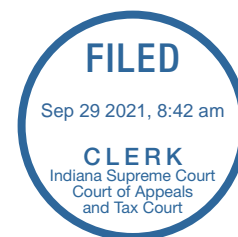


## MEMORANDUM DECISION

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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### ATTORNEY FOR APPELLANT

Justin R. Wall  
Wall Legal Services  
Huntington, Indiana

### ATTORNEYS FOR APPELLEE

Theodore E. Rokita  
Attorney General of Indiana  
  
Courtney Staton  
Deputy Attorney General  
  
Whitley Pannell  
Certified Legal Intern  
  
Trent Bennett  
Certified Legal Intern  
Indianapolis, Indiana

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## IN THE COURT OF APPEALS OF INDIANA

Korie Shantel Miller,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

September 29, 2021

Court of Appeals Case No.  
21A-CR-718

Appeal from the Wells Circuit  
Court

The Honorable Kenton W.  
Kiracofe, Judge

Trial Court Cause No.  
90C01-1810-F2-9

**Brown, Judge.**

[1] Korie Shantel Miller appeals her convictions and sentence for dealing in a narcotic drug as a level 2 felony and dealing in a Schedule IV controlled substance as a level 6 felony. Miller claims the trial court erred by trying her in absentia and that her sentence is inappropriate. We affirm.

### ***Facts and Procedural History***

[2] After two controlled buys involving Miller and a confidential informant on August 17, 2018, and September 4, 2018, the State charged Miller on October 19, 2018, with Count I, dealing in a narcotic drug as a level 2 felony and Count II, dealing in a Schedule IV controlled substance as a level 6 felony. The trial court originally scheduled a two-day jury trial beginning July 9, 2019. At the final pretrial conference on June 12, 2019, Miller told the court that she intended to hire private counsel, and the court vacated her trial date. At a July 12, 2019 status hearing, Miller told the court she was unable to retain private counsel, and the court reappointed her public defender and set the matter for a status hearing on August 14, 2019.

[3] Miller was present in court with her counsel on August 14, 2019, and during that hearing the court scheduled Miller's jury trial for November 19, 2019, and a final pretrial conference for October 16, 2019. Miller acknowledged the trial date, and the court advised her to keep in contact with her counsel.

[4] On October 16, 2019, the court held the final pretrial conference, but Miller did not appear. Miller's counsel stated that Miller "does know about the jury trial; that is something that we were preparing for, and I know from speaking with

her that she does want to go to jury trial” and Miller was “planning on confirming that jury trial date today, so that is – that was our plan, and I have reviewed that plan with my client.” Transcript Volume 2 at 47. Miller’s counsel also requested that a warrant for Miller’s arrest not be issued at that time. The court then confirmed the dates of Miller’s jury trial and took an arrest warrant under advisement on the condition that Miller appear before the court on October 21, 2019, and it also noted that if Miller failed to appear the trial would proceed in her absence.

[5] On October 18, 2019, the State filed a motion to revoke Miller’s bail because she had been charged with domestic battery as a class A misdemeanor in Adams County, and the court granted the State’s motion and issued a warrant for Miller’s arrest. On October 21, 2019, the court held a hearing at which Miller did not appear, and the court again issued a warrant for her arrest. On November 13, 2019, Miller’s counsel filed a motion to continue the jury trial scheduled for November 19 and 20, 2019, which the court denied.

[6] On November 19, 2019, Miller failed to appear for the first day of her trial. Her counsel renewed her request to continue the trial, which the court denied, reasoning that Miller had waived her right to be present because she was present, when the court scheduled it, and she had been specifically instructed to keep in contact with her counsel at that time. Miller was tried in absentia on November 19 and 20, 2019, and the jury found her guilty as charged.

