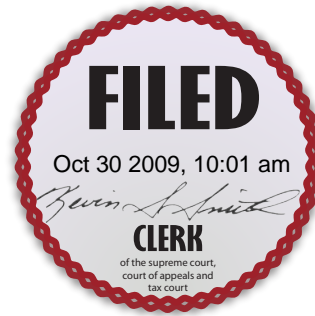


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DANA R. ZIRKEL,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 80A05-0905-CR-240

APPEAL FROM THE TIPTON CIRCUIT COURT
The Honorable Thomas R. Lett, Judge
Cause No. 80C01-0809-FB-219

October 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Dana Zirkel appeals his twenty-year sentence for Class B felony burglary. Because Zirkel's plea agreement included a waiver of his right to appeal his sentence, we affirm.

FACTS AND PROCEDURAL HISTORY

The State charged Zirkel with Class B felony burglary, Class B felony possession of a firearm by a serious violent felon, Class D felony attempted theft, Class D felony criminal recklessness, Class D felony residential entry, and Class A misdemeanor false informing. Zirkel agreed to plead guilty to Class B felony burglary in exchange for dismissal of the remaining charges. The trial court accepted the plea agreement. After hearing evidence, the court imposed a twenty-year sentence.

DISCUSSION AND DECISION

Zirkel argues the court should have found two significant mitigators supported by the record and his sentence is inappropriate in light of his offense and character. Pursuant to the terms of Zirkel's plea agreement, we may not address either argument.¹

"[A] defendant may waive the right to appellate review of his sentence as part of a written plea agreement." *Creech v. State*, 887 N.E.2d 73, 75 (Ind. 2008).

Zirkel's plea agreement provided:

3. The Defendant knowingly, intelligently and voluntarily waives the right to challenge the trial court's finding and balancing of

¹ We are somewhat surprised Zirkel's waiver was not acknowledged on appeal by either the State or Zirkel's counsel, who signed the plea agreement as trial counsel.

mitigating and aggravation factors and further waives the right to have the Court of Appeals review the sentence herein under Indiana Appellate Rule 7 (B).

4. The Defendant knowingly, intelligently and voluntarily waives the right to challenge the sentence herein on the basis that it is erroneous.

(App. at 18.) Accordingly, Zirkel waived his right to appellate review. *See Creech*, 887 N.E.2d at 77.

“A plea agreement is contractual in nature, binding the defendant, the state, and the trial court, once the judge accepts it.” *St. Clair v. State*, 901 N.E.2d 490, 492 (Ind. 2009). Zirkel has not argued the written plea agreement inaccurately reflects his agreement. *See, e.g., Ricci v. State*, 894 N.E.2d 1089, 1093-94 (Ind. Ct. App. 2008) (written waiver of right to appeal sentence was not knowingly entered when trial court told defendant *at the plea hearing* that he had a right to appeal, and neither defense counsel nor prosecutor corrected the court), *trans. denied* 898 N.E.2d 1232 (Ind. 2008).² Neither has Zirkel argued his plea agreement should be set aside because it was unknowingly entered. Therefore, we affirm.

Affirmed.

CRONE, J., and BROWN, J., concur.

² Because Zirkel has not provided a transcript of his change of plea hearing, we will not presume the trial court inaccurately advised Zirkel during that hearing. We note the trial court erroneously stated at the end of the sentencing hearing that Zirkel could appeal his sentence and erroneously appointed counsel for that purpose, but those errors by the trial court were too late to alter Zirkel’s waiver. *See Creech*, 887 N.E.2d at 77 (“By the time the trial court erroneously advised Creech of the possibility of appeal, Creech had already pled guilty and received the benefit of his bargain.”).