MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Ricky Allen Kiper, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

September 27, 2023

Court of Appeals Case No. 23A-CR-674

Appeal from the Vanderburgh Circuit Court

The Honorable Celia Pauli, Magistrate

Trial Court Cause No. 82C01-2207-MR-4320

Memorandum Decision by Judge Crone
Judges Brown and Felix concur.

Crone, Judge.

Case Summary

[1] Ricky Allen Kiper, Jr., appeals the seventy-five-year aggregate sentence imposed by the trial court following his guilty plea to murder and to being a habitual offender. He contends that the trial court abused its discretion during sentencing and that his sentence is inappropriate in light of the nature of his offense and his character. Finding no abuse of discretion and that he has not met his burden to demonstrate that his sentence is inappropriate, we affirm.

Facts and Procedural History

[2] On July 27, 2022, Kiper murdered James McClernon. Specifically, Kiper shot McClernon in the head and then changed his clothing, hid his backpack and the firearm he used, and fled the scene. Witnesses who heard shots and saw Kiper running from the scene contacted police. After Kiper was subsequently arrested and read his *Miranda* rights, he told Vanderburgh County sheriff's detectives that he intentionally killed McClernon because he wanted to "protect the children" and that it "was necessary to take the matter into his own hands" since police were not doing "anything about sex offenders." Appellant's App. Vol. 2 at 66.[1] Although Kiper stated that McClernon had a knife at the time he killed him, Kiper admitted that he handed the knife to McClernon just before

[1] The record indicates that Kiper believed that his actions were justified based upon a mistaken belief that McClernon had committed sex offenses against children. Tr. Vol. 2 at 13.

shooting him. Kiper admitted that McClernon "did not provoke or threaten" him in any way before he shot him. *Id*.

[3] The State charged Kiper with murder and alleged that he was a habitual offender. The State further filed a notice of intent to seek an enhanced sentence due to Kiper's use of a firearm. A jury trial began on January 20, 2023. After the trial began, Kiper elected to enter into a plea agreement with the State in which he agreed to plead guilty to murder and admit to being a habitual offender in exchange for dismissal of the firearm enhancement. Sentencing was left to the trial court's discretion. Following a sentencing hearing, the trial court imposed a sixty-year sentence for murder, enhanced by fifteen years for the habitual offender enhancement, for an aggregate sentence of seventy-five years. This appeal ensued.

Discussion and Decision

Section 1 – The trial court did not abuse its discretion during sentencing.

[4] Kiper first contends that the trial court abused its discretion during sentencing. In general, "sentencing decisions are left to the sound discretion of the trial court, and we review the trial court's decision only for an abuse of this discretion." *Singh v. State*, 40 N.E.3d 981, 987 (Ind. Ct. App. 2015), *trans. denied* (2016). "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." *Anglemyer v. State*, 868

N.E.2d 482, 490 (Ind. 2007) (quotation marks omitted), *clarified on reh'g*, 875 N.E.2d 218. A trial court may abuse its discretion by: (1) failing to enter a sentencing statement at all; (2) entering a sentencing statement that includes aggravating and mitigating factors that are unsupported by the record; (3) entering a sentencing statement that omits reasons that are clearly supported by the record; or (4) entering a sentencing statement that includes reasons that are improper as a matter of law. *Id*. at 490-91.

[5] The trial court here found three aggravating factors and two mitigating factors. As for aggravating factors, the trial court found the nature and particularized circumstances of the crime, Kiper's extensive criminal history, and that he was on parole at the time of the murder. The court found Kiper's decision to plead guilty and his history of "abuse as well as mental health and addiction issues" to be mitigating factors. Tr. Vol. 2 at 15. Kiper challenges solely the trial court's finding that the nature and particularized circumstances of his crime was an aggravating factor. It is well established that while a "trial court may not use a material element of the offense as an aggravating factor," it "may find the nature and particularized circumstances surrounding the offense to be an aggravating factor." *Gober v. State*, 163 N.E.3d 347, 354 (Ind. Ct. App. 2021), *trans. denied*. To enhance a sentence using the nature and circumstances of the crime, the trial court must detail why the defendant deserves an enhanced sentence under the particular circumstances. *Weaver v. State*, 189 N.E.3d 1128, 1135 (Ind. Ct. App. 2022), *trans. denied*.

