

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

David L. Kennedy,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 17, 2021

Court of Appeals Case No.
20A-CR-2182

Appeal from the Pike Circuit Court

The Honorable Jeffrey L.
Biesterveld, Judge

Trial Court Cause No.
63C01-1809-F5-758

Pyle, Judge.

Statement of the Case

- [1] David L. Kennedy (“Kennedy”), appeals, following his guilty plea to Level 5 felony theft,¹ his six-year sentence with three years executed in a community corrections’ work release program and three years suspended to probation. Kennedy argues that: (1) the trial court abused its discretion in its determination of mitigating circumstances; and (2) his sentence—specifically, the portion that was ordered to be served on work release—is inappropriate. Concluding that the trial court did not abuse its discretion and that Kennedy’s sentence is not inappropriate, we affirm his sentence.
- [2] We affirm.

Issues

1. Whether the trial court abused its discretion when sentencing Kennedy.
2. Whether Kennedy’s sentence is inappropriate.

Facts

- [3] In 2017, Kennedy owned a construction company and did home construction and home remodeling. In December 2017, Ryan Knepp (“Ryan”) and Chelsa Knepp (“Chelsa”) (collectively, “the Knepps”) hired Kennedy to build a house for them and their four children on the Knepps’ five-acre property. The new

¹ IND. CODE § 35-43-4-2.

home was to cost approximately \$250,000.00. The Knepps sold their existing home and used funds from that sale to put toward the construction of their new home. In February 2018, the Knepps gave Kennedy multiple checks, including one for \$10,000.00 and another for \$70,000.00. Kennedy did not use those funds to complete the required work on the house. The Knepps realized that there were problems with Kennedy after they learned that Kennedy had failed to pay various subcontractors. The Knepps attempted to discuss the problems with Kennedy, but they were met with excuses from Kennedy. Ultimately, the Knepps' house was never constructed, and they sold the property.

[4] In September 2018, the State charged fifty-two-year-old Kennedy with Level 5 felony theft and Level 6 felony theft. In October 2018, Kennedy was released on a \$25,000.00 bond, which was paid by his brother. In September 2019, the State filed a motion to revoke Kennedy's bond, alleging that Kennedy had been charged with committing additional offenses (including three counts of Level 5 felony corrupt business influence, Level 6 felony theft, and two counts of Class A misdemeanor home improvement fraud) in Lawrence County. In October 2019, the trial court held a hearing and determined that Kennedy "pose[d] a risk to the physical safety of the community[.]" (App. Vol. 2 at 77). The trial court modified Kennedy's bond by ordering him to "pay an additional \$25,000.00, 10% permitted, bond[.]" (App. Vol. 2 at 77). After the ten percent bond was paid, Kennedy was re-released on bond.

[5] In August 2020, Kennedy entered into a written plea agreement with the State and pled guilty to Level 5 felony theft. The State agreed to dismiss the Level 6

felony charge and to request that Kennedy’s “sentence . . . be served in Work Release with no actual Department of Correction time.” (App. Vol. 2 at 4).

The plea agreement also provided that the trial court would determine the duration of Kennedy’s sentence and the restitution due to the victims. The trial court accepted Kennedy’s guilty plea and entered judgment of conviction on the Level 5 felony.

[6] Kennedy’s presentence investigation report (“PSI”) that had been prepared for his sentencing hearing revealed that Kennedy had three convictions and multiple pending charges in multiple counties, and these offenses were similar in nature to his current offense. Specifically, Kennedy had three theft convictions out of Owen County for offenses that had occurred between January and September 2018. In the Owen County case, Kennedy had been charged with five counts of Level 6 felony theft, and he pled guilty to three of those counts. The trial court entered judgment of conviction on the three counts as Class A misdemeanors, sentenced Kennedy to three years of probation, and ordered him to pay over \$15,000.00 in restitution to his victims.

[7] Kennedy also had the following pending cases: (1) a Davies County Level 6 felony check fraud charge that was alleged to have occurred in May 2018; (2) a Martin County Level 6 felony check deception charge that was alleged to have occurred in July 2018; (3) a Martin County Level 6 felony check deception charge that was alleged to have occurred in August 2018; (4) three Monroe County charges for home improvement fraud (two as Class A misdemeanors and one as a Class B misdemeanor) that were alleged to have occurred between

December 2018 to October 2019; and (5) six Lawrence County charges (three charges for Level 5 felony corrupt business influence, a Level 5 felony theft charge, and two Class A misdemeanor home improvement fraud charges) that were alleged to have occurred between February and August 2019.

Additionally, Kennedy had been charged in Orange County with Level 6 felony check deception in September 2018, and he entered into a pretrial diversion agreement for this charge. He paid over \$3,000.00 in restitution, and the charge was dismissed in November 2019.

