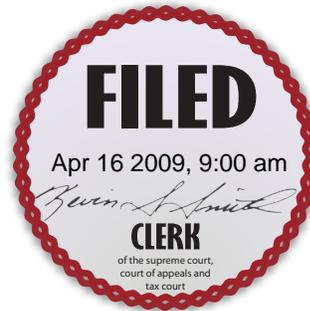


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DARRELL AVERY,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-0808-CR-747
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Peggy Ryan Hart, Commissioner
The Honorable Steven R. Eichholtz, Judge
Cause No. 49G23-0801-FA-12716

April 16, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Darrell Avery appeals his sentence for dealing in cocaine as a Class B felony and raises the following issue: whether his six-year sentence with two years executed and four years suspended was inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

FACTS AND PROCEDURAL HISTORY

In August 2007, a confidential informant approached Avery and asked to buy \$40.00 worth of crack cocaine. Avery provided .25 grams of cocaine to the informant in exchange for \$40.00. As a result of this incident, the State charged Avery with two offenses: Count I, dealing in cocaine¹ as a Class A felony and Count II, possession of cocaine² as a Class B felony. Avery signed a plea agreement wherein the State agreed to dismiss Count II in exchange for Avery's plea of guilty to dealing in cocaine as a Class B felony, a lesser included offense of Count I. The State also agreed to dismiss another charge pending against Avery in a separate cause. Finally, the agreement provided that the executed portion of Avery's sentence would be capped at six years.

The trial court accepted Avery's plea agreement. At a sentencing hearing, the trial court found Avery's lack of criminal history, his age, and the fact that a prolonged incarceration could have an unnecessary detrimental effect on Avery's dependent children as mitigating factors. The court did not find any aggravating circumstances. The trial court

¹ See Ind. Code § 35-48-4-1.

² See Ind. Code § 35-48-4-6.

sentenced Avery to six years, with two years executed and four years suspended and one year of the suspended sentence to be served on probation. Avery now appeals.

DISCUSSION AND DECISION

Avery contends that the two-year executed portion of his sentence is inappropriate. An appellate court may revise a sentence after careful review of the trial court's decision if it concludes that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). Even if the trial court followed the appropriate procedure in arriving at its sentence, the appellate court still maintains a constitutional power to revise a sentence it finds inappropriate. *Hope v. State*, 834 N.E.2d 713, 718 (Ind. Ct. App. 2005). However, this Court “must and should exercise deference to a trial court's sentencing decision, both because Rule 7(B) requires us to give ‘due consideration’ to that decision and because we understand and recognize the unique perspective a trial court brings to its sentencing decisions.” *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). The defendant bears the burden of demonstrating that the sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

When determining whether a sentence is inappropriate, we recognize that the advisory sentence “is the starting point the Legislature has selected as an appropriate sentence for the crime committed.” *Weiss v. State*, 848 N.E.2d 1070, 1072 (Ind. 2006). A person who commits a Class B felony shall be imprisoned for a fixed term of between six and twenty years, the advisory sentence being ten years. Ind. Code § 35-50-2-5. Thus, in sentencing Avery, the trial court made a significant downward departure from the ten-year advisory

sentence—Avery received the minimum number of years prescribed in the sentencing range with only one-third of that sentence executed.

Nevertheless, Avery argues that his sentence was inappropriate in light of the nature of the offense and the character of the offender. Specifically, Avery contends that the two-year executed portion of his sentence was inappropriate in light of several mitigating factors such as his disadvantaged background, his lack of a criminal record, his potential for rehabilitation, and the hardship that his incarceration will impose on his dependent children. Avery also claims that his remorse and acceptance of responsibility for his crime by pleading guilty warranted a reduction in his sentence. Avery further argues that his sentence is inappropriate because the offense did not involve any physical violence and because he was “hooked” as a result of a “set up by law enforcement.” *Appellant’s Br.* at 12.

We disagree. Avery was charged with dealing in cocaine within 1,000 feet of a park, an A felony, but was allowed to plead guilty to a lesser included offense. While the offense was unremarkable and Avery has no prior criminal history and has been an attentive and supportive father to his two young children, the trial court demonstrated significant leniency when it sentenced Avery to six years, the minimum sentence in the statutory range for a Class B felony, and suspended all but two years of that sentence. After due consideration, we cannot say that Avery has demonstrated that his sentence is inappropriate in light of the nature of the offense and the character of the offender.

Affirmed.

BAKER, C.J., and NAJAM, J., concur.