MEMORANDUM DECISION

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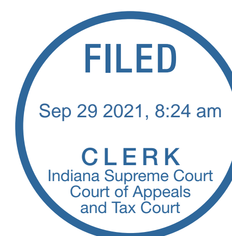

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IN THE

COURT OF APPEALS OF INDIANA

Eric Nolan Duncan, Jr.,

Appellant-Defendant,

v.

State of Indiana,

Appellee-Plaintiff,

September 29, 2021

Court of Appeals Case No. 21A-CR-778

Appeal from the Lake Superior Court

The Honorable Samuel L. Cappas, Judge

Trial Court Cause Nos. 45G04-1811-F3-123 45G04-2002-F6-381

Robb, Judge.

Case Summary and Issue

[1] Eric Duncan pleaded guilty to intimidation, a Level 5 felony, and resisting law enforcement, a Class A misdemeanor. The trial court sentenced him to six years to be served in the Indiana Department of Correction ("DOC") for the intimidation conviction followed by one year in Lake County Community Corrections for the resisting law enforcement conviction. Duncan now appeals his sentence, raising one issue for our review which we restate as: whether his sentence is inappropriate in light of the nature of his offense and his character. Concluding his sentence is not inappropriate, we affirm.

Facts and Procedural History

[2] On November 15, 2018, Duncan and T.W., the mother of Duncan's children, got into an altercation at his home in Gary, Indiana. Duncan pushed T.W. and began kicking and punching her. Duncan's grandmother, who was in the home, told him several times to stop but he would not. During the incident Duncan pointed a rifle at T.W. and threatened to kill her. While this was occurring, Duncan and T.W.'s one-year-old child kept coming into the room. When Duncan finally left T.W. alone and went to sleep, T.W. snuck out of the home with the help of Duncan's grandmother. After getting out of the house, T.W. went to a hospital in Chicago. T.W. told police that similar incidents have occurred in the past, including Duncan striking her with weapons.

[3] As a result of this incident, the State charged Duncan with criminal confinement as Level 3 and Level 6 felonies, intimidation as Level 5 and Level 6 felonies, domestic battery as a Level 6 felony and a Class A misdemeanor, and pointing a firearm, a Class A misdemeanor.[1]

[4] On February 9, 2020, Officer Perez of the Lake County Police Department was patrolling when he observed a silver sedan, driven by Duncan, fail to make a complete stop at a stop sign. Officer Perez pulled the vehicle over and attempted to conduct a traffic stop but as he got out of his cruiser and walked toward Duncan's vehicle, Duncan drove away. Officer Perez returned to his cruiser and gave chase. In an attempt to escape from Officer Perez, Duncan drove recklessly by exceeding the speed limit, driving into oncoming traffic, and disregarding all traffic control signals. Duncan eventually lost control of his vehicle and crashed into a pole. Duncan then exited the vehicle and took off running. Officer Perez gave chase on foot until Duncan finally came to a stop in an alley and was arrested. While searching the vehicle, police found a box of live ammunition.

[5] Subsequently, the State charged Duncan with resisting law enforcement, a Class A misdemeanor; reckless driving, a Class C misdemeanor; and failure of

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[1] These crimes were charged in cause number 45G04-1811-F3-000123 ("Cause #123").

duty, a Class B misdemeanor.[2] This incident occurred while Duncan was out on bond for the November 2018 incident.

[6] On May 2, 2020, Duncan was involved in an altercation during which he hit his girlfriend with a handgun and fired the weapon several times. The State then charged Duncan with domestic battery by means of a deadly weapon, intimidation, and criminal recklessness, all Level 5 felonies, and domestic battery as a Level 6 felony and Class A misdemeanor.[3]

[7] On February 17, 2021, Duncan pleaded guilty to intimidation in Cause #123 and resisting law enforcement in Cause #381. In return for his plea, the State dismissed all other charges against Duncan in Cause #123 and Cause #381 and dismissed Cause #203 in its entirety. The plea agreement did not dictate sentence length but did stipulate that the sentences for Cause #123 and Cause #381 would be consecutive because Duncan was out on bond for Cause #123 when the offense in Cause #381 was committed. The trial court found Duncan's age (twenty-one at the time of sentencing), his multiple failed attempts at rehabilitation, his two children, and his guilty plea to be mitigating factors. However, the trial court gave these factors little weight, finding that Duncan received a substantial benefit by pleading guilty, has failed to pay court ordered child support, and has had substantial contacts with the juvenile court. As aggravating factors, the trial court found that Duncan has a lengthy criminal

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[2] These crimes were charged in cause number 45G04-2002-F6-000381 ("Cause #381").

[3] These crimes were charged in cause number 45G04-2005-F5-000203 ("Cause #203").

history and numerous contacts with the criminal justice system. Specifically, the trial court highlighted his history of domestic abuse, that five of Duncan's cases involved handguns when he does not have a license to carry a gun, that he committed five offenses while on bond, and the circumstances of his resisting law enforcement offense.

[8] The trial court then sentenced Duncan to six years for intimidation to be executed in the DOC and one year for resisting law enforcement to be served consecutively in community corrections. Duncan now appeals.

