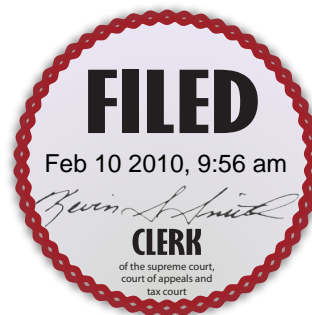


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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DOUGLAS WAYNE MCCLISH,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 76A05-0910-CR-613

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APPEAL FROM THE STEUBEN SUPERIOR COURT

The Honorable William C. Fee, Judge

Cause No. 76D01-0903-FD-237

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**February 10, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Douglas McClish pleaded guilty to Operating a Vehicle While Intoxicated,<sup>1</sup> a class D felony, and Driving While Suspended,<sup>2</sup> a class A misdemeanor. The trial court sentenced McClish to an aggregate term of three years, with one year executed and two years to be served in Community Corrections. On appeal, McClish argues that the sentence imposed is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

In establishing a factual basis for his guilty plea, McClish admitted the facts in the probable cause affidavit and attached narrative report. The relevant part of the narrative report follows:

REPORT REFERENCE: An investigation pertaining to an OWI in Angola located in Steuben County, Indiana.

DETAILS:

1) ON 03/07/2009 at approximately 2:25 pm Deputy Miller was patrolling in a fully marked squad car on US 20. Miller was passing the hospital and was flagged down by a male pedestrian. The unknown male explained to Miller that a white older Ford truck just left there and was heading south on John Street from US 20. The male explained to Miller that the driver was extremely intoxicated. He also told Miller the registration plate was blue and had the numbers 1584.

2) At this time Miller began searching the area for the truck and also notified the Angola Police Department of the complaint. A few minutes later Miller was contacted by Officer Gilbert who located the vehicle heading south on Wayne Street from US 20. Gilbert advised Miller a short time later that they were stopped at Prospect and Darling and his truck was partially parked in a driveway.

3) Miller pulled up on the scene and Gilbert was speaking with the driver, Doug McClish. Gilbert then walked over to Miller and advised him [McClish] pulled into the driveway got out of his truck and began to exit his truck. At this time Gilbert stated that he started talking with [McClish] and could smell the odor of an alcoholic beverage and [McClish] was also swaying and had

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<sup>1</sup> Ind. Code Ann. § 9-30-5-3 (West, PREMISE through 2009 1st Regular Sess.).

<sup>2</sup> Ind. Code Ann. § 9-24-19-2 (West, PREMISE through 2009 1st Regular Sess.).

glassy eyes. Gilbert also told Miller that [McClish] stated the reason he pulled into a driveway was to avoid Gilbert from seeing him drive badly. . . .

4) Miller then began talking with [McClish]. Miller ran his information and found out he was suspended prior. Miller at this time asked [McClish] if he had been drinking and [McClish] did not answer Miller. Miller then had [McClish] take a PBT with a failing result of .21%. [McClish] was then placed into protective custody for driving while suspended prior and also suspicion of OWI. Miller then looked inside the truck and noticed open beer cans in the passenger seat and floor of the truck. There were also numerous unopened cold cans of beer still in the box. . . .

*Appellant's Appendix at 74.*

On March 9, 2009, the State charged McClish with Count I, operating a vehicle while intoxicated (OWI), a class A misdemeanor; Count IA, OWI with a prior conviction, class D felony; and Count II, driving with a suspended license, a class A misdemeanor. The State also alleged McClish was a habitual substance offender. On July 14, 2009, McClish pleaded guilty to OWI as a class D felony and driving while suspended as a class A misdemeanor in exchange for the dismissal of the habitual substance offender allegation. The trial court held a sentencing hearing on August 10, 2009. In sentencing McClish, the court considered as aggravating his extensive juvenile and adult criminal history and the fact that he was on probation when he committed the current offenses. As mitigating, the court indicated that it considered McClish's expression of remorse and his acceptance of responsibility. Based on its findings, the trial court sentenced McClish to three years with one year executed and two years in Community Corrections for the felony OWI conviction and to a concurrent sentence of three hundred twelve days for the misdemeanor driving while suspended conviction. McClish now appeals.