[6] Kiper complains that in finding this aggravator, the trial court improperly mentioned the loss of the victim's life and the impact that loss had on the victim's family, which would not be something unique to this murder but would be something normally associated with any loss of life. He directs us to our supreme court's opinion in *Pickens v. State*, 767 N.E.2d 530 (Ind. 2002), in which the court noted, among other things, that "the terrible loss that accompanies the loss of a family member accompanies almost every murder," and therefore "this impact on the family is encompassed within the range of impact which the presumptive sentence is designed to punish." *Id.* at 535. However, unlike in *Pickens,* the trial court here went much further than simply mentioning the terrible loss associated with the victim's death as a reason for aggravation. The trial court specifically emphasized that the particularized circumstances surrounding this murder were especially troubling, as the nature of Kiper's crime was clearly a type of "vigilante justice," and Kiper decided that he had the right to be "judge, jury, and executioner" based upon his mistaken belief about McClernon. Tr. Vol. 2 at 15. Under the circumstances, we cannot say that the trial court abused its discretion in finding the nature and circumstances surrounding this murder to be an aggravating factor.

[7] Regardless, Kiper does not dispute that his extensive criminal history and his parole status were valid aggravating factors. It is well settled that even if "an improper aggravator is used, we remand for resentencing only if we cannot say with confidence that the trial court would have imposed the same sentence if it considered the proper aggravating and mitigating circumstances." *McCain v.*

State, 148 N.E.3d 977, 984 (Ind. 2020) (citation omitted). Given that the trial court relied upon two additional and very serious aggravating factors, we can say with confidence that the trial court would have imposed the same sentence even without considering the nature and circumstances surrounding the crime. Accordingly, even assuming error, remand for resentencing is unnecessary.

Section 2 – Kiper has not met his burden to demonstrate that his sentence is inappropriate.

[8] Kiper also asks us to reduce 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." Kiper has the burden of showing that his sentence is inappropriate. *Anglemyer*, 868 N.E.2d at 490. 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).

[9] "[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.

[10] Turning first to the nature of the offenses, 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 murder is between forty-five and sixty-five years, with the advisory sentence being fifty-five years. Ind. Code § 35-50-2-3. A person convicted of murder who is found to be a habitual offender faces an additional fixed term between eight years and twenty years. Ind. Code § 35-50-2-8(i)(1). The trial court here imposed a sixty-year sentence for murder and a fifteen-year sentence for the habitual offender enhancement. Thus, the aggregate seventy-five-year sentence was ten years below the maximum allowable sentence.[2]

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[2] As noted by the State, in pleading guilty and obtaining dismissal of the firearm enhancement, Kiper pragmatically reduced his maximum exposure from 105 years to eighty-five years. *See* Ind. Code § 35-50-2-11(g) (a person found to have knowingly or intentionally used a firearm in the commission of certain offenses faces an additional fixed term between five and twenty years).

[11] Regarding the nature of the offense, Kiper admitted to committing an unprovoked premeditated murder under the guise of vigilante justice. He claims that, other than referring to the presentence investigation report to which the probable cause affidavit was attached, the State presented no substantive evidence at the sentencing hearing regarding the nature of the offense, and "so there is no evidence warranting a sentence above the advisory." Appellant's Br. at 15. However, we remind Kiper that it is his burden on appeal to present us with compelling evidence portraying in a positive light the nature of the offense, such as accompanied by restraint, regard, and lack of brutality. He has presented us with nothing, and therefore he has not met his burden to persuade us that the nature of his crime warrants a sentence reduction.

[12] More significantly, we need look no further than Kiper's character to affirm the sentence imposed. An offender's character is shown by his life and conduct. *Adams v. State*, 120 N.E.3d 1058, 1065 (Ind. Ct. App. 2019). This assessment includes consideration of the defendant's criminal history. *Johnson v. State*, 986 N.E.2d 852, 857 (Ind. Ct. App. 2013). To say that Kiper has an extensive criminal history and a clear disdain for the rule of law would be an understatement. At only thirty-four years old, Kiper has amassed nine prior felony and numerous misdemeanor convictions. He was on parole in Kentucky with an active warrant out for his arrest when he committed the current offense. He has been granted leniency on multiple occasions, with the opportunity to serve sentences on probation or work release, and he has repeatedly violated the conditions of these programs. He admits to being a daily marijuana smoker and

an abuser of methamphetamine. Although we are not unsympathetic to his struggles with mental health and addiction, he has failed to present us with compelling evidence of substantial virtuous traits or persistent examples of good character that would persuade us that the less-than-maximum sentence imposed by the trial court is inappropriate.

[13] In sum, Kiper has failed to demonstrate that the trial court abused its discretion during sentencing or that his sentence is inappropriate. Accordingly, we affirm the sentence imposed by the trial court.

[14] Affirmed.

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