[8] During the sentencing hearing, the parties discussed the PSI probation officer's recommendation that Kennedy be placed on probation instead of work release if the work release placement would result in a lower paying job and hinder Kennedy's ability to pay restitution. Specifically, the probation officer recommended that Kennedy receive a five-year suspended sentence to probation and complete 800 hours of community service. The State indicated that it disagreed with the probation officer's recommendations. The trial court pointed out that the probation officer's recommendations were merely recommendations and that the trial court would make the determination of the aggravating and mitigation circumstances and make the "ultimate decision" regarding Kennedy's sentence. (Tr. Vol. 2 at 18).

[9] At the hearing, the Knepps testified regarding how Kennedy's offense against them had affected them and how they had lost their dream home. The Knepps testified that in addition to the \$80,000.00 that they had paid to Kennedy, they had also paid two subcontractors whom Kennedy had failed to pay so that there

would not be any liens placed on their property. Specifically, the Knepps had paid \$8,500.00 to the septic system subcontractor and \$5,400.00 to the subcontractor who had dug the basement. Additionally, Ryan testified that he had discussed the problems with Kennedy and had “asked for proof of where [the Knepps] money was at multiple, multiple times[,]” but Kennedy gave the Knepps “multiple excuses.” (Tr. Vol. 2 at 45, 46). The Knepps testified that Kennedy had never apologized to them and that he had made no personal effort to repay the Knepps for their loss. Ryan did, however, acknowledge that the Knepps had received the \$27,500.00 that had been paid on Kennedy’s behalf to bail him out of jail, but Ryan noted that “[i]f it had not been for the bail [funds,] [he] d[id]n’t think [he] would have seen a dollar” from Kennedy. (Tr. Vol. 2 at 38).

[10] When Kennedy testified at the sentencing hearing, he acknowledged that he had poorly managed his business accounts. He stated that he had “mismanaged [the Knepps’] money horribly” but then tried to minimize his responsibility by stating that he “didn’t take eighty thousand dollars and run off to China” or spend it on gambling or drugs. (Tr. Vol. 2 at 82). Kennedy suggested that the trial court should find that any imprisonment would result in undue hardship to his family. Additionally, Kennedy requested that any sentence he received to be served strictly on probation.

[11] The trial court found the following aggravating circumstances: (1) Kennedy’s criminal history; (2) Kennedy’s violation of the conditions of pretrial release; and (3) the harm, injury, loss, or damage suffered by the victims was significant

and greater than the elements necessary to prove the commission of the offense. The trial court determined that Kennedy's guilty plea and the fact that he had made some restitution to the victims to be mitigating circumstances. The trial court imposed a six (6) year sentence with three (3) years executed in the Wabash Valley Regional Community Corrections on work release and three (3) years suspended to probation. The trial court also ordered Kennedy to pay \$66,510.00 in restitution to the Knepps as a special condition of probation. Kennedy now appeals.

Decision

[12] Kennedy contends that: (1) the trial court abused its discretion when sentencing him; and (2) his sentence is inappropriate. We will review each argument in turn.

1. Abuse of Discretion

[13] Kennedy argues that the trial court abused its discretion in its determination of mitigating circumstances. Sentencing decisions rest within the sound discretion of the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). So long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Id.* An abuse of discretion will be found where the decision is clearly against the logic and effect of the facts and circumstances before the court or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.* A trial court may abuse its discretion in several ways, including: (1) failing to enter a sentencing

statement at all; (2) entering a sentencing statement that includes aggravating and mitigating factors that are unsupported by the record; (3) entering a sentencing statement that omits reasons that are clearly supported by the record; or (4) entering a sentencing statement that includes reasons that are improper as a matter of law. *Id.* at 490-91.

[14] Kennedy argues that the trial court abused its discretion in its determination of mitigating circumstances. Specifically, Kennedy contends that the trial court's failure to find undue hardship to his dependents as a mitigating circumstance was "a plain oversight" by the trial court and that the trial court had "abundant uncontested evidence to find that long-term incarceration . . . would result in undue hardship[.]" (Kennedy's Br. 10). We disagree.

[15] There is no requirement that a trial court find a defendant's incarceration would result in undue hardship to his dependents. *Benefield v. State*, 904 N.E.2d 239, 247 (Ind. Ct. App. 2009), *trans. denied*. As our Indiana Supreme Court has observed, "[m]any persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship." *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999).

[16] The record on appeal shows that Kennedy is married and that he is the father of two adult children. During the sentencing hearing, Kennedy testified his wife had some back issues from a car accident ten to twelve years prior and that she had a congenital heart defect. The record, however, reveals that Kennedy's

wife works as a hairstylist, has operated her own business for over ten years, and earns up to \$1,200.00 per month. One of Kennedy's sons testified at the sentencing hearing and stated that Kennedy's wife, who is the son's stepmother, has three grandchildren (ages eighteen, twelve, and two). The son further testified that Kennedy's wife ran her own hair salon and that she spent some of her earnings on her grandchildren. Additionally, Kennedy's son testified that he knew that he would be "step[ping] up" and "helping" his stepmother and her grandchildren. (Tr. Vol. 2 at 106). Kennedy's counsel argued that placing Kennedy in prison would result in undue hardship to Kennedy's wife and family.

