MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Clemente L. Alexander,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 3, 2021

Court of Appeals Case No. 20A-CR-2024

Appeal from the Jasper Superior Court

The Honorable Russell D. Bailey, Judge

Trial Court Cause Nos. 37D01-1801-F4-39 37D01-1905-F6-470

Bailey, Judge.

Case Summary

[1] Clemente L. Alexander ("Alexander") appeals his sentence to six years' imprisonment for the Level 4 felony of which he was convicted, i.e., unlawful possession of a firearm by a serious violent felon.[1]

[2] We affirm.

Issues

[3] Alexander raises the following two restated issues:

I. Whether the trial court abused its discretion when it sentenced him to the advisory sentence of six years' imprisonment.

II. Whether the sentence imposed is inappropriate in light of the nature of the offense and Alexander's character.

Facts and Procedural History

[4] On October 31, 2017, Officer Kenneth Williams ("Officer Williams") conducted a traffic stop of a white Chevrolet because the vehicle was speeding. Officer Williams identified the driver as Alexander, who lived in Milwaukee, Wisconsin. When he approached Alexander's vehicle, Officer Williams immediately noticed the smell of marijuana coming from inside the vehicle.

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[1] Ind. Code § 35-47-4-5(c) (2017).

Officer Williams asked Alexander to exit the vehicle, and Alexander did so. Officer Williams then questioned Alexander about the smell of marijuana coming from his vehicle, but Alexander denied any knowledge of marijuana in the vehicle.

[5] Officer Williams searched Alexander's vehicle and found "a small amount of a greenish leafy substance in a removable ash tray in the center cup holder area, which he believed to be raw marijuana." App. v. II at 17. Officer Williams also found several items of merchandise that he believed to be counterfeit based on his specific training in identifying counterfeit items. Officer Williams estimated the total value of the items to be about $49,000. Officer Williams also found in the vehicle a black Taurus 9mm handgun that was loaded.

[6] Alexander was confirmed to be an escapee from the Wisconsin Department of Corrections since June 29, 2017, where he was serving prison time for drug- and firearm-related charges. Hobart Police Detective Brandon Kissee ("Det. Kissee") confirmed Alexander's criminal history caused him to be classified as a serious violent felon.

[7] On January 16, 2018, the State of Indiana charged Alexander with unlawful possession of a firearm by a serious violent felon, as a Level 4 felony. A bench warrant was issued for Alexander, and on December 10, 2018, the Jasper Superior Court received correspondence from the Wisconsin Department of Corrections stating Alexander's warrant was received and would be lodged as a

detainer. The warrant was eventually served on Alexander in March 2019, and he posted bond.

[8] Two months later and while out on bond, Alexander was stopped driving southbound on I-65 for speeding. The officer who stopped him detected a strong odor of marijuana coming from inside the vehicle. Upon searching the vehicle, the officer found two baggies. The first baggie contained a green leafy substance, and the other contained a white pill, a pink pill, and a blue pill. A field test on the white pill was positive for ecstasy. The officer found another 1.5 green pills which were identified as Hydrocodone variants.

[9] On June 3, 2019, the State filed a Motion to Revoke Bond in which it alleged that, while out on bond, Alexander had been charged with unlawful possession or use of a legend drug, as a Level 6 felony,[2] possession of a controlled substance, as a Level 6 felony,[3] and possession of marijuana, as a Class A misdemeanor[4] under cause number 37D01-1905-F6-470 ("F6-470"). Alexander entered into a plea agreement under which he pled guilty to unlawful possession of a firearm by a serious violent felon, as a Level 4 felony, and the State agreed to dismissal of the pending charges in F6-470. The terms of the sentence were to be argued and left open to the trial court.

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[2] I.C. §§ 16-42-19-13 (2019), 16-42-19-27(a) (2019).

[3] I.C. § 35-48-4-7(b) (2019).

[4] I.C. § 35-48-4-11(a)(1), (b)(1) (2019).

[10] At sentencing, and after the parties presented evidence and argument, the trial court found as follows:

> [T[he Court would find that there—there [are] aggravating factors, with a history of criminal activity and the fact that the instant offense was committed while he was a fugitive from justice, and however, the Court would also find that there's mitigating factors of—that he's involved in community projects and in a family-owned business and he did take responsibility for his actions. So therefore, and in sum—the Court would find that the aggravating factors and the mitigating factors would balance each other out in this case. That doesn't always happen. I believe that they're both relevant in this case and what—however, in looking at the history of the fact that there's been violations of parole in the past, also that many—much of the criminal history was while he was a much younger man, but having—looking at the seriousness of this offense, the instant offense, and the nature of it, I—I do not believe that he would be a good candidate for probation, and therefore I would, the Court would rule that the probation—that there not be any probation based on the history, and that an executed sentence of six years would be proper, which is the advisory sentence in this case…

Tr. at 23. This appeal ensued.

Discussion and Decision

Sentencing

[11] Alexander maintains that the trial court erred in sentencing him. Sentencing decisions lie within the sound discretion of the trial court. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). An abuse of discretion occurs if 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." *Gross v. State*, 22 N.E.3d 863, 869 (Ind. Ct. App. 2014) (citation omitted), *trans. denied*. A trial court abuses its discretion in sentencing if it does any of the following:

> (1) fails "to enter a sentencing statement at all;" (2) enters "a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any[ ]—but the record does not support the reasons;" (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration;" or (4) considers reasons that "are improper as a matter of law."

