

MEMORANDUM DECISION

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IN THE
Court of Appeals of Indiana

Jeremy Kelly,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

April 26, 2024

Court of Appeals Case No.
23A-CR-2522

Appeal from the Wayne Circuit Court
The Honorable April R. Drake, Judge

Trial Court Cause No.
89C01-2202-F4-7

Memorandum Decision by Judge Crone
Judges Bailey and Pyle concur.

Crone, Judge.

Case Summary

- [1] Jeremy Kelly appeals the sentence imposed by the trial court following his guilty plea to level 4 felony unlawful possession of a firearm by a serious violent felon and class B misdemeanor criminal mischief. He contends that his sentence is inappropriate in light of the nature of the offenses and his character. Finding that he has not met his burden to establish that his sentence is inappropriate, we affirm.

Facts and Procedural History

- [2] On the night of February 25, 2022, Kelly drove his SUV into Kandis Swim's driveway. He exited his vehicle and walked toward Swim, screaming that he was the devil and telling Swim that she needed to get inside the vehicle with him. Swim ran to her house, called the police to report the incident, and then told her husband what had happened.
- [3] Kelly drove away from Swim's house, and Swim's husband followed, locating Kelly in a gas station parking lot. Kelly was yelling, talking to imaginary people, and pulling items out of his SUV and placing them on the ground. When Kelly drove away from the gas station, Swim's husband followed him and reported to the police that Kelly had driven to a fast-food restaurant.
- [4] Patrolman Matthew Smarrelli, with the Wayne County Sheriff's Department, located Kelly in the restaurant's drive-thru lane and observed Kelly open and

close the driver-side door several times. Kelly also began throwing items from his SUV onto the ground. When Patrolman Smarrelli approached the SUV, he noticed that Kelly had removed the SUV's interior door panel and was attempting to push the panel through his window and inside the drive-thru window. When the patrolman asked Kelly what was going on, he pointed toward the passenger seat and told the patrolman, "[T]he devil is in here." Ex. Vol. 1 at 6. Kelly then pointed to the ground and said, "[T]here's a snake right there, I just killed it." *Id.* Patrolman Smarrelli did not see a snake.

[5] Patrolman Smarrelli handcuffed Kelly, placed him in his patrol car, and arranged to transport him to a facility to undergo a psychiatric evaluation. A search of Kelly's jacket revealed several knives and the cylinder to a revolver. Sergeant Bryan Skaggs, who assisted Patrolman Smarrelli, moved Kelly's vehicle out of the drive-thru lane and into a parking spot. While inside the vehicle, he saw a revolver between the driver's seat and the console. An NCIC check on the revolver revealed that it had been reported stolen out of Portland, Indiana. The patrolman and the sergeant arranged to have Kelly's vehicle towed, and they performed an inventory search of the vehicle. In addition to the revolver, the officers found a shotgun in the vehicle's cargo area.

[6] Patrolman Smarrelli read Kelly his *Miranda* rights and then asked him about the stolen revolver. Kelly told the patrolman that the revolver belonged to his father. Shortly thereafter, Patrolman Smarrelli learned from the Portland Police Department that Kelly was a suspect regarding the killing of his father that had

occurred earlier that day.¹ The Portland Police Department also informed Patrolman Smarrelli that Kelly was a serious violent felon.

[7] Patrolman Smarrelli transported Kelly to the Wayne County Sheriff's Department. During the ride, Kelly growled, talked about the devil, whom he called "boss," and told the patrolman that because he was a grand master wizard, people turned into snakes on his command. *Id.* at 7. After Kelly was removed from the patrol car and placed inside an interview room at the sheriff's office, he kicked two holes in the wall.

[8] The State charged Kelly with level 4 felony unlawful possession of a firearm by a serious violent felon and class B misdemeanor criminal mischief. The State also filed a habitual offender sentencing enhancement. On May 30, 2023, the day Kelly's jury trial was to begin, Kelly withdrew his not-guilty plea and pled guilty to the level 4 felony and the class B misdemeanor charges. In exchange, the State dismissed the habitual offender sentencing enhancement. Kelly's sentence was left open to argument by the parties.

[9] At the sentencing hearing on September 25, 2023, Kelly refused to be sworn in, and he did not provide a statement of allocution. Following the hearing, the trial court found Kelly's criminal history to be an aggravating circumstance.

¹ On February 25, 2022, Kelly's father was killed in his home. *Kelly v. State*, 226 N.E.3d 266, 267 (Ind. Ct. App. 2024). On March 1, 2022, the State charged Kelly with the murder of his father. *Id.* Kelly pled guilty to level 2 felony voluntary manslaughter on June 5, 2023. *Id.* On July 14, 2023, the court sentenced Kelly to thirty years executed for that offense, to be served consecutive to the sentence imposed in the instant case.

