MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Eric Diaz,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

June 2, 2023

Court of Appeals Case No. 22A-CR-2205

Appeal from the Hendricks Superior Court

The Honorable Rhett M. Stuard, Judge

Trial Court Cause No. 32D02-2012-CM-1178

Memorandum Decision by Judge Weissmann
Judges Bailey and Brown concur.

Weissmann, Judge.

[1] Eric Diaz challenges his conviction for operating a vehicle with an alcohol concentration equivalent (ACE) of .08 grams. Diaz argues that, after a valid traffic stop, the officer violated Diaz's rights under the Fourth Amendment to the United States Constitution by requiring Diaz to leave his vehicle and undergo field sobriety tests. He also contends his sentence is inappropriate. We affirm, finding Diaz waived his Fourth Amendment claim and that his request for sentencing revision is unpersuasive.

Facts

[2] Early one morning, just before Christmas 2020, Hendricks County Sheriff's Department Corporal Kyle Schaefer observed Diaz driving erratically on the roadway. Specifically, Diaz stopped his car belatedly at an intersection, made an abrupt lane change, and turned into an apartment complex without signaling. Diaz parked near the entrance to an apartment building, and Corporal Schaefer did the same. Corporal Schaefer then left his police vehicle and approached Diaz's car while Diaz was still sitting in the driver's seat.

[3] When Corporal Schaefer asked to see Diaz's license and registration, Diaz immediately became agitated and called 911. Corporal Schaefer smelled alcohol emanating from Diaz's vehicle and observed that Diaz's eyes were bloodshot, "watery," and "glazed." *Id.* at 22. Corporal Schaefer administered several non-standardized sobriety tests while Diaz remained in his car. For instance, Corporal Schaefer asked Diaz to count backward from 68 to 52. Diaz skipped

three numbers. When Corporal Schaefer asked Diaz to recite the alphabet from E through P, Diaz responded with "E H P M O Q." *Id.* at 23.

[4] After checking Diaz's personal information, Corporal Schaefer asked Diaz to step out of his car for three standardized field sobriety tests, all of which Diaz failed. Diaz refused to take a chemical test to measure his level of intoxication. Corporal Schaefer therefore obtained a search warrant to draw Diaz's blood. Subsequent testing showed that Diaz had a blood ACE of .143 grams—nearly twice the legal limit. *See* Ind. Code § 9-30-5-1(a)(1).

[5] The State charged Diaz with operating a vehicle while intoxicated, a Class A misdemeanor, and operating a vehicle with an ACE of .08 grams, a Class C misdemeanor. After a bench trial, the trial court acquitted Diaz of the Class A misdemeanor but found him guilty of the Class C misdemeanor. The court sentenced Diaz to 60 days imprisonment and 365 days probation but suspended all but 5 days of his executed sentence. Diaz appeals both his conviction and sentence.

Discussion and Decision

[6] Diaz contends Corporal Schaefer lacked reasonable suspicion to order him to leave his vehicle and undergo field sobriety tests. All the evidence collected after Diaz left his vehicle—including the field sobriety tests and the blood draw—was inadmissible, according to Diaz, and the remaining evidence was insufficient to support conviction. Diaz also challenges his sentence under Indiana Appellate Rule 7(B) as inappropriate in light of the nature of the offense and the character

of the offender. We conclude Diaz has waived his challenge to the traffic stop and his sentence was not inappropriate.

I. Validity of Traffic Stop and Sufficiency of the Evidence

[7] Diaz does not challenge Corporal Schaefer's initial stop of Diaz's vehicle. Instead, Diaz claims Corporal Schaefer extended the traffic stop without reasonable suspicion in violation of the Fourth Amendment beginning at the point when he asked Diaz to leave his car and undergo field sobriety tests. Claiming that all evidence obtained through the improperly extended stop was inadmissible, Diaz concludes the remaining evidence did not establish probable cause under the Fourth Amendment for the blood draw warrant or establish his guilt beyond a reasonable doubt.

[8] Diaz has waived his Fourth Amendment claims by failing to object. Diaz objected only once at trial—to the blood draw analysis—and ultimately withdrew even that objection. Tr. Vol. II, pp. 29-30. He either remained silent or stated he had no objection to all the evidence that he now claims stemmed from a Fourth Amendment violation. That evidence included Corporal Schaefer's testimony, the body cam video of the entire stop, the blood draw, and the test results. *Id.* at pp. 23-30.

