MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Jeremy Porter,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

August 30, 2023

Court of Appeals Case No. 23A-CR-641

Appeal from the Tippecanoe Superior Court

The Honorable Michael Bergerson, Senior Judge

Trial Court Cause No. 79D02-2207-F5-113

Memorandum Decision by Judge Crone
Judges Brown and Felix concur.

Crone, Judge.

Case Summary

[1] Jeremy Porter appeals the five-year executed sentence imposed by the trial court following his guilty plea to possession of child pornography as a level 5 felony. Finding that Porter has not met his burden to establish that his sentence is inappropriate in light of the nature of his offense and his character, we affirm.

Facts and Procedural History

[2] Like both Porter and the State, we quote the affidavit of probable cause for its recitation of the facts:

> Officer Odom of the Lafayette Police Department and Corrections Officers Slater and Hartsock stat[ed] affirmatively on May 29, 2022 at approximately 1pm, officers were advised of a report involving child pornography being located on a cell phone belonging to Jeremy Porter Sr.
>
> Upon arrival, officers spoke with Jeremy Porter Jr. who indicated he was at his father, Jeremy Porter Sr.'s residence, and used Jeremy Porter Sr.'s cell phone to make a call. Jeremy Porter Jr. advised he observed what appeared to be child pornography on the cell phone and turned the cell phone over to police. Officers learned Jeremy Porter Sr. was a participant of the Tippecanoe County Community Corrections program and was living at a residence on Emerald Pines Court in Lafayette, Indiana. Community Corrections officers and officers with the Lafayette Police Department subsequently searched Jeremy Porter Sr.'s residence and seized two additional cell phones.

Affiant [Paul Huff] examined the contents of all three cell phones and located images of child pornography stored on the devices. On one of the cell phones seized from Jeremy Porter Sr.'s residence, Affiant observed multiple images saved to the phone contents which depicted juvenile females who appeared to be less than twelve years of age with their genitals exposed. Affiant noticed the images had a modified date of September 14, 2021 and were still stored in some form on the cell phone when it was seized on May 29, 2022. Affiant further observed a "selfie" image of Jeremy Porter Sr. saved to the phone with a modified date of September 15, 2021.

On the other cell phone seized from Jeremy Porter Sr.'s residence, Affiant observed multiple images saved to the phone contents which depicted juvenile children who appeared to be less than twelve years of age. Affiant observed some of the images depicted the exposed genitalia of the children and others depicted the children engaged in sexual intercourse or other sexual conduct. Affiant further noted all of these images had a modified date between September 10, 2020 and July 12, 2021 and they were still accessible on the cell phone when it was seized on May 29, 2022. Affiant also observed several images saved to the phone contents which depicted juvenile females who appeared to be less than twelve years of age being subjected to sadomasochistic abuse involving leg and/or arm restraints with their genitalia exposed. Affiant noted these images had a modified date between September 5, 2021 and March 9, 2022 and were still stored in some form on the phone when it was seized on May 29, 2022. Affiant further observed several documents and receipts addressed to Jeremy Porter Sr. were saved to the phone's contents.

Affiant reviewed Jeremy Porter Sr.'s cell phone which was provided to officers with the Lafayette Police Department on May 29, 2022. Affiant observed multiple images saved to the phone contents which depicted juvenile females who appeared to

> be less than twelve years of age with their genitalia exposed. Affiant noted these images had a modified date of March 2, 2022 and were still stored in some form on the cell phone when it was seized on May 29, 2022. The investigation was completed in early July 2022.

Appellant's App. Vol. 2 at 14.

[3] In July 2022, the State charged Porter with four counts of level 5 felony possession of child pornography. *Id*. at 10-13. The State also filed a petition to revoke Porter's probation in a separate matter, cause number 79D02-2008-F5-130 (F5-130).