Discussion and Decision

I. Standard of Review

[9] Duncan argues that the "maximum allowable seven-year aggregate sentence was inappropriate in light of the nature of the offenses and Duncan's character." Brief of the Appellant at 7. Indiana Appellate Rule 7(B) permits us to revise a sentence "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." Sentencing is "principally a discretionary function" of the trial court to which we afford great deference. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). "Such deference should prevail unless overcome by compelling evidence portraying in a positive light the nature of the offense . . . and the defendant's character[.]" *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[10] The defendant carries the burden of persuading us that the sentence imposed by the trial court is inappropriate, *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006), and we may look to any factors appearing in the record in making such a determination, *Reis v. State*, 88 N.E.3d 1099, 1102 (Ind. Ct. App. 2017). The question under Rule 7(B) is "not whether another sentence is *more* appropriate; rather, the question is whether the sentence imposed is inappropriate." *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008). "The principal role of appellate review should be to attempt to leaven the outliers, . . . not to achieve a perceived 'correct' result in each case." *Cardwell*, 895 N.E.2d at 1225.

II. Inappropriate Sentence

A. Nature of the Offense

[11] Our analysis of the "nature of the offense" portion of Rule 7(B) review begins with the advisory sentence. *Clara v. State*, 899 N.E.2d 733, 736 (Ind. Ct. App. 2009). The advisory sentence is the starting point selected by the legislature as an appropriate sentence for the crime committed. *Childress*, 848 N.E.2d at 1081. Duncan pleaded guilty to a Level 5 felony and a Class A misdemeanor. A person who commits a Class A misdemeanor "shall be imprisoned for a fixed term of not more than one (1) year[.]" Ind. Code § 35-50-3-2. And a person who commits a Level 5 felony "shall be imprisoned for a fixed term of between one (1) and six (6) years, with the advisory sentence being three (3) years." Ind. Code § 35-50-2-6(b). The trial court sentenced Duncan to six years in the DOC for intimidation, a Level 5 felony, and one year in community corrections for resisting arrest, a Class A misdemeanor, to be served consecutively.

[12] Duncan concedes the nature of his offense justifies the one-year sentence for resisting law enforcement. *See* Br. of the Appellant at 8. However, he argues that his conduct with respect to the intimidation conviction fails to "constitute 'the worst of the worst' for which the maximum sentence should be reserved[.]"[4] *Id.* at 9. The nature of the offense is found in the details and circumstances of the offense and the defendant's participation therein. *Lindhorst v. State*, 90 N.E.3d 695, 703 (Ind. Ct. App. 2017). When determining whether a defendant's sentence that deviates from the advisory sentence is inappropriate, we consider whether there is anything more or less egregious about the offense as committed by the defendant that distinguishes it from the typical offense accounted for by our legislature when it set the advisory sentence. *Moyer v. State*, 83 N.E.3d 136, 142 (Ind. Ct. App. 2017), *trans. denied*.

[13] Here, Duncan threatened to kill T.W. while pointing a rifle at her. Duncan did not have a license for the firearm and the rifle essentially operated as an automatic weapon because of a bump stock modification. Duncan also battered T.W. during this incident, punching and kicking her. Duncan and T.W.'s one-year-old child witnessed the incident. Further, Duncan refused to allow T.W. to

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[4] The State argues that "[w]hile Duncan was sentenced to seven years, the trial court ordered one of those years to be served on community corrections" and therefore, he did not receive the maximum sentence. Brief of Appellee at 12. In *Davidson v. State*, our supreme court declined to constrict "appellate courts to consider only the appropriateness of the aggregate length of the sentence without considering also whether a portion of the sentence is ordered suspended or otherwise crafted using any of the variety of sentencing tools available to the trial judge." 926 N.E.2d 1023, 1025 (Ind. 2010). However, we need not determine whether Duncan's sentence, which was suspended in part to community corrections, constitutes the maximum because we find sufficient basis for the sentence whether it was the maximum or not.

leave his home and she was required to sneak out. The circumstances surrounding Duncan's offense are much greater than those required to prove intimidation and as such, his sentence is not inappropriate.

B. Character of the Offender

[14] We conduct our review of a defendant's character by engaging in a broad consideration of his or her qualities. *Moyer*, 83 N.E.3d at 143. A defendant's life and conduct are illustrative of his or her character. *Morris v. State*, 114 N.E.3d 531, 539 (Ind. Ct. App. 2018), *trans. denied*. And a defendant's criminal history is one relevant factor in analyzing his or her character, the significance of which varies based on the "gravity, nature, and number of prior offenses in relation to the current offense." *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007).

[15] Duncan has had fifteen contacts with the criminal justice system in the past ten years, he has committed five offenses while on bond, and five of his cases have involved a handgun which he does not have a license to carry. Duncan argues his prior contacts with law enforcement do not support his sentence given that the present conviction is his first felony. However, "[e]ven a minor criminal record reflects poorly on a defendant's character[.]" *Reis*, 88 N.E.3d at 1105. Duncan's criminal history is particularly significant given its relation in gravity and nature to his intimidation conviction, and the sheer number of his previous convictions and contacts with the criminal justice system is extensive, especially given his age.

[16] Further, because Duncan pleaded guilty, the State dismissed eight felonies, including a Level 3 felony,[5] and four misdemeanors across three separate cases. In *Anglemyer v. State*, the court held that the defendant's guilty plea which reduced a potential maximum sentence of twenty-eight years by twelve years, "alone was a substantial benefit." 875 N.E.2d 218, 221 (Ind. 2007) (opinion on reh'g). Because Duncan received a "substantial benefit" in pleading guilty and significantly reducing his potential maximum sentence, his sentence is not inappropriate.

Conclusion

[17] We conclude that Duncan's sentence is not inappropriate in light of the nature of his offense and his character. Accordingly, we affirm.

[18] Affirmed.

Bradford, C.J., Altice, J., concur.

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[5] Under Indiana Code section 35-50-2-5, a person who commits a Level 3 felony shall be imprisoned for a term between three and sixteen years, with an advisory sentence of nine years.