Id. (quoting *Anglemyer v. State*, 868 N.E.2d 482, 490-491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007)).

[12] So long as a sentence is within the statutory range, the trial court may impose it without regard to the existence of aggravating or mitigating factors. *Anglemyer*, 868 N.E.2d at 489. If the trial court does find the existence of aggravating or mitigating factors, it must give a statement of its reasons for selecting the sentence it imposes. *Id*. at 490. However, the relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion, *Gross*, 22 N.E.3d at 869, and a trial court is under no obligation to explain why a proposed mitigator does not exist or why the court found it to be insignificant, *Sandleben v. State*, 22 N.E.3d 782, 796 (Ind. Ct. App. 2014), *trans. denied*.

[13] The trial court imposed upon Alexander the six-year advisory sentence for his Level 4 felony conviction. Alexander's only argument as to why the trial court abused its discretion when it imposed that sentence is that the court "fail[ed] to find that the mitigating factors outweighed the aggravating factors." Appellant Br. at 10. As the relative weight assignable to properly found factors is not subject to review, we find no abuse of discretion in the sentence imposed. *See Gross*, 22 N.E.3d at 869 (citing *Anglemyer*, 868 N.E.2d at 491).

Appellate Rule 7(B)

[14] Alexander contends that the sentence for his Level 4 felony conviction of unlawful possession of a firearm by a serious violent felon is inappropriate in light of the nature of the offense and his character. Article 7, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." *Roush v. State*, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007) (alteration in original). This appellate authority is implemented through Indiana Appellate Rule 7(B). *Id.* Revision of a sentence under Rule 7(B) requires the appellant to demonstrate that his sentence is "inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B); *see also Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

[15] Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented, and the trial court's judgment "should receive considerable deference." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind.

2008). The principal role of appellate review is to attempt to "leaven the outliers." *Id.* at 1225. Whether we regard a sentence as inappropriate 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. The question is not whether another sentence is more appropriate, but rather whether the sentence imposed is inappropriate. *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008). Deference to the trial court "prevail[s] unless overcome by compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant's character (such as substantial virtuous traits or persistent examples of good character)." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[16] We begin by noting that Alexander's six-year sentence for his Level 4 felony is the advisory sentence. I.C. § 35-50-2-5.5. The advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed," *Childress v. State*, 848 N.E.2d 1073, 1081 (Ind. 2006); thus, "[w]e are unlikely to consider an advisory sentence inappropriate." *Shelby v. State*, 986 N.E.2d 345, 371 (Ind. Ct. App. 2013), *trans. denied*. "[A] defendant sentenced to the advisory term bears a particularly heavy burden in persuading [the] court on appeal that his sentence is inappropriate." *Shelby*, 986 N.E.2d at 371.

[17] Moreover, our review of the record discloses nothing remarkable about the nature of the offense that would warrant revising Alexander's sentence. "The

nature of the offense is found in the details and circumstances of the commission of the offense and the defendant's participation." *Zavala v. State*, 138 N.E.3d 291, 301 (Ind. Ct. App. 2019) (quotation and citation omitted), *trans. denied*. Here, Alexander was a fugitive from justice and a serious violent felon caught speeding with marijuana and a loaded firearm in his car. Approximately four months earlier, he had escaped from the custody of the Wisconsin Department of Corrections. At the time he was stopped, Alexander had active felony warrants out of Milwaukee for escape and weapons-related offenses. Although Alexander notes that he "was not threatening anyone with this firearm," Appellant Br. at 12, that is hardly a sign of restraint in the commission of the crime; that is, the fact that Alexander did not commit an even more dangerous firearm-related crime at the same time as the crime of unlawfully possessing the firearm does not lessen the severity of the offense he committed.

[18] Nor does the nature of Alexander's character warrant a sentence revision. "The significance of a criminal history in assessing a defendant's character and an appropriate sentence varies based on the gravity, nature, and number of prior offenses in relation to the current offense." *Denham v. State*, 142 N.E.3d 514, 517 (Ind. Ct. App. 2020) (quotation and citation omitted), *trans. denied*; *see also Maffett v. State*, 113 N.E.3d 278, 286 (Ind. Ct. App. 2018) ("Continuing to commit crimes after frequent contacts with the judicial system is a poor reflection on one's character.") (citation omitted). Alexander has a lengthy criminal history that includes four misdemeanor convictions and eight felony

convictions, all of which were either drug offenses, weapons offenses, or attempts to flee from justice. He has previously been sentenced to the Wisconsin Department of Corrections four times and was released to parole three times, with notices of violations of parole being filed on multiple occasions. Alexander's extensive criminal history reflects poorly on his character and is not outweighed by his recent community service and employment.

[19] Alexander has failed to carry his heavy burden of demonstrating that his advisory sentence of six years' imprisonment for his Level 4 felony conviction is inappropriate in light of the nature of the offense and his character.

Conclusion

[20] The trial court did not abuse its discretion when it sentenced Alexander to the six-year advisory sentence for his Level 4 felony conviction. And Alexander's sentence is not inappropriate given the nature of his offense and his character.

[21] Affirmed.

May, J., and Robb, J., concur.