday, your trial was the following Tuesday given that Memorial Day was the 30th of May. The rule says seventy (70), it also says we're supposed to set it at the next available trial date. Due to the pandemic that's lasted two (2) years, the [c]ourt calendar is very congested. There's also been a number of speedy's requested. We set these, the [c]ourt scheduler does, at the next available date. So, your case was a couple days outside the seventy (70) [days]. Considering all the circumstances, the pandemic, everything else, I find that to be reasonable.

(Tr. Vol. III, pp. 177-78). The trial court sentenced Wade to six years for Level 5 felony burglary, enhanced by six years for the habitual offender adjudication, and to 180 days for Class B misdemeanor false informing, with sentences to run consecutively, for an aggregate term of twelve years and 180 days in the Department of Correction.

[8] Wade now appeals. Additional facts will be provided if necessary.

DISCUSSION AND DECISION

I. *Criminal Rule 4(B)*

[9] Wade contends that the trial court erroneously denied his motion to dismiss pursuant to Criminal Rule 4(B). A denial of a motion for discharge under Criminal Rule 4(B) is generally reviewed under the clearly erroneous standard. *Austin v. State*, 997 N.E.2d 1027, 1040 (Ind. 2013). While the trial court's resolution of legal questions, or application of law to undisputed facts, is reviewed *de novo*, appellate review will only consider "the probative evidence and reasonable inferences supporting" the trial court's decision, without reweighing evidence or choosing between reasonable inferences. *Id*.

[10] Criminal Rule 4(B) provides: "If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion." Exceptions to this requirement include, among other things, "where there was no sufficient time to try him during such seventy (70) calendar days because of the congestion of the court calendar." Crim. R. 4(B)(1). While court congestion generally requires a motion from the State, a trial court "may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance." *Id*. Where the trial court's finding of an emergency is based on undisputed facts, our standard of review—like for all questions of law—is *de novo*. *Austin*, 997 N.E.2d at 1039. The ultimate

reasonableness of the trial court's finding of an emergency depends very much upon the facts and circumstances of the particular case. *See id*.

[11] Wade's original speedy trial request pursuant to Criminal Rule 4(B) was made on March 7, 2022. He again requested a speedy trial at the next hearing on March 14, 2022. We have previously held that a second request for a speedy trial is an abandonment of the first request for a speedy trial. *Hahn v. State*, 67 N.E.3d 1071, 1081 (Ind. Ct. App. 2016) (citing *Minneman v. State*, 441 N.E.2d 673, 677 (Ind. 1982) ("When a defendant files a motion for early trial under Ind. [Crim. R.] 4(B), such filing constitutes an abandonment of previous motions for early trial filed by that defendant."), *cert. denied*, 461 U.S. 933, 103 S.Ct. 2099, 77 L.Ed.2d 307 (1983). Accordingly, Wade's seventy-day term under Crim. R. 4(B) was re-set on March 14, 2022.

[12] During the March 14, 2022 pretrial hearing, the trial court set Wade's jury trial for May 31, 2022, which was 78 days later or 7 days outside his speedy trial term. The trial court noted on its "Trial Setting/Omnibus Hearing" order that "Defendant accept[ed] dates." (Appellant's App. Vol. II, p. 26). "[I]t is incumbent upon the defendant to object at the earliest opportunity when his trial date is scheduled beyond the time limits prescribed by Ind. [Crim. R.] 4(B)(1)." *Smith v. State*, 477 N.E.2d 857, 861-62 (Ind. 1985). "This requirement is enforced to enable the trial court to reset the trial date within the proper time period." *Dukes v. State*, 661 N.E.2d 1263, 1266 (Ind. Ct. App. 1996). "A defendant who permits the court, without objection, to set a trial date outside the 70-day limit is considered to have waived any speedy trial request."

Stephenson v. State, 742 N.E.2d 463, 488 (Ind. 2001), *cert. denied*, 534 U.S. 1105, 122 S.Ct. 905, 151 L.Ed.2d 874 (2002). As Wade failed to object at the March 14, 2022 hearing when the trial court set his trial date outside the 70-day limit, he waived his speedy trial request pursuant to Crim. R. 4(B).

