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IN THE COURT OF APPEALS OF INDIANA

JAMES C. FRAZEE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 15A01-0908-CR-413
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DEARBORN SUPERIOR COURT
The Honorable Jonathan N. Cleary, Judge
Cause No. 15D01-0809-FD-202

November 10, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant James C. Frazee appeals his two-year sentence for Operating a Vehicle While Intoxicated ("OWI") with a Prior Conviction of OWI, as a Class D felony,[1] alleging that his sentence is inappropriate. We affirm.

Facts and Procedural History

Pursuant to a plea agreement, Frazee pled guilty to Operating a Vehicle While Intoxicated with a Prior Conviction, as a Class D felony, on April 7, 2009. In exchange, the State agreed to dismiss the remaining charges of Operating a Vehicle While Intoxicated, Endangering a Person, as a Class A misdemeanor,[2] Operating a Vehicle with a BAC of .08 or Higher, a Class C misdemeanor,[3] Open Alcohol Container, a Class C infraction,[4] Driving Left of Center,[5] and Driving Over Maximum Speed Limit.[6] The agreement also provided that sentencing would be left to the discretion of the trial court. After a sentencing hearing, the trial court sentenced Frazee to two years imprisonment at the Indiana Department of Correction. Frazee now appeals.

Discussion and Decision

Frazee alleges that his sentence is inappropriate.[7] In Reid v. State, our Supreme Court

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[1] Ind. Code § 9-30-5-3.
[2] Ind. Code § 9-30-5-2(b).
[3] Ind. Code § 9-30-5-1(a).
[4] Ind. Code § 9-30-15-3.
[5] Ind. Code § 9-21-8-2.
[6] Ind. Code § 9-21-5-2.
[7] While it is clear from the issue statement and the standard of review in his appellate brief that Frazee intended to propound a 7(B) argument, the argument is phrased in terms of whether the trial court properly considered certain evidence as aggravators and mitigators. In Anglemyer v. State, our Supreme Court clearly expressed

reiterated the standard by which appellate courts independently review criminal sentences:

> Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence through Indiana Appellate Rule 7(B), which provides that a 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. The burden is on the defendant to persuade us that his sentence is inappropriate.

Reid v. State, 876 N.E.2d 1114, 1116 (Ind. 2007) (internal quotation and citations omitted).

More recently, the Court reiterated that "sentencing is principally a discretionary function in which the trial court's judgment should receive considerable deference." Cardwell v. State, 895 N.E.2d 1219, 1222 (Ind. 2008). Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented. See id. at 1224. One purpose of appellate review is to attempt to "leaven the outliers." Id. at 1225. "[W]hether we regard a sentence as appropriate at the end of the day 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." Id. at 1224.

Frazee pled guilty to a Class D felony, which has a sentencing range of six months to three years, with one and one-half years as the advisory. See Ind. Code § 35-50-2-7. The trial court sentenced Frazee to two years executed.

As for the nature of the offense, an intoxicated Frazee was on U.S. 50 driving his car,

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that there are two separate claims by which a defendant can challenge his sentence: abuse of discretion and the independent review under 7(B) as to whether the sentence is inappropriate. See Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). These are separate, distinct arguments and the respective terminology should not be intermingled.

which was weaving within the driving lane.[8] At that time, Frazee had an alcohol concentration level of .11 grams of alcohol per 210 liters of breath. Frazee has a prior conviction for Operating a Vehicle while Intoxicated from 2004.

As to the character of the offender, Frazee's criminal history includes a significant number of convictions involving intoxication: Drinking in a Public Place (conviction from Kentucky), three separate instances of Public Intoxication, Driving While Under the Influence, and two instances of Operating a Vehicle While Intoxicated. Between the prior OWI offense and the current offense, Frazee was in counseling to address his alcohol abuse. However, at the beginning of 2008, Frazee failed to follow up with his therapy and relapsed, as evidenced by his arrest for the current offense on August 31, 2008.

While Frazee pled guilty to the current offense, he received the benefit of the dismissal of the remaining charges, consisting of a Class A misdemeanor, a Class C misdemeanor, and three traffic infractions. Although the State did not file a habitual substance offender allegation despite Frazee's criminal history supporting such, Frazee alleges that the charge bargaining that resulted in the plea agreement precluded the State from later filing the enhancement. Thus, Frazee concedes that the State's inability to file the enhancement was also a benefit of the plea agreement.

In light of the nature of the offense and the character of the offender, Frazee has not

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[8] The trial court also relied on the excessive speed at which Frazee was driving as well as his car going left of the center of the road. However, these facts support the traffic infractions that were dismissed pursuant to the plea agreement and cannot be used as aggravators. Roney v. State, 872 N.E.2d 192, 201 (Ind. Ct. App. 2007) (The trial court abused its discretion by finding the circumstances of the uncharged crimes to be aggravators and considering the factual circumstances supporting the potential charges.), trans. denied.

convinced this Court that his OWI sentence of two years is inappropriate.

Affirmed.

VAIDIK, J., and BRADFORD, J., concur.