[4] In January 2023, the parties filed a plea agreement in which Porter pled guilty to one count of level 5 felony possession of child pornography, and the State agreed to dismiss the three other felonies. *Id.* at 16-18. In addition, Porter agreed that his sentence would run consecutive to the sentence that he had been serving for F5-130 when he committed the current offense. The State agreed that Porter's penalty for violating probation in F5-130 would be sixty-two days of executed time already served. The plea agreement further provided that Porter "shall receive the sentence this Court deems appropriate after hearing any evidence or argument of counsel." *Id*. at 16. At a plea hearing, Porter admitted that he was guilty of level 5 felony possession of child pornography and that he violated the community corrections placement that he was serving for F5-130. Tr. Vol. 2 at 18-19.

[5] At a February 2023 sentencing hearing, the trial court heard Porter's testimony, considered the presentence report, and listened to arguments before ordering a five-year executed sentence. In its sentencing order, the court found two mitigating circumstances: Porter "plead guilty and accepted responsibility; [Porter's] good employment history." Sentencing Order at 1. The court found that the mitigating circumstances were outweighed by the following aggravating factors:

> [Porter's] criminal history; [Porter] has had two (2) Petitions to Revoke filed against him; [Porter] has been unsuccessfully terminated from probation in the past; [Porter] has had one (1) Petition to Execute filed against him; [Porter] was on community corrections when the instant offense was committed; prior attempts at rehabilitation have failed; the amount of pornographic material [Porter] had in his possession.

Id. Porter filed a timely appeal.

Discussion and Decision

[6] Porter asks us to revise his sentence pursuant to Indiana Appellate Rule 7(B), which states, "The Court may 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." Porter has the burden of showing that his sentence is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. Although Rule 7(B) requires us to consider both the nature of the offense and the character of the offender, the appellant is not required to prove that

each of those prongs independently renders his sentence inappropriate. *Connor v. State*, 58 N.E.3d 215, 218 (Ind. Ct. App. 2016); *see also Moon v. State*, 110 N.E.3d 1156, 1163-64 (Ind. Ct. App. 2018) (Crone, J., concurring in part and concurring in result in part) (quotation marks omitted) (disagreeing with majority's statement that Rule 7(B) "plainly requires the appellant to demonstrate that his sentence is inappropriate in light of both the nature of the offenses and his character."). Rather, the two prongs are separate inquiries that we ultimately balance to determine whether a sentence is inappropriate. *Connor*, 58 N.E.3d at 218.

[7] When reviewing a sentence, our principal role is to leaven the outliers rather than necessarily achieve what is perceived as the correct result in each case. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). "We do not look to determine if the sentence was appropriate; instead we look to make sure the sentence was not inappropriate." *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). "[S]entencing is principally a discretionary function in which the trial court's judgment should receive considerable deference." *Cardwell*, 895 N.E.2d at 1222. "Such deference should prevail 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). As we assess the nature of the offense and character of the offender, "we may look to any factors appearing in the record." *Boling v. State*, 982 N.E.2d 1055, 1060 (Ind. Ct.

App. 2013). Ultimately, whether a sentence should be deemed inappropriate "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." *Cardwell*, 895 N.E.2d at 1224. Moreover, when conducting an appropriateness review, the appellate court may consider all penal consequences of the sentence imposed including the manner in which the sentence is ordered served. *Davidson v. State*, 926 N.E.2d 1023, 1025 (Ind. 2010).

[8] Turning first to the nature of the offense, we observe that "the advisory sentence is the starting point the Legislature selected as appropriate for the crime committed." *Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014). The sentencing range for a level 5 felony is between one and six years, with the advisory sentence being three years. Ind. Code § 35-50-2-6. Porter was sentenced to five years in the Department of Correction. Accordingly, Porter received a sentence below the maximum allowable executed sentence of six years for possession of child pornography. Porter urges us to reduce his sentence, "believ[ing] none of his actions (by simply possessing the images) distinguishes it from the typical offense" of level 5 felony possession of child pornography. Appellant's Br. at 14.