McClish argues that his sentence is inappropriate. We have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. *See* Ind. Appellate Rule 7(B); *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g* by 875 N.E.2d 218. Although we are not required under App. R. 7(B) to be "extremely" deferential to a trial court's sentencing decision, we recognize the unique perspective a trial court brings to such determinations. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). Moreover, we observe that McClish bears the burden of persuading this court that his sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867.

We first consider the nature of the offense. McClish belittles the seriousness of his offense by asserting that there was no accident and no individuals were harmed. McClish, however, is simply lucky that he did not harm or even kill another person as he drove around a residential, urban area on a Saturday afternoon with a blood alcohol level more than two and one-half times the legal limit. Under such circumstances, the potential for serious injury or even death was high. McClish has failed to convince us that the circumstances of the crime support a finding that the sentence imposed is inappropriate.

Turning to the character of the offender, we begin by noting that McClish has an extensive criminal history comprised of more than fifty prior criminal convictions and juvenile adjudications. McClish's criminal history is detailed below.

### Juvenile History

11/01/83	Criminal Mischief	Probation
	Disorderly Conduct	
	Criminal Trespass	
10/10/84	Theft	Indiana Boys School
	Leaving the Scene	
	Fleeing	
	Criminal Recklessness	
	Reckless Driving	
04/04/86	Burglary--B felony	Indiana Boys School

### Adult History

07/21/87	Burglary--B felony	10 years, 9 suspended
05/06/88	Resisting Law Enforcement--A misdemeanor	180 days, 107 suspended
11/26/90	Failure to Stop After an Accident--A misdemeanor	Sentence unknown
	Reckless Driving--B misdemeanor	
12/17/90	Resisting Law Enforcement--A misdemeanor	1 year home detention
07/10/92	OWI--A misdemeanor	1 year suspended
	Resisting Law Enforcement--A misdemeanor	30 days executed
08/18/92	Invasion of Privacy--A misdemeanor	1 year suspended
10/09/92	Public Intoxication--B misdemeanor	180 days suspended
11/26/92	Criminal Possession of a Weapon 4th Degree--A misdemeanor (New York)	Time Served
01/29/93	Domestic Battery--A misdemeanor	1 year suspended except 50 days served
07/29/94	Failure to Identify a Fugitive from Justice--B misdemeanor (Texas)	30 days executed
07/29/94	Tampering with Government Record--A misdemeanor (Texas)	35 days executed
01/27/95	Driving While Intoxicated--B misdemeanor (Texas)	90 days executed
	Driving While Suspended--B misdemeanor (Texas)	90 days executed
04/13/95	Possession of Marijuana--B misdemeanor (Texas)	90 days executed
08/11/95	Criminal Trespass--B misdemeanor (Texas)	30 days executed
11/09/95	Criminal Trespass--B misdemeanor (Texas)	45 days executed