- [7] Miller was arrested on the bench warrant on March 16, 2021, and she was brought before the trial court on the next day. The court informed Miller that a bench warrant had been issued for her arrest, she had been tried in absentia, and the jury had returned a verdict of guilty on both counts. Miller told the court that she understood why she was being held and asked, “to be sentenced as soon as possible.” Transcript Volume 4 at 76. Miller also stated to the court that she had “been running from this for a long time,” had “missed a mother and a son’s funeral,” and “would like to get this behind” her. *Id.* The court ordered a presentence investigation report (“PSI”). The Wells County Probation Department performed a screening for Purposeful Incarceration, which indicated that Miller “may be a ‘Good Candidate’ for the Purposeful Incarceration program.” Appellant’s Confidential Appendix Volume II at 189.<sup>1</sup>
- [8] On April 15, 2021, the court held the sentencing hearing. Miller, who was thirty-three years old at the time of the hearing, testified that she was a drug addict but had never been given the opportunity to participate in any rehabilitation programs to address her substance abuse issues. Miller also

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<sup>1</sup> Purposeful Incarceration is “a partnership between the Indiana court system and the Indiana Department of Correction (IDOC)” and “ is a sentencing recommendation that judges can use in situations where the judge is committed to modifying a sentence upon the offender’s successful completion of substance abuse treatment.” See <https://www.in.gov/idoc/files/Purposeful-Incarceration-FAQ-for-Judges-updated-6.9.20.pdf> [<https://perma.cc/Y538-9F52>]. The trial judge recommending Purposeful Incarceration must indicate on the abstract of judgment or sentencing order that after successful completion of the recommended substance abuse program, the court will consider modification of the offender’s sentence. *Id.* Some form of the following language must also be used on the abstract of judgment or sentencing order: “Defendant is recommended for Purposeful Incarceration. Upon successful completion of the clinically appropriate substance abuse treatment program as determined by the IDOC, the court will consider a modification to this sentence.” *Id.*

testified that for the past year she had been in Muncie, Indiana, taking care of her two oldest children.<sup>2</sup> She requested Purposeful Incarceration and probation.

[9] The prosecutor argued that, because Miller’s convictions were both controlled buys her sentences had to be concurrent, and that her prior criminal history, pending criminal charges, violations of probation, parole, or pretrial release were aggravating factors.<sup>3</sup> The prosecutor also contended that Miller’s case was not a drug possession case but was a dealing charge, noted that according to her PSI she had not held a job since 2015, and recommended a sentence of at least twenty-four years with no probation. The prosecutor also disputed that Purposeful Incarceration was appropriate for Miller because “the primary reason for not giving her Purposeful Incarceration is that – that this was a dealing for profit: it wasn’t a possession; it wasn’t an addiction. It was a c[r]ime of dealing.” Transcript Volume 4 at 109.

[10] Miller’s counsel disputed the prosecutor’s characterization that Miller was dealing for profit, contending that “she’s dealing to get drugs. She wasn’t profiting the money, putting it in a bank account; she doesn’t have a ton of money sitting anywhere.” *Id.* Her counsel acknowledged that “[s]he was

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<sup>2</sup> Miller had two younger children whom she had given up for adoption once the Department of Child Services filed termination petitions in those cases.

<sup>3</sup> When the prosecutor questioned Miller about prior cases in which she had been placed on probation and noted that the PSI showed she had five probation violations filed against her, Miller disputed that five probation violations had been filed against her, stating she “failed probation – um – a drug screen for probation one time.” Transcript Volume 4 at 93.

dealing. She was selling her prescription drugs, and then she was going and getting meth and getting high on methamphetamine.” *Id.* Her counsel contended that Miller was a “prime candidate” for Purposeful Incarceration because she had not utilized prior services through probation or the Department of Child Services because she was “too high to take advantage of them.” *Id.* at 110. In mitigation, Miller’s counsel argued that the crime was nonviolent and Miller had a changed attitude as to “accepting her wrongdoing and accepting the mistakes that she has made” and had acknowledged that she was a drug addict. *Id.* at 111. Her counsel further argued that Miller’s criminal history was minimal and should not be used as an aggravator and that her new pending criminal charges also should not be used in aggravation. Miller’s counsel noted that this was Miller’s “first higher-level charge,” she has two children who are still in her life, and the adoptive parents of her other two children are allowing Miller to remain in their lives. *Id.* at 112. She also urged the court to consider the mitigating factors, impose a sentence below the seventeen-year advisory sentence, and allow Miller to participate in Purposeful Incarceration.

