

# MEMORANDUM DECISION

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# IN THE COURT OF APPEALS OF INDIANA

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James D. Smiley,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff*

February 17, 2023  
Court of Appeals Case No.  
22A-CR-2269  
  
Appeal from the  
Parke Circuit Court  
  
The Honorable  
Sam A. Swaim, Judge  
  
Trial Court Cause No.  
61C01-2105-F5-137

**Memorandum Decision by Judge Vaidik**  
Judges Tavitas and Foley concur.

**Vaidik, Judge.**

## Case Summary

- [1] James D. Smiley appeals his advisory sentence of three years for Level 5 felony possession of methamphetamine, arguing the trial court erred in not identifying several mitigators. We affirm.

## Facts and Procedural History

- [2] In May 2021, the State charged Smiley with Level 5 felony possession of methamphetamine and Class B misdemeanor possession of marijuana. Smiley and the State entered into a Drug Court Agreement under Indiana Code section 33-23-16-14. Under the agreement, Smiley would plead guilty to Level 5 felony possession of methamphetamine, the State would dismiss the marijuana charge, and the trial court would take the “plea of guilty under advisement pending outcome of drug court placement.” Appellant’s App. Vol. II p. 53.
- [3] In August 2022, the State petitioned to terminate Smiley’s participation in drug court. The petition alleged that Smiley had tested positive for meth nine times despite being offered a variety of treatment options. At the violation hearing, Smiley waived his right to counsel and admitted that he “continually used methamphetamine while” participating in drug court and that this violated the rules. Tr. p. 26. The trial court entered judgment of conviction for Level 5 felony possession of methamphetamine and set the matter for sentencing.

[4] At sentencing, the State presented evidence of Smiley’s “significant” criminal history. *Id.* at 32. According to the presentence investigation report, Smiley has several convictions in Arkansas, including aggravated assault and delivering methamphetamine (for which he received a fifteen-year sentence). Smiley also has a drug conviction in Missouri and a conviction for Level 6 felony possession of methamphetamine in Indiana. The trial court asked Smiley if he wanted to say anything, and he said no. The court then sentenced Smiley to the advisory term of three years:

The advisory sentence is three years, so, based on your criminal history, the Court could sentence you to six years in the Department of Correction. The Probation Department is recommending three years, all executed. I find that to be a very reasonable sentence for this offense. You were given numerous times to participate in Drug Court and you decided not to. So, there is, really, no other alternative at this point.

*Id.*

[5] Smiley now appeals.

## Discussion and Decision

[6] Smiley contends the trial court erred in not finding several mitigators. The finding of mitigators rests within the sound discretion of the trial court, and we review such decisions only for an abuse of that discretion. *Wert v. State*, 121 N.E.3d 1079, 1084 (Ind. Ct. App. 2019), *trans. denied*. One way a trial court

abuses its discretion is by not recognizing mitigators that are clearly supported by the record and advanced for consideration. *Id.*

[7] Smiley argues the trial court should have identified as mitigators that he (1) admitted violating the rules of drug court, (2) suffers from drug addiction, and (3) took care of his elderly father. But as the State points out, Smiley did not advance these mitigators at sentencing. Smiley's argument thus fails from the outset.

[8] But even assuming the trial court erred by not finding these mitigators, "we need not remand for resentencing if we can say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." *Vega v. State*, 119 N.E.3d 193, 203 (Ind. Ct. App. 2019). Here, we can say with confidence that the court would have imposed the same sentence had it identified these mitigators. Smiley has a substantial criminal history, including several drug convictions. Smiley was given an opportunity to participate in drug court but used meth the whole time. The court said it could sentence Smiley to six years given his criminal history but found the probation department's recommendation reasonable. We have no doubt the court would have sentenced Smiley to the advisory term even had it identified these mitigators. We therefore affirm Smiley's sentence.

[9] Affirmed.

Tavitas, J., and Foley, J., concur.