The court found Kelly's guilty plea to be a mitigating circumstance but afforded it "minimal" weight because Kelly had pled guilty on the day his jury trial was to begin and after the jury had convened. Tr. Vol. 2 at 128. The court sentenced Kelly to concurrent executed terms of nine years for the level 4 felony and 120 days for the class B misdemeanor. The court ordered the nine-year sentence to run consecutive to the thirty-year sentence he received for killing his father. The court noted that it had not recommended Kelly for participation in a purposeful incarceration program because he had been inconsistent in statements to his probation officer regarding his methamphetamine use. This appeal ensued.

Discussion and Decision

[10] Kelly 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." 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). Kelly bears the burden to show that his sentence is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g* 875 N.E.2d 218.

[11] “[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.

[12] Regarding 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 4 felony is between two and twelve years, with an advisory sentence of six years. Ind. Code § 35-50-2-5.5. The sentencing range for a class B misdemeanor is a fixed term of no more than one hundred and eighty days. *See* Ind. Code § 35-50-3-3. Kelly’s sentence of nine years for the level 4 felony is more than the advisory sentence but less than the maximum sentence he could have received. The trial court ordered his 120-day sentence for the class B misdemeanor to be served concurrently.

- [13] Kelly “does not challenge the nature of [his] sentence[.]” Appellant’s Br. at 17. And he concedes that his offenses are a “serious matter.” *Id.* at 18. Even excluding that concession, the nature of Kelly’s offenses does not render his sentence inappropriate. Kelly, a serious violent felon, drove to the home of a woman he did not know with a shotgun and a revolver in his SUV. He yelled and screamed at the woman that he was the devil, and he attempted to coerce her into his vehicle. He later drove to a fast-food restaurant and blocked the drive-thru lane. He yelled and cursed at the employees, threw items from his vehicle onto the ground, and tried to push the vehicle’s door panel through the drive-thru window. When he was transported to the county sheriff’s office and placed in an interview room, he kicked two holes in the wall.
- [14] Regarding his character, Kelly concedes that he has a lengthy and “substantial” criminal history. *Id.* at 16. He claims, however, that his sentence is inappropriate because he is “not the worst of offenders,” he is remorseful, he pled guilty, and “it would be tragic to send [him] to prison [without] appropriate treatment” through participation in a purposeful incarceration program. *Id.* at 17, 18.
- [15] 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). An offender’s character is shown by his “life and conduct.” *Adams v. State*, 120 N.E.3d 1058, 1065 (Ind. Ct. App. 2019). A typical factor we consider when examining a defendant’s character is criminal history. *McFarland v. State*, 153 N.E.3d 369, 374 (Ind. Ct. App. 2020), *trans. denied* (2021).

[16] Fifty-one-year-old Kelly is no stranger to the criminal justice system. Kelly’s criminal history comprises eight prior misdemeanor convictions and seven prior felony convictions, dating back to when he was nineteen years old. Kelly has been convicted of misdemeanor battery, criminal mischief, criminal recklessness, resisting law enforcement, leaving the scene of an accident, operating a vehicle while intoxicated, and possession of marijuana. His felony convictions include criminal confinement with serious bodily injury, battery committed by means of a deadly weapon, battery against a public safety official, intimidation, and resisting law enforcement. As the trial court observed, Kelly had been afforded “short[-]term imprisonment options . . . including short jail terms, probation, [and] suspended sentences,” but the leniency had not deterred Kelly from continuing to engage in criminal activity. Tr. Vol. 2 at 127. And as the trial court further observed, Kelly had received a thirty-year executed sentence—for killing his father on the same day that he committed the instant offenses—and that sentence was ordered to run consecutive to the nine-year sentence Kelly received in the instant case.

[17] Furthermore, the trial court could not have determined whether Kelly was remorseful because he refused to be sworn in at his sentencing hearing, and he did not provide a statement of allocution to the court. As for pleading guilty, Kelly did not do so until the day his trial was to begin and after a jury had convened. And to the extent that Kelly argues that the trial court should have recommended to the DOC that he be placed in a purposeful incarceration program, we note that a trial court’s decision to not recommend a defendant for

placement in a particular program is not subject to appellate review. *See Miller v. State*, 105 N.E.3d 194, 196-97 (Ind. Ct. App. 2018) (rejecting argument that sentence was inappropriate because trial court did not recommend him for the purposeful incarceration program). Entry into the program is left to determination by the DOC, and “trial courts . . . have no authority to require the DOC to place a particular defendant into a program.” *Id.* at 196.

[18] In short, Kelly has not met his burden to establish that his sentence is inappropriate in light of the offenses and his character. We decline to reduce his sentence pursuant to Appellate Rule 7(B), and we affirm the sentence imposed by the trial court.

Affirmed.

Bailey, J., and Pyle, J., concur.

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