[11] The court noted it had reviewed Miller’s PSI along with the probable cause affidavit, presided over the jury trial in the matter, took judicial notice of Miller’s two DCS cases over which it had also presided, and reviewed the sentencing criteria set forth in Ind. Code § 35-38-1-7.1 As aggravating factors, the court identified Miller’s history of criminal behavior, and her violation of the conditions of her probation and pretrial release, including her failure to

appear for the trial in this case. With respect to Miller's statements that she had not been offered substance abuse programs or services, the court stated:

[F]or her to come into court today and say she has never been offered any programs or services is absolutely a blatant lie. I presided over her CHINS cases; I know exactly what was done in those cases. In the – in the reports that I read [] to her was the – the type of testimony throughout that CHINS case that [Miller] was refusing to participate and refusing to make any changes in her life. And I would note that those CHINS cases preceded her dealing in this case. And I was looking at the dates . . . the date of the offenses here are alleged . . . were proven to be . . . in August of '18 and September of '18; that's the same timeframe that [Miller] was failing to appear for substance abuse treatment; failing to appear for . . . services; case management service; and – and really falling apart in her DCS case. For her to say she had no access to services, is – is just a blatant lie, and it shades all of her comments then today regarding her real motivation to get treatment, and to do things . . . and to change her life.

*Id.* at 115. As to Purposeful Incarceration, the court acknowledged that there was a “reasonable argument” that could be made for Miller's participation in that program, but that Miller was “probably, at best, a cautionary candidate” noting that Miller was dealing and the probation department's recommendation that she was a good candidate was based on her own statements. *Id.* The court also noted that “[s]paces in those programs are limited . . . there are a number of offenders . . . who have shorter periods of incarceration that could use those services . . . to prepare them for reentry.” *Id.* at 116. The court did not recommend Miller for Purposeful Incarceration. It found there were no mitigating factors, the aggravating factors justified an enhanced sentence, and

agreed with the prosecutor's recommendation of twenty-four years executed as "an appropriate sentence" for Miller. *Id.* at 117. The court imposed an executed sentence of twenty-four years on Count I and a two-and-one-half year concurrent sentence on Count II.

### *Discussion*

#### I.

[12] Miller first argues the court erred by trying her in absentia and not providing her with an opportunity to explain her absence. Both the federal and Indiana constitutions afford defendants in a criminal proceeding the right to be present at all stages of their trial. U.S. Const. amend. VI; Ind. Const. art. 1, § 13. However, a defendant may be tried in absentia if the trial court determines that the defendant knowingly and voluntarily waived that right. *Jackson v. State*, 868 N.E.2d 494, 498 (Ind. 2007) (citations omitted). The Indiana Supreme Court has explained:

When a defendant fails to appear for trial and fails to notify the trial court or provide it with an explanation of his absence, the trial court may conclude the defendant's absence is knowing and voluntary and proceed with trial when there is evidence that the defendant knew of his scheduled trial date.

*Id.* (quotation and citations omitted). The best evidence that a defendant knowingly and voluntarily waived his right to be present at trial is the defendant's presence in court on the date the matter is set for trial. *Id.* (quotation omitted).



[13] However, a defendant who has been tried in absentia must be afforded an opportunity to “to explain [her] absence and thereby rebut the initial presumption of waiver.” *Brown v. State*, 839 N.E.2d 225, 227 (Ind. Ct. App. 2005) (internal quotation marks omitted), *trans. denied*. This does not require a sua sponte inquiry; rather, the defendant cannot be prevented from offering an explanation. *Soliz v. State*, 832 N.E.2d 1022, 129 (Ind. Ct. App. 2005) (citation omitted), *trans. denied*. On appeal, we consider the entire record to determine whether the defendant voluntarily, knowingly, and intelligently waived her right to be present at trial. *Id.*

[14] There is no dispute that Miller knew of her trial date but did not appear for her trial. We therefore presume that she waived her right to be tried in person. *See Jackson*, 868 N.E.2d at 498. Miller contends that she was not given an opportunity to explain her absence to the court and that there is no basis in the record to evaluate the reason for her absence at trial and whether the absence was voluntary. Contrary to Miller’s argument, the court provided her with an opportunity to explain her absence. The record reveals that at the March 17, 2021 hearing following Miller’s arrest, Miller told the court that she understood why she was being held, and she asked, “to be sentenced as soon as possible.” Transcript Volume 4 at 76. Miller also stated that she had “been running from this for a long time” and “would like to get this behind” her. *Id.* We cannot say that Miller was prevented from providing an explanation for her absence at trial nor has she rebutted the presumption of waiver already established by her knowledge of the trial date and failure to appear. We conclude Miller

knowingly, voluntarily, and intelligently waived her right to be present at trial. The trial court did not err by trying her in absentia.