[17] Contrary to Kennedy's suggestion, the trial court did not overlook his proffered mitigating circumstance; instead, the trial court simply and duly rejected it. *See Benefield*, 904 N.E.2d at 247 (explaining that there is no requirement that a trial court find a defendant's incarceration would result in undue hardship to his dependents). Moreover, the trial court ordered Kennedy to serve his sentence on work release and on probation, and both placements offer Kennedy the opportunity to work and continue to contribute to his family. Because Kennedy failed to show that this proffered mitigator was significant, the trial court did not abuse its discretion by declining to find it as a mitigating circumstance. *See Dowdell*, 720 N.E.2d at 1154 (explaining that a defendant who argues that a trial court failed to find a mitigating circumstance must show that the proffered mitigator is both significant and clearly supported by the record).

2. Inappropriate Sentence

- [18] Kennedy argues that his sentence, which is comprised of both work release in a community corrections program and on probation, is inappropriate. He does not challenge the duration of his sentence. Instead, he asks this Court to instruct the trial court to place him on probation only with no work release.
- [19] We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). The defendant has the burden of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). The principal role of a Rule 7(B) 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 v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). “Appellate Rule 7(B) analysis is not to determine whether another sentence is more appropriate but rather whether the sentence imposed is inappropriate.” *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012) (internal quotation marks and citation omitted), *reh’g denied*.
- [20] Appellate review of a defendant’s sentence under Rule 7(B) will include consideration of the length of the sentence as well as consideration of “whether a portion of the sentence is ordered suspended or otherwise crafted using any of the variety of sentencing tools available to the trial judge,” such as placement in community corrections or on probation. *Davidson v. State*, 926 N.E.2d 1023,

1025 (Ind. 2010). A defendant may challenge, under Appellate Rule 7(B), the location where a sentence is to be served. *Biddinger v. State*, 868 N.E.2d 407, 414 (Ind. 2007). However, “it will be quite difficult for a defendant to prevail on a claim that the placement of his sentence is inappropriate” because a defendant challenging the placement of a sentence must convince us not that another placement would be more appropriate but that the ordered placement is inappropriate. *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008).

[21] When determining whether a sentence is inappropriate, we acknowledge that the advisory sentence “is the starting point the Legislature has selected as an appropriate sentence for the crime committed.” *Childress*, 848 N.E.2d at 1081. Kennedy pled guilty and was convicted of Level 5 felony theft. A person who commits a Level 5 felony “shall be imprisoned for a fixed term of between one (1) and six (6) years, with the advisory sentence being three (3) years.” I.C. § 35-50-2-6(b). Here, Kennedy’s plea agreement provided that the State would request for Kennedy’s “sentence to be served in Work Release with no actual Department of Correction time.” (App. Vol. 2 at 4). The trial court imposed a six-year sentence but used some of the “sentencing tools” available to it when it ordered three years to be served in a community corrections program on work release and suspended the remaining three years to probation. *See Davidson*, 926 N.E.2d at 1025.

[22] Turning first to the nature of Kennedy’s offenses, we note that he took \$80,000.00 from the Knepps but did not use it for the construction of their dream home that they had hired Kennedy to build. When the Knepps

confronted Kennedy about their money and the problems with the house construction, Kennedy gave the Knepps “multiple excuses.” (Tr. Vol. 2 at 45). The Knepps also paid two subcontractors whom Kennedy had failed to pay, resulting in the Knepps losing an additional \$13,900.

[23] In reviewing Kennedy’s character, we note that he has a criminal history that includes convictions and pending charges in multiple counties that are similar in nature to the current offense. Specifically, Kennedy had three theft convictions out of Owen County that involved the victims losing over \$15,000.00. He also had seven felony charges and five misdemeanor charges pending among four other counties. More troubling is the fact that some of pending charges are alleged to have occurred when Kennedy was out on bond in this case, which reflects extremely poorly on his character. *See Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007) (explaining that any criminal history reflects poorly on a person’s character).

[24] Additionally, we reject Kennedy’s contention that the work release portion of his sentence was detrimental to the Knepps and impeded his ability to pay restitution. Kennedy’s contention is nothing more than an argument that it would have been better had the trial court ordered him to serve his entire sentence on probation instead of dividing it between work release and probation, and such an argument fails to meet the burden of showing that a sentence is inappropriate. *See King*, 894 N.E.2d at 268 (explaining that a defendant challenging the placement of a sentence must convince us not that another placement would be more appropriate but that the ordered placement is

inappropriate). Further, it should be noted that appellate courts that are asked to review and revise a criminal sentence also have the authority to “impose a more severe sentence than was ordered by the trial court.” *McCullough v. State*, 900 N.E.2d 745, 746 (Ind. 2009). While we have chosen not to do so here, the plea agreement and the facts of this case would have supported the trial court ordering a portion of Kennedy’s sentence to be executed at the Department of Correction.

[25] Nevertheless, Kennedy has not persuaded us that his six-year sentence, with three years in a community corrections program on work release and three years suspended to probation, is inappropriate. Therefore, we affirm the sentence imposed by the trial court.

[26] Affirmed.

Najam, J., and Tavitas, J., concur.