

MEMORANDUM DECISION

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

Richard Allen Byrd,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 19, 2021

Court of Appeals Case No.
21A-CR-637

Appeal from the Howard Circuit
Court

The Honorable Lynn Murray,
Judge.

Trial Court Cause Nos.
34C01-1901-F4-191, 34C01-1903-
F4-688

Altice, Judge.

Case Summary

[1] Richard Byrd pled guilty, under two separate cause numbers, to sexual battery as a Level 6 felony. The trial court sentenced him to an aggregate sentence of five years of incarceration with three of those years suspended to supervised probation. On appeal, Byrd argues that the sentence is inappropriate. Specifically, he argues that the executed portion of his sentence should be served on in-home detention and/or work release.

[2] We affirm.

Facts¹ & Procedural History

[3] Byrd's wife, Rebecca (Beckie) Byrd, operated a daycare out of their home. On October 3, 2018, L.J., a five-year-old child, told her father that earlier that day Byrd had touched her "privates." *Appendix Vol. 2* at 174. L.J. had been sleeping alone in a bedroom at the Byrd residence before school when she awoke to Byrd touching her "private part" underneath her clothing. *Id.* at 178. Byrd told L.J. to be quiet and continued touching her until he heard a car door outside. The State charged Byrd with one count of Level 4 felony child molesting under Cause No. 34C01-1903-F4-668 on March 5, 2019.

[4] After the allegations against Byrd arose, another parent decided to no longer use Beckie to care for her six-year-old daughter, A.M. On December 17, 2018, A.M. told her mother that Byrd had touched her previously as well. A.M. explained that she was sitting on Byrd's lap watching television with some of the other children

¹ Byrd's four-sentence statement of the facts section in his appellate brief is woefully lacking. It leaves out several pertinent facts relevant for our review and overstates one of the child victim's ages.

when Byrd put his hand down her pants, into her underwear, and touched her. After telling Byrd to stop two separate times, A.M. got off Byrd's lap when he touched her a third time. On January 16, 2019, the State charged Byrd with one count of Level 4 felony child molesting under Cause No. 34C01-1901-F4-191.

[5] On August 7, 2020, the parties filed a plea agreement in which Byrd pled guilty to a lesser charge of Level 6 felony sexual battery under both cause numbers. The terms of the agreement were that Byrd would serve consecutive terms of thirty months with up to one year executed for each cause and the remainder of the sentences to be served on supervised probation.

[6] On March 17, 2021, the trial court accepted Byrd's guilty plea. After considering the mitigating and aggravating circumstances at the sentencing hearing on March 24, 2021, the trial court sentenced Byrd for each offense to thirty months at the Howard County Criminal Justice Center with one year executed followed by eighteen months of supervised probation. The trial court ordered the sentences to be served consecutively. Byrd now appeals.

Discussion and Decision

[7] Byrd argues that his sentence is inappropriate. We may revise a sentence authorized by statute if, after due consideration of the trial court's decision, we find the sentence inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). Trial courts are allowed to tailor an appropriate sentence based on the circumstances presented, and the trial court's judgment "should receive considerable deference." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). This

deference to the trial court's sentencing "prevail[s] 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, 112 (Ind. 2015).

[8] In his appeal, Byrd does not challenge the length of his sentence, but rather challenges only the trial court's decision to order the executed term be served in jail rather than in community corrections. Byrd argues that he should be released from incarceration to serve the rest of his term either on work release or in-home detention.

[9] "The place that a sentence is to be served is an appropriate application of our review and revise authority." *Biddinger v. State*, 868 N.E.2d 407, 414 (Ind. 2007). However, "we note that it will be quite difficult for a defendant to prevail on a claim that the placement of his or her sentence is inappropriate." *Fonner v. State*, 876 N.E.2d 340, 343 (Ind. Ct. App. 2007). The question under App. R. 7(B) is whether the sentence imposed is inappropriate, not whether another sentence is more appropriate. *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008).

[10] "The nature of the offenses is found in the details and circumstances of the commission of the offenses and the defendant's participation." *Croy v. State*, 953 N.E.2d 660, 664 (Ind. Ct. App. 2011). Byrd does not offer any insight as to why he believes his sentence is inappropriate in this regard, and he provides absolutely no

discussion regarding the circumstances of his offenses.² In its oral sentencing statement, the trial court found the facts to be “particularly egregious” and we agree. *Transcript* at 18. Byrd violated his position of trust and took advantage of two vulnerable girls of very tender age. In A.M.’s case, Byrd put his hands down her pants in a room full of other children and continued to do so even after she told him to stop. In L.J.’s case, Byrd snuck into a room while she was sleeping, touched her under her clothing, and told L.J. to be quiet when she awoke while being molested. He stopped only upon hearing a car door outside. The nature of Byrd’s offenses against the two young victims at his wife’s daycare make his sexual battery offenses particularly troubling.

[11] Though Byrd does not directly address his character, he generally notes, with no citation to authority or argument, that he is fifty-seven years old, was employed and economically self-sufficient at the time of sentencing, has “only fair” physical health, and pled guilty. *Appellant’s Brief* at 9. It is unclear to us what Byrd’s age or health issues have to do with his character, and his employment, which he obtained about a year after the instant offenses, does not seem particularly mitigating to us under the circumstances. Finally, we do not find Byrd’s guilty plea substantially mitigating as he gained an enormous benefit by having the Level 4 felony child molesting charges exchanged for Level 6 felony sexual battery convictions. As a result, his sentencing

² As we have too many times in the past, we remind appellate counsel Donald E.C. Leicht that his failure to provide cogent argument for his clients on appeal may result in waiver. Here, Leicht has made little to no attempt to apply the App. R. 7(B) standard to the facts of this case. We would be well within our right to find his clearly “perfunctory” sentencing argument waived, but we exercise our discretion to address the merits of the appeal. See *Williams v. State*, 631 N.E.2d 485, 489 (Ind. 1994) (finding “perfunctory” sentencing claim waived for failure to present cogent argument, supporting reasons, or citations to relevant authorities).

exposure was reduced by nineteen years³ and his executed time was capped at only two years.

[12] Given the nature of Byrd's offenses and his character, serving the executed portion of his sentence in jail instead of community corrections is not inappropriate. Thus, we affirm Byrd's sentence.

[13] Judgment affirmed.

Bradford, C.J. and Robb, J., concur.

³ The sentencing range for a Level 6 Felony is six months to two and one-half years, whereas the range for Level 4 felony convictions is two to twelve years. Ind. Code §§ 35-50-2-7, 5.5.