[9] Diaz did not challenge the legality of the traffic stop until closing arguments, when it was too late. Tr. Vol. II, pp. 59-61; *see Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010) (ruling that a defendant cannot "resurrect an objection after the evidence has been submitted" to preserve a Fourth Amendment claim for

appeal). As to the blood draw warrant, Diaz at trial never directly challenged it as unsupported by probable cause. Through his inaction prior to closing arguments, Diaz has waived his Fourth Amendment claims. *See Halliburton v. State*, 1 N.E.3d 670, 678 (Ind. 2013) (failure to object at trial waives the issue on review unless fundamental error occurs). His acquiescence in the admission of the search evidence may even qualify as invited error. *Batchelor v. State*, 119 N.E.3d 550, 559 (Ind. 2019)

[10] On appeal, Diaz does not claim fundamental error, a doctrine which allows appellate review of claims waived by a failure to object in the trial court. *See id.* He also has failed to include the warrant authorizing the blood draw or, as far as we can tell, Corporal Schaefer's affidavit that prompted the trial court's issuance of the warrant.[1]

[11] In short, Diaz's silence or acquiescence denied the trial court the opportunity to consider his objections when the challenged evidence was introduced and has

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[1] The parties's briefs and the record are silent as to the specific allegations in the search warrant affidavit, and neither party includes the affidavit or warrant in an appendix. Diaz premises his challenge to the warrant's validity entirely on the State's failure to introduce evidence of the contents of the search warrant affidavit and warrant. Diaz has waived that challenge by failing to cite to any supporting authority or offer cogent reasoning. Appellant's Br., p. 10; *see* Ind. Appellate Rule 46(A)(8)(a) (argument in appellant's brief "must contain the contentions of the appellant on the issues presented, supported by cogent reasoning" and "[e]ach contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on.").

Diaz ultimately is responsible for the omissions in the trial record of which he complains. Searches conducted pursuant to a warrant are presumptively valid, and the defendant carries the burden of overcoming that presumption. *Albrecht v. State*, 185 N.E.3d 412, 420 (Ind. Ct. App. 2022). Diaz never challenged the adequacy of the warrant or supporting affidavit in the trial court proceedings; therefore, the State never introduced evidence of those documents.

left his Fourth Amendment claims unpreserved for appellate review. Diaz's claim of insufficient evidence, which is premised solely on the Fourth Amendment violations that he has waived, also necessarily must fail. We affirm Diaz's conviction.

II. Appropriateness of Sentence

[12] Diaz next challenges his sentence under Indiana Appellate Rule 7(B). That rule allows this Court to "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). We are unpersuaded by Diaz's 7(B) claims.

[13] We conduct Rule 7(B) review with "substantial deference" to the trial court because the "principal role of [our] review is to attempt to leaven the outliers, and not to achieve a perceived correct sentence." *Knapp v. State*, 9 N.E.3d 1274, 1292 (Ind. 2014) (quotations and citations omitted). "To assess the appropriateness of the sentence, we look first to the statutory range established for the classes of the offenses." *Croy v. State*, 953 N.E.2d 660, 664 (Ind. Ct. App. 2011). Operating a vehicle with an ACE of .08 grams, a Class C misdemeanor, carries a sentence of up to 60 days imprisonment and a $500 fine. Ind. Code § 35-50-3-4. At a minimum, though, a defendant convicted of this offense must serve 5 days in custody. Ind. Code § 9-30-5-15(a)(1)(A).

[14] If the court suspends, in whole or in part, a sentence for a Class C misdemeanor, "it may place the person on probation under IC 35-38-2 for a

fixed period of not more than one (1) year, notwithstanding the maximum term of imprisonment for the misdemeanor . . . .” Ind. Code § 35-50-3-1(b). When “the use or abuse of alcohol, drugs, or harmful substances is a contributing factor or a material element of the offense, the court may place the person on probation under IC 35-38-2 for a fixed period of not more than two (2) years” absent some statutory limitations not applicable here. Ind. Code § 35-50-3-1(c).

[15] The court sentenced Diaz to 60 days imprisonment—with all but the minimum 5 days imprisonment suspended to probation—and 365 days probation. Diaz's argument that his sentence is inappropriate rests on his claim that he received the maximum sentence. But Diaz's largely suspended sentence is not the maximum. “A suspended sentence is not the same as an executed sentence.” *Jenkins v. State*, 909 N.E.2d 1080, 1084 (Ind. Ct. App. 2009). “Common sense dictates that less executed time means less punishment,” meaning “a year of probation, a year of community corrections, and a year of prison” are not “equivalent.” *Id.*

[16] In any event, Diaz's sentence is not inappropriate under Rule 7(B). “The nature of the offenses is found in the details and circumstances of the commission of the offenses and the defendant's participation.” *Croy*, 953 N.E.2d at 664. Here, Diaz drove erratically while under the influence of alcohol. He became belligerent as soon as he was stopped, although he complied with the officer's requests during the field sobriety tests. Diaz refused a chemical test, necessitating the need for the officer to obtain a warrant to draw Diaz's blood. The blood draw showed Diaz's blood ACE was nearly twice the .08 grams

required for his conviction. Nothing about the nature of the offense suggests a minimum executed sentence and a year of probation is inappropriate.

[17] Nor do we find any compelling reason to adjust Diaz's sentence based on his character. "The character of the offender is found in what we learn of the offender's life and conduct." *Croy*, 953 N.E.2d at 664. But Diaz's life and conduct remain largely unknown. He offered no details of his character at sentencing other than he was employed. He does not elaborate on his character on appeal. We conclude Diaz's sentence was not inappropriate under Rule 7(B) in light of the nature of the offender and the character of the offender.

[18] We affirm Diaz's conviction and sentence.

Bailey, J., and Brown, J., concur.