[13] On April 18, 2022, Wade objected to the trial date being set outside the 70-day time limit. However, because he failed to object "at the earliest opportunity," *i.e.,* during the March 14, 2022 hearing, Wade's claim is waived. *Smith*, 477 N.E.2d at 861-62. *See Wright v. State*, 593 N.E.2d 1192, 1195 (Ind. 1992) (holding that "it was reasonable to assume that [the defendant] had abandoned his request for a speedy trial" where the defendant "waited nearly a month before filing an objection to the later trial date"), *cert. denied*, 506 U.S. 1001, 113 S.Ct. 605, 121 L.Ed.2d 540 (1992), *abrogated on other grounds by Fajardo v. State*, 859 N.E.2d 1201 (Ind. 2007). Even if we characterize Wade's objection on April 18, 2022, as a third request for a speedy trial, his trial was set for May 31, 2022—43 days after the request—and thus, Wade's Crim. R. 4(B) right was not violated. Accordingly, based on the facts before us, Wade's speedy trial right was not violated and the trial court did not err in denying Wade's motion to dismiss pursuant to Criminal Rule 4(B).

II. *Inappropriateness of Sentence*

[14] Next, Wade contends that his aggregate sentence of twelve years and 180 days is inappropriate in light of the nature of the offenses and his character and requests this court for a downward revision of his imposed aggregate sentence.

Sentencing is primarily "a discretionary function in which the trial court's judgment should receive considerable deference." *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). Nevertheless, although a trial court may have acted within its lawful discretion in fashioning a sentence, our court may revise the sentence "if, after due consideration of the trial court's decision, [we] find[ ] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). "The principal role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." *Cardwell*, 895 N.E.2d at 1225. Ultimately, "whether 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." *Id.* at 1224. We focus on "the length of the aggregate sentence and how it is to be served." *Id.* Our court does "not look to see whether the defendant's sentence is appropriate or if another sentence might be *more* appropriate; rather, the test is whether the sentence is 'inappropriate.'" *Barker v. State*, 994 N.E.2d 306, 315 (Ind. Ct. App. 2013), *trans. denied*.

[15] The advisory sentence is the starting point selected by the General Assembly as a reasonable sentence for the crime committed. *Childress v. State*, 848 N.E.2d 1073, 1081 (Ind. 2006). Here, the trial court sentenced Wade to six years for Level 5 burglary, which carried a possible sentence of between one and six

years, with the advisory sentence being three years. *See* I.C. § 35-50-2-6(b). Wade received 180 days for Class B misdemeanor false informing, which carried an imprisonment sentence of not more than 180 days. *See* I.C. § 35-50-3-3. The trial court enhanced his sentence by six years for the habitual offender adjudication, which carried a sentencing range between two and six years. *See* I.C. § 35-50-2-8(i). Wade's aggregate sentence amounted to twelve years and 180 days—the maximum sentence the trial court could impose. Wade now bears the burden of persuading our court that this sentence is inappropriate. *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008). The trial court's judgment should prevail unless it is "overcome by compelling evidence portraying in a positive light the nature of the offense . . . and the defendant's character." *Stephenson v. State*, 29 N.E.3d 111, 111-12 (Ind. 2015).

[16] With respect to the nature of the crimes, we note that Wade kicked in the door of an unoccupied apartment that was used as a storage facility by the property management company. He stole two microwaves and when he got caught lied about his identity. Turning to his character, we observe that "[t]he significance of a criminal history in assessing a defendant's character and an appropriate sentence varies based on the gravity, nature, proximity, and number of prior offenses in relation to the current offense." *Sandleben v. State*, 29 N.E.3d 126, 137 (Ind. Ct. App. 2015). Wade's criminal history started as a juvenile with two delinquency adjudications that would have been Class C misdemeanor offenses if committed by an adult. His adult history consists of five felony convictions and twelve misdemeanor convictions, including, robbery, burglary,

theft, and false reporting. Wade had his probation revoked four times and incurred a parole violation. He was on probation for another burglary conviction when he committed the present offenses. During sentencing, the trial court remarked that Wade had previously been sentenced to work release, probation, home detention, purposeful incarceration, short jail sentences, and long jail sentences, all to no avail. Based on the facts before us and that "prior attempts at rehabilitation [] have failed" we cannot say that Wade's aggregate sentence is "overcome by compelling evidence portraying in a positive light the nature of the offense . . . and the defendant's character." *Stephenson*, 29 N.E.3d at 111-12; (Tr. Vol. III, p. 178). Therefore, we affirm the trial court's imposition of his twelve years and 180 days sentence.

CONCLUSION

[17] Based on the foregoing, we hold that the trial court did not violate Wade's right to a speedy trial pursuant to Criminal Rule 4(B) and that Wade's sentence is not inappropriate in light of the nature of the offenses and his character.

[18] Affirmed.

[19] Altice, C. J. and Pyle, J. concur