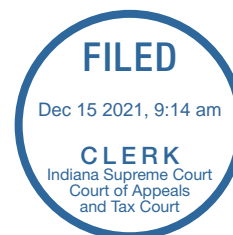


MEMORANDUM DECISION

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 W. Gaines,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 15, 2021

Court of Appeals Case No.
21A-CR-786

Appeal from the Shelby Superior
Court

The Honorable K. Mark Loyd,
Senior Judge

Trial Court Cause No.
73D01-1912-F2-16

Riley, Judge.

STATEMENT OF THE CASE

- [1] Appellant-Defendant, Richard Gaines (Gaines), appeals his sentence following his conviction for two counts of dealing in methamphetamine, Level 2 felonies, Ind. Code §§ 35-48-4-1.1(a)(1) and (e)(2); 35-48-1-16.5(3)(B)(i).
- [2] We affirm.

ISSUE

- [3] Gaines presents the court with one issue, which we restate as: Whether his sentence is inappropriate in light of his offenses and his character.

FACTS AND PROCEDURAL HISTORY

- [4] Misti Collins (Collins) is Gaines' niece. In the summer of 2019, Collins was facing methamphetamine possession and dealing charges. In the hopes of receiving a more favorable outcome as to those charges, Collins approached the Shelby County Sheriff's Department (SCSD) with an offer to cooperate in controlled buys of methamphetamine from Gaines. SCSD narcotics detectives surveilled Gaines' home in the 100 block of East Hendricks Street in Shelbyville, Indiana, to verify the information given by Collins pertaining to Gaines' drug dealing activities. Gaines' home was located approximately 196 feet from the property of St. Joseph's school.
- [5] On Monday, August 12, 2019, under the visual and audio surveillance of members of the SCSD, Collins made a controlled buy from Gaines of 6.42 grams of methamphetamine at his home. Earlier in the day and prior to the

buy, a detective with the SCSD observed cars in the parking lot and children playing on the playground of St. Joseph's school. On Friday, August 16, 2019, Collins made a second controlled buy of 6.76 grams of methamphetamine from Gaines at his home.

[6] On December 12, 2019, the State filed an Information, charging Gaines with two Counts of Level 2 felony dealing in methamphetamine for dealing between five and ten grams of methamphetamine with an enhancing circumstance, namely that he had dealt within 500 feet of school property when persons under the age of eighteen were reasonably expected to be present. On January 7, 2020, the State filed an amended Information seeking to have Gaines sentenced as an habitual offender due to having three prior, unrelated convictions for Level 6 felony possession of a narcotic drug, Class D felony possession of methamphetamine, and Class C felony battery with a deadly weapon. On January 29, 2021, Gaines posted bond and was released from custody.

[7] The trial court convened Gaines' two-day jury trial on March 9, 2021. Gaines did not appear in the morning of the second day of his trial. Gaines' counsel represented to the trial court that he had received a telephone call from Gaines, who stated that he was experiencing vehicle issues but would be in court by 8:30 a.m. By 10:30 a.m., Gaines still had not arrived, nor had he communicated further with his counsel or the trial court. The trial court determined that Gaines' absence was voluntary, and Gaines was tried *in absentia*. The jury found Gaines guilty as charged and subsequently found that

he was an habitual offender. A warrant was issued for Gaines' arrest, and he was taken into custody on that warrant on March 24, 2021.

[8] On March 30, 2021, the Shelby County Probation Department filed its presentence investigation report. Gaines would be fifty-nine years old at the time of his sentencing hearing. Gaines has a criminal history involving forty-eight criminal cases spanning from 1981 to the present. Gaines has an arrest record for offenses including felony theft, felony possession of a controlled substance, felony residential entry, criminal mischief, and invasion of privacy. He also has twenty-seven misdemeanor convictions for offenses including conversion, battery resulting in bodily injury, battery, resisting law enforcement, marijuana possession, operating a vehicle while intoxicated, check deception, driving while suspended, reckless driving, criminal trespass, and public intoxication. Apart from the three felony convictions which the State proved rendered him an habitual offender, Gaines has an additional seven felony