11/09/95	Possession of Marijuana--B misdemeanor (Texas)	45 days executed
04/12/96	Criminal Trespass--B misdemeanor (Texas)	90 days executed
11/22/96	Burglary of a Vehicle--A misdemeanor (Texas)	60 days executed
11/22/96	Burglary of a Vehicle--A misdemeanor (Texas)	60 days executed
11/04/98	Unauthorized Use of a Motor Vehicle--felony (Louisiana)	1 year executed
12/17/01	Assault--first degree misdemeanor (Ohio)	6 months probation
03/11/02	Open Container--misdemeanor (Ohio)	Community Service
06/11/03	Driving While Intoxicated--misdemeanor (Ohio)	90 days, 84 suspended
01/14/04	Driving While Intoxicated Second Offense--misdemeanor (Ohio)	90 days, 80 days suspended
	Driving Under Suspension--misdemeanor (Ohio)	30 days suspended
01/14/04	Menacing--misdemeanor (Ohio)	30 days suspended
	Trespassing--misdemeanor (Ohio)	30 days suspended
08/27/04	Resisting Arrest--misdemeanor (Ohio)	180 days suspended
	Domestic Violence--misdemeanor (Ohio)	30 days suspended
08/27/04	Violation of a Protective Order--misdemeanor (Ohio)	180 days suspended
08/30/04	Assault--fourth degree felony (Ohio)	7 months executed suspended to 4 years community control
08/03/06	OWI-Second Offense--misdemeanor (Ohio)	180 days, 160 suspended
	No Valid Operator's License--misdemeanor (Ohio)	90 days suspended
09/01/06	Public Intoxication--B misdemeanor	180 days suspended except 20 days served
11/30/06	Public Intoxication--B misdemeanor	Time Served
12/05/06	Check Deception--A misdemeanor	90 days except 8 days served
07/30/07	Criminal Trespass--A misdemeanor	1 year executed
08/27/07	Violation of a Protection Order--misdemeanor (Ohio)	180 days suspended
08/03/08	Driving Under the Influence--misdemeanor (Ohio)	180 days, 160 suspended
01/07/09	Operating a Vehicle While Intoxicated-Endangering a person--A misdemeanor	1 year suspended to 134 days in community corrections
01/07/09	Battery Resulting in Bodily Injury--A misdemeanor	1 year suspended

Despite his extensive record, McClish has served comparatively little time in correctional institutions.

In addition to his lengthy criminal record, McClish has a history of probation violations and revocations. In 1986, as a juvenile, McClish was discharged from parole because he committed another offense. While serving a 1987 adult probation, McClish was arrested on a subsequent criminal offense, but it appears that a probation violation was never filed. In 1992, McClish was ordered to serve sixty days for failing to complete an alcohol treatment program, a condition of his probation for an OWI conviction. In 2004, McClish's probation in Ohio was revoked and he was ordered to serve his previously suspended sentence for assault, a fourth degree felony, with the Ohio Department of Rehabilitation and Corrections. In 2007, McClish admitted to violating his probation on a check deception conviction. At the time of the instant offenses, McClish was on probation and living at a Community Corrections transitional living facility.

McClish acknowledges his "significant" criminal history, but argues that his overall character, as evidenced by his recent effort to maintain sobriety and the testimony of two of his supporters, does not warrant the sentence imposed by the trial court. *Appellant's Brief* at 11. We disagree.

The severity of McClish's criminal record is readily apparent when considering the number, proximity, and similarity of his prior offenses with the current offense. Of particular note is that McClish has accumulated seven prior misdemeanor convictions for driving/operating a vehicle while intoxicated with the most recent being two months before

the prior offense. Many of his other convictions are likewise alcohol or drug related. McClish's record demonstrates his repeated disregard for the law. Further, suspended sentences and short periods of incarceration have had no rehabilitative effect on McClish. Despite his numerous contacts with the criminal justice system, including incarceration and periods of probation, McClish has failed to reform his ways. McClish's criminal history and his conduct while on probation is more telling of his character than his recent efforts to change his ways. McClish's character is not deserving of a lesser sentence.<sup>3</sup>

In light of the nature of the offense and the character of the offender, the sentence imposed is not inappropriate.

Judgment affirmed.

NAJAM, J., and BRADFORD, J., concur.

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<sup>3</sup> The State asserts that "[b]oth the sheer number of [McClish's] convictions and the fact that seven are identical to the instant conviction makes his sentence inappropriately lenient." *Appellee's Brief* at 8. The State requests that if McClish's sentence is to be revised, we exercise our authority pursuant to *McCullough v. State*, 900 N.E.2d 745 (Ind. 2009) to revise the sentence upward. We have considered the State's request, but choose in this instance to defer to the trial court's exercise of discretion in crafting the sentence imposed.