

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Kirk Shaffer,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 26, 2021

Court of Appeals Case No.
21A-CR-400

Appeal from the LaPorte Circuit
Court

The Honorable Thomas J.
Alevizos, Judge

Trial Court Cause No.
46C01-1910-F2-1339

Brown, Judge.

[1] Kirk Shaffer appeals his sentence for possession of methamphetamine as a level 3 felony and claims his sentence is inappropriate. We affirm.

Facts and Procedural History

[2] On October 1, 2019, law enforcement initiated a traffic stop of Shaffer in LaPorte County and found him in possession of approximately 56.6 grams of methamphetamine. The State charged Shaffer with: Count I, dealing in methamphetamine as a level 2 felony; Count II, possession of methamphetamine in an amount of at least twenty-eight grams as a level 3 felony; Count III, possession of paraphernalia as a class C misdemeanor; and Count IV, possession of marijuana as a class B misdemeanor. Shaffer and the State entered into a plea agreement dated December 18, 2020, pursuant to which Shaffer agreed to plead guilty to possession of methamphetamine as a level 3 felony under Count II and the State agreed to dismiss the remaining counts. The agreement provided that Shaffer would receive a maximum sentence of ten years in the Department of Correction (the “DOC”). The court held a hearing at which Shaffer pled guilty pursuant to the plea agreement.

[3] On February 5, 2021, the court held a sentencing hearing. Shaffer presented letters and certificates from the Salvation Army and proof that he obtained a driver’s license while the case was pending. A letter from the Salvation Army stated that Shaffer was a resident of its Adult Rehabilitation Center, a long-term residential rehabilitation facility, and a certificate of completion dated August 26, 2020, stated that he successfully completed the basic core curriculum levels 1-5 of its spiritual levels program. The prosecutor argued that Shaffer did not

report to community corrections to be placed on GPS as required after he returned from the Salvation Army, and noted the amount of methamphetamine found on him. Shaffer's counsel argued that Shaffer completed his treatment program "with flying colors," he remained sober, he has certain health issues, and he cared for his mother-in-law with whom he resided. Transcript Volume II at 14. He stated, and Shaffer agreed, that the treatment program saved his life. Shaffer's counsel also stated the GPS violation was a surprise to him and his client. Shaffer stated that he went to the Salvation Army for six and one-half months and passed and, since his return, he had been at work, obtained his license, helped his mother-in-law, and was taking care of his health including scheduling procedures.

[4] The court found the aggravating factors included that Shaffer had a criminal history and had recently violated conditions of his bond when he did not report for GPS monitoring as directed. It found his criminal history was not a tremendous aggravating factor, his most immediate conviction was having a precursor to make methamphetamine, and he was off probation on that matter for only one and one-half years before picking up the current charge. It found Shaffer's guilty plea to be a slight mitigating factor. The court sentenced Shaffer to nine years. It suspended three years to probation and ordered that his executed sentence may be served as three years in the DOC followed by three years in the LaPorte County Community Corrections GPS Program as long as he remained eligible, compliant, and in good standing.

Discussion

- [5] Ind. Appellate Rule 7(B) provides that we “may revise a sentence authorized by statute 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.” Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).
- [6] Shaffer requests that this Court exercise its authority to revise the trial court’s sentencing order to allow him to serve his executed sentence in community corrections. He argues that he has struggled with alcohol and substance abuse issues for over thirty years, has made significant changes in his life to stay sober, successfully completed an extensive six-month program with the Salvation Army, and has a minimal prior criminal history.
- [7] Ind. Code § 35-50-2-5 provides a person who commits a level 3 felony shall be imprisoned for a fixed term of between three and sixteen years with the advisory sentence being nine years. Shaffer received the advisory sentence with three years suspended to probation and three years of the executed sentence served through community corrections.
- [8] Our review of the nature of the offense reveals that Shaffer possessed approximately 56.6 grams of methamphetamine. Our review of Shaffer’s character reveals that he pled guilty to possession of methamphetamine as a level 3 felony and in exchange the State dismissed the remaining counts. The

presentence investigation report (“PSI”) indicates that Shaffer, who was born in 1964, has convictions for theft in 1983 and battery as a class B misdemeanor in 2010, and that he pled guilty in 2016 to possession of a precursor and possession of methamphetamine as level 6 felonies and was sentenced as class A misdemeanors on both counts. The court found that he did not report for GPS monitoring as directed.

[9] According to the PSI, Shaffer reported that he worked for twenty-five years as a carpenter and had been employed since December 2015 at a plastics company where he worked forty hours a week. Shaffer reported that he and his significant other resided in her mother’s trailer and that he cared for her mother who was in poor health. He also reported he was being treated for blood clots in his leg, a nodule on his liver, and cataracts. With respect to substance abuse, the PSI states that Shaffer reported that he consumed alcohol on a daily basis between the ages of eighteen and forty-five and the last time he recalled consuming alcohol was in December 2015. He reported he started using marijuana at the age of fourteen, he used the drug daily for several years, and he most recently used the drug in December 2016. He further reported that he used methamphetamine on a daily basis between the ages of twenty-five and fifty-six, he was using three grams daily prior to his arrest in this matter, and he most recently used the drug on the day of his arrest. Shaffer indicated that, prior to his arrest, he had never participated in a substance abuse treatment program and, as a condition of his bond in this matter, he received substance abuse treatment at the Salvation Army. The PSI also provides that Shaffer’s

overall risk assessment score using the Indiana Risk Assessment System places him in the low risk to reoffend category.

[10] After due consideration, we conclude that Shaffer has not sustained his burden of establishing that his advisory sentence for possession of methamphetamine as a level 3 felony with three years suspended and three years served on community corrections is inappropriate in light of the nature of the offense and his character.¹

[11] For the foregoing reasons, we affirm Shaffer's sentence.

[12] Affirmed.

Najam, J., and Riley, J., concur.

¹ To the extent Shaffer argues the court abused its discretion by failing to consider his history of alcohol and substance abuse and successful completion of the treatment program, we need not address this issue because we find that his sentence is not inappropriate. See *Chappell v. State*, 966 N.E.2d 124, 134 n.10 (Ind. Ct. App. 2012) (noting that any error in failing to consider the defendant's guilty plea as a mitigating factor is harmless if the sentence is not inappropriate) (citing *Windhorst v. State*, 868 N.E.2d 504, 507 (Ind. 2007) (holding that, in the absence of a proper sentencing order, Indiana appellate courts may either remand for resentencing or exercise their authority to review the sentence pursuant to Ind. Appellate Rule 7(B)), *reh'g denied*; *Mendoza v. State*, 869 N.E.2d 546, 556 (Ind. Ct. App. 2007) (noting that, "even if the trial court is found to have abused its discretion in the process it used to sentence the defendant, the error is harmless if the sentence imposed was not inappropriate"), *trans. denied*), *trans. denied*. Even if we were to address Shaffer's abuse of discretion argument, we would not find it persuasive in light of the record.