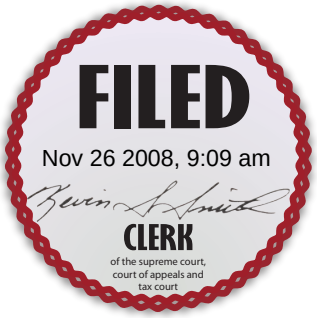

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IN THE
COURT OF APPEALS OF INDIANA

DAVID D. FOSTER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 28A01-0807-CR-319
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GREENE CIRCUIT COURT
The Honorable Erik C. Allen, Judge
Cause No. 28C01-0712-FB-203
28C01-0212-FB-164

November 26, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

David Foster appeals his sentence for Class D felony possession of methamphetamine. We affirm.

Issues

Foster raises two issues on appeal, which we restate as:

I. whether the trial court abused its discretion in sentencing him; and

II. whether his sentence is appropriate in light of the nature of the offense and his character.

Facts

Foster pled guilty to Class B felony dealing in a controlled substance on March 11, 2003. The trial court sentenced him to fourteen years, with four suspended to probation, and he was released from prison in June 2005. On October 23, 2007, the probation department filed a petition to revoke Foster's probation based on two positive tests for methamphetamine use. Foster tested positive a third time on December 18, 2007, and the State filed an amended petition to revoke probation that day.

The State filed separate charges against Foster on December 17, 2007, for Class B felony possession of methamphetamine and Class A misdemeanor possession of paraphernalia. Foster entered into a plea agreement with the State in which he pled guilty to the lesser offense of Class D felony possession and the misdemeanor charge was dismissed. He also admitted to the probation violation pursuant to the plea agreement. It provided that for his probation violation, the remaining two years of that sentence would

be reinstated to be served in the Department of Correction and served consecutive to the other sentence imposed.

On May 24, 2008, the trial court held a sentencing hearing. It sentenced Foster to two years executed for the Class D felony possession conviction, to be served consecutive to the two years of reinstated sentence for his probation violation. Foster appeals only the new two-year sentence for the Class D felony possession conviction.

Analysis

I. Abuse of Discretion

In reviewing a sentence imposed under the current advisory scheme, we engage in a four-step process. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). First, a trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal only for an abuse of discretion. Id. Third, the weight given to those reasons—the aggravators and mitigators—is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id.

The trial court issued reasonably detailed oral and written sentencing orders. It found that Foster had a substantial criminal history with a pattern of controlled substance-related offenses, and that he was on probation for a controlled substance offense as aggravating factors. It found as a mitigating factor that Foster pled guilty and was taking

responsibility for his actions. The trial court concluded that the aggravators outweighed the mitigators.

Foster argued that the trial court failed to find the following mitigators: the small amount of drugs involved; his history of steady employment; his service as a jail trustee; and the hardship to his ailing mother. Foster's attorney presented these factors to the trial court during the sentencing hearing. The trial court acknowledged that only a small amount of methamphetamine was involved, but reasoned that "having a small amount of residue . . . on a pen tube, well it's because you snorted or you smoked the rest of it." Tr. p. 68.

Although Foster briefly testified about his past jobs as a heavy machine operator and his union membership, his testimony included the fact that he was frequently laid off and was arrested before being called back on the job. Regular employment is not necessarily a significant mitigating factor. McKinney v. State, 873 N.E.2d 630, 646 (Ind. Ct. App. 2007), trans. denied. The trial court noted that Foster seemed like a "nice guy" who stayed employed, but it was not obligated to assess Foster's employment as a significant mitigating factor, especially when his employment history seemed spotty. Tr. p. 68.

As for Foster's service as a jail trustee while incarcerated, good behavior is expected from all inmates and the trial court did not abuse its discretion by not declaring such service as a mitigating factor. Finally, Foster did testify that he served as a caretaker for his ailing mother, but he also testified that he and his brother shared the duties. The trial court is not obligated to find that incarceration will result in undue hardship to

dependents. Roney v. State, 872 N.E.2d 192, 204 (Ind. Ct. App. 2007), trans. denied. The trial court did not abuse its discretion by not finding an undue hardship on Foster's dependents to be a mitigating factor.

The sentencing statement is adequate and the trial court did not abuse its discretion in selecting the applicable aggravators and mitigators. To the extent Foster argues that we should reweigh the aggravators and mitigators, we do not engage in reweighing these factors on appeal. Anglemyer, 868 N.E.2d at 491. The trial court did not abuse its discretion in sentencing Foster.

II. Appropriateness

Foster argues that his two-year sentence is inappropriate given the nature of the offense and his character. See Ind. Appellate Rule 7(B). Although Indiana Appellate Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id.

Foster contends that the amount of methamphetamine in his possession was so small that the nature of his offense does not warrant a two-year sentence. We realize that this offense is not an out of the ordinary or especially egregious drug offense. The advisory sentence for a Class D felony conviction is one and one-half years, and Foster received only an additional six months. See Ind. Code § 35-50-2-7. "[A] revision of a

sentence under Indiana Appellate Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of both the nature of his offenses and his character." Williams v. State, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008).

Foster's character does not warrant a reconsideration of the sentence. His lengthy criminal history includes prior convictions for possession of and dealing methamphetamine, the drug he was illegally possessing in the instant offense. Foster was on probation at the time of the offense. He accumulated several operating while intoxicated convictions and a felony conviction for nonsupport of a child. Foster's criminal history also reveals past failures at probation. Although many of his convictions are linked to his substance abuse issues, Foster has failed to successfully complete a treatment program. We cannot conclude that Foster's two-year sentence is inappropriate in light of his character.

Conclusion

The trial court did not abuse its discretion in sentencing Foster. The two-year sentence is appropriate in light of the nature of the offense and his character. We affirm.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.