[9] Our legislature states that a "person who, with intent to view the image, knowingly or intentionally possesses or accesses an image that depicts or describes sexual conduct" by a child who is known to be or appears to be less than eighteen (or in this case twelve) years of age commits possession of child pornography, a level 5 felony. Ind. Code § 35-42-4-4(d), -(e)(2). The statute

refers to "the image" and "an image." Porter's offense veered well beyond the singular. As the trial court stated:

> The Court cannot ignore and [won't] ignore the scope of the amount of pornographic material that you had in your possession. Identified in the presentence investigation at least, a[t] least a hundred and sixty-three different videos, twelve thousand, over twelve thousand web history artifacts, fifty-eight thousand separate images and I'm not going to ignore that, absolutely not. That's infuriating, it's, it's beyond the scope of depravity and I find that the aggravating circumstances far, far outweigh the mitigating circumstances in this case.

Tr. Vol. 2 at 35-36. Porter does not present us with compelling evidence portraying his offense in a positive light. Nothing about the nature of his offense convinces us that his sentence merits a reduction.

[10] As for Porter's character, we observe that an offender's character is shown by his "life and conduct." *Adams v. State*, 120 N.E.3d 1058, 1065 (Ind. Ct. App. 2019) (citation omitted). We assess a defendant's character by engaging in a broad consideration of his qualities. *Madden v. State*, 162 N.E.3d 549, 564 (Ind. Ct. App. 2021). A typical factor we consider when examining a defendant's character is criminal history, with its significance varying based on the gravity, nature, and number of prior offenses. *See McFarland v. State*, 153 N.E.3d 369, 374 (Ind. Ct. App. 2020), *trans. denied* (2021).

[11] Fifty-one-year-old Porter downplays his "minor criminal history." Appellant's Br. at 15.[1] His history includes convictions for driving while suspended in 1998, operating a motor vehicle while suspended in 2000, DUI in 2004, drug possession and no operator's license in 2005, driving while suspended in 2011, and felony intimidation (F5-130) and misdemeanor criminal recklessness in 2021. Porter's sentences have included fines, suspended fines, jail time, suspended jail time, suspended driver's license followed by occupational driving privileges, unsupervised probation, drug/alcohol counseling, community service, community corrections, and time in the Department of Correction. Appellant's App. Vol. 2 at 24-26. Porter has had two petitions to revoke probation filed against him and "has been unsuccessfully discharged from probation." *Id*. at 26. He has had one "Petition to Execute Community Corrections Sentence in Custody filed against him and granted" and was serving an executed sentence on community corrections at the time of the commission of the instant offense. *Id*. While not a horrible legal history, Porter's forays into the judicial system reveal a disregard for the law and a failure to take advantage of opportunities for leniency and rehabilitation. This reflects poorly on his character.

[12] Porter's work history is insufficient to overcome his demonstrated poor character and the nature of his offense. *See Hall v. State*, 177 N.E.3d 1183, 1198 (Ind. 2021) (affirming sentence which was "not an outlier appropriate for 7(B)

[1] Porter fails to mention his prior felony.

revision" regardless of defendant's regular employment). Further, we note that the trial court listed Porter's decision to plead guilty as a mitigator but found that it, along with his employment, were outweighed by the aggravating factors. We do not disagree and note that while Porter's plea saved the State resources, it also insured that he would not be subject to potential sentencing for four level 5 felonies. *Cf. Amalfitano v. State*, 956 N.E.2d 208, 212 (Ind. Ct. App. 2011) (stating that a guilty plea "is not necessarily a mitigating factor where the defendant receives a substantial benefit from the plea or where evidence against the defendant is so strong that the decision to plead guilty is merely pragmatic"), *trans. denied* (2012).

[13] In sum, Porter has not met his burden to establish that his five-year sentence for level 5 felony possession of child pornography is inappropriate in light of the egregious nature of his offense and his demonstrated poor character. Therefore, we affirm.

[14] Affirmed.

Brown, J., and Felix, J., concur.