## II.

- [15] Miller also argues that her sentence is inappropriate in light of the nature of her offenses and her character. She contends that the nature of the offenses is “not particularly egregious” because they “essentially have no victim, other than the general public and are not crimes of violence” and, while the offenses involved drug dealing, the transactions involved \$185 in total. Appellant’s Brief at 20. She contends that her offenses reflected her drug problem and that she was recommended for Purposeful Incarceration which the court did not order.
- [16] Ind. Appellate Rule 7(B) provides that we “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).
- [17] Ind. Code § 35-50-2-4.5 provides that a person who commits a level 2 felony shall be imprisoned for a fixed term of between ten and thirty years, with an advisory sentence of seventeen and one-half years. Ind. Code § 35-50-2-7 provides that a person who commits a level 6 felony shall be imprisoned for a fixed term of between six months and two and one-half years, with an advisory sentence of one year.

[18] Our review of the nature of the offenses reveals that Miller sold approximately 10.64 grams of Hydrocodone and 2.48 grams of Xanax for a total of \$185 in two controlled buys to a confidential informant.

[19] Our review of Miller's character reveals that she has no history of juvenile adjudications, and her adult criminal history includes a 2013 conviction for class D felony theft, a 2013 conviction for class A misdemeanor conversion, two convictions in 2015 for level 6 felony theft, and a 2016 conviction for level 6 felony forgery. At the time of her sentencing hearing, she also had four pending criminal cases under separate cause numbers for: (1) domestic battery as a class A misdemeanor; (2) failure to appear as a level 6 felony; (3) identity deception as a level 6 felony and false informing as a class A misdemeanor; and (4) possession of methamphetamine as a level 6 felony and false informing as a class A misdemeanor. In addition to violating the terms of her pretrial release by failing to appear for trial in this matter, she had also been placed on probation on multiple occasions but had her probation revoked and had not taken advantage of prior substance abuse services that were offered to her during her case involving DCS.

[20] The PSI indicates that Miller reported she first experimented with marijuana at the age of eighteen and used it daily until March 1, 2021, abused heroin for eight years and last used it in 2015, experimented with prescription medications at the age of twenty-eight and used them daily until 2019, and experimented with methamphetamine at age of the thirty-one and used it several times per week until February 2021. Regarding the availability of prior substance abuse

services, the court noted that Miller’s offenses occurred during “the same timeframe that [she] was failing to appear for substance abuse treatment; failing to appear for . . . services; case management service; and – and really falling apart in her DCS case.” Transcript Volume 4 at 115.

[21] Miller concedes that “any arguments that [she] may make for lowering this sentence may not be supported by the record before this Court” but asks us to modify her sentence to allow her to participate in Purposeful Incarceration. Appellant’s Brief at 22. Here, the court stated that it was not recommending Miller for Purposeful Incarceration, explaining that she was “at best a cautionary candidate . . . she was dealing,” and further that given the length of time Miller was facing for the conviction of a level 2 felony offense “participation in [Purposeful Incarceration] will be better served . . . later in her period of incarceration” to help with reentry. Transcript Volume 4 at 115-116. We cannot say that reversal is warranted on this basis.<sup>4</sup>

[22] After due consideration, we cannot say that Miller has met her burden of establishing that her sentence is inappropriate in light of the nature of the offenses and her character.

[23] For the foregoing reasons, we affirm the trial court.

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<sup>4</sup> We note that, with DOC approval, Miller could participate in Purposeful Incarceration, and could petition the court to consider a sentence modification following successful completion of the program.

[24] **Affirmed.**

Najam, J., and Riley, J., concur.