MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Michael E. Rice,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 13, 2024

Court of Appeals Case No. 23A-CR-2033

Appeal from the Allen Superior Court

The Honorable Frances C. Gull, Judge

Trial Court Cause Nos. 02D06-2206-CM-1965 & 02D05-2209-F6-1074

Memorandum Decision by Judge Riley
Judges Foley and Felix concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] In this consolidated appeal, Appellant-Defendant, Michael E. Rice (Rice), appeals his sentence for possession of marijuana, a Class A misdemeanor, Ind. Code § 35-48-4-11(1), and for operating a motor vehicle while never having received a valid driver's license, I.C. § 9-24-18-1(a), a Class C misdemeanor, in cause number 02D06-2206-CM-001965 (cause 1965), and his sentence for possession of cocaine or narcotic drug, a Level 6 felony, I.C. § 35-48-4-6(a), in cause number 02D05-2209-F6-001074 (cause 1074).

[2] We affirm.

ISSUE

[3] Rice presents this court with one issue on appeal, which we restate as: Whether his sentence is inappropriate in light of the nature of the offenses and his character.

FACTS AND PROCEDURAL HISTORY

[4] On June 17, 2022, officers with the Fort Wayne Police Department stopped the vehicle driven by Rice after receiving a report that he was involved in an altercation with a Door Dash driver in the drive-thru of a Taco Bell. Rice informed the officers that he had marijuana in the vehicle and that he did not have a license to drive the car. That same day, the State filed an Information, charging Rice with Class A misdemeanor possession of marijuana and Class C misdemeanor operating a motor vehicle while never having received a valid driver's license under cause 1965. On July 15, 2022, Rice entered into a pretrial

diversion program agreement with the State, in which the State agreed to dismiss the charges contingent upon Rice's compliance with certain provisions, including completion of a substance abuse education course and not being charged with new criminal offenses. The case was removed from the active docket.

[5] Approximately a month later, on August 28, 2022, Rice was found in a park in Allen County on a suspected drug overdose and with oxycodone in his pocket for which he did not have a prescription. On September 7, 2022, the State filed an Information, charging Rice with Level 6 felony possession of cocaine or narcotic drug in cause 1074. On October 12, 2022, the State moved to re-docket cause 1965, which was granted that day. Also on the same day, a plea agreement was filed in cause 1965 with a recommendation for a referral to drug court. Five days later, Rice pleaded guilty to Level 6 felony possession of a narcotic drug in cause 1074, and Class A misdemeanor possession of marijuana and Class C misdemeanor driving without a license under cause 1965. The trial court took the plea under advisement and Rice was placed in the drug court program.

[6] Barely a month later, on November 16, 2022, a warrant was issued for Rice's arrest for failing to comply with the drug court program rules. On November 21, 2022, and April 17, 2023, warrants were issued for Rice's arrest for failing to appear for status hearings. On April 24, 2023, a petition to terminate the drug court program was filed, alleging that Rice had violated the program's terms by being terminated unsuccessfully from the Step House program on April 13,

2023; by failing to appear in court on April 17, 2023; and by failing to attend treatment at the Bowen Center on April 18 and 19, 2023. On July 10, 2023, Rice's participation in the drug court program was terminated in both causes.

[7] On August 11, 2023, the trial court entered judgment of conviction for Level 6 felony possession of a narcotic drug in cause 1074, and Class A misdemeanor possession of marijuana and Class C misdemeanor driving without a license in cause 1965. During the hearing, the trial court found Rice's criminal history and his failure to rehabilitate to be aggravators, while his plea and remorse were considered to be mitigators. The trial court sentenced him to one and one-half years for his Level 6 felony conviction in cause 1074, and to 183 days for his Class A misdemeanor conviction and to 60 days for his Class C misdemeanor conviction in cause 1965, with the misdemeanor convictions to run concurrent to one another and consecutively to the sentence in cause 1074.

[8] Rice now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

[9] Rice contends that the trial court abused its decision by sentencing him to an aggregate sentence of two years and maintains that considering the nature of the offenses and his character a downward revision of the sentence or a different placement is warranted. 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*. Rice bears the burden of persuading our court that his 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).

[10] 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). The sentencing range for a Level 6 felony is between

six months and two-and-a-half years, with an advisory sentence of one year. I.C. § 35-50-2-7(b). A Class A misdemeanor carries a sentence up to 365 days and a Class C misdemeanor carries a sentence up to sixty days. I.C. §§ 35-50-3-2; -4. Here, the trial court imposed a sentence of 183 days for the Class A misdemeanor conviction and sixty days for the Class C misdemeanor conviction, to run concurrently to one another and consecutively to Rice's Level 6 felony conviction, for which he received a sentence of one and one-half years. Rice's aggregate sentence is two years.

[11] Rice has failed to persuade us that his two-year sentence is inappropriate. While the nature of Rice's offenses might not look egregious *per se*, it is the repeated nature of them that gives us pause. After Rice was arrested on June 17, 2022, for possession of marijuana and driving without a license, he was offered the opportunity to have these misdemeanor charges dismissed as part of a pretrial diversion program. Despite this grant of leniency, Rice was again arrested barely a month later, on August 28, 2022, for another drug offense and after he was suspected of having overdosed on illegal substances. Again, the trial court offered leniency by placing him in the drug court program, but Rice failed to abide by the program's rules and was terminated from the program unsuccessfully.

[12] Focusing on Rice's character, we note that despite his young age—he is twenty-five years old—he has an extensive criminal history. *See Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007) (a defendant's criminal history is relevant in assessing his character). As a juvenile, Rice incurred six delinquency

adjudications, three of which if committed by an adult would have been felonies. His adult record includes three prior misdemeanors and two prior felony convictions. Reflecting poorly on his character is the fact that he had previously been returned to probation once, had probation modified once, and had probation revoked twice. *See Webb v. State*, 149 N.E.3d 1234, 1243 (Ind. Ct. App. 2020) (failure to complete probation shines a negative light on a defendant's character). Although Rice was twice awarded the opportunity to have his charges dismissed in cause 1965, first as part of a pretrial diversion program and second by completing the drug diversion program, he did not avail himself of that opportunity. *See Sanders v. State*, 71 N.E.3d 839, 845 (Ind. Ct. App. 2017) (finding that defendant's disregard for the opportunity that the drug court afforded him reflected poorly on his character).

[13] Despite his criminal history, Rice now contends that he should be "given a shot at probation" or at "an all-suspended sentence" and requests placement outside of the Department of Correction (DOC). (Appellant's Br. pp. 10, 11). Although a challenge to placement of a sentence is available for review under Appellate Rule 7(B), it is "quite difficult" for a defendant to succeed on a claim that his placement is inappropriate. *Moon v. State*, 110 N.E.3d 1156, 1162 (Ind. Ct. App. 2018). A "defendant challenging the placement of a sentence must convince [the reviewing court] that the given placement is itself inappropriate." *Id*. In support of a placement outside of the DOC, Rice claims that his mental health issues and traumatic childhood suggest that he should have been allowed to "work on the issues outside of the prison system." (Appellant's Br. p. 9).

However, Rice does not explain how or why his needs cannot be met by placement in the DOC. *Cf. Moyer v. State*, 796 N.E.2d 309, 314 (Ind. Ct. App. 2003) (holding that the trial court abused its discretion in not considering a serious medical condition at sentencing where the record clearly demonstrated that the jail could not accommodate defendant's illness). Furthermore, although Rice appeared to contend during the sentencing hearing that he suffered from "significant mental health issues, including bi-polar disorder, ADHD, schizophrenia, and dyslexia" and was "prescribed several medications which he currently has not been taking," his presentence investigation report refutes these claims. (Transcript p. 15). In his presentence investigation report, Rice reported that even though he had been diagnosed with bipolar disorder, ADHD, dyslexia, and schizophrenia at age 8 and was placed on various medications and attended counseling, he "denied having any recent diagnoses or being prescribed any medications." (Appellant's App. Vol. II, p. 114).

[14] Moreover, the trial court provided Rice with several opportunities to work on his mental health and substance abuse issues outside of the prison system through the pretrial diversion program first ordered in cause 1965, and then later through the drug court diversion program. However, Rice did not avail himself of the trial court's offered opportunities and leniency. *See Hape v. State*, 903 N.E.2d 977, 1002 (Ind. Ct. App. 2009) (finding that where the defendant has a substance abuse issue but has not taken steps to treat it, the sentence does not warrant a reduction), *trans. denied*; *Davis v. State*, 173 N.E.3d 700, 706-07 (Ind. Ct. App. 2021) (stating that defendant's failure to seek mental health

treatment for his known issues did not support a sentencing revision). Despite his many encounters with the criminal justice system, Rice has failed to reform his behavior and he has not provided any evidence about his character or the nature of the offenses that persuades us that his sentence and placement in the DOC was inappropriate. Accordingly, as we find Rice's sentence not inappropriate in light of the nature of the offenses and his character, we affirm the trial court's imposition of the aggregate two-year sentence.

CONCLUSION

[15] Based on the foregoing, we hold that Rice's sentence is not inappropriate in light of the nature of his offenses and his character.

[16] Affirmed.

[17] Foley, J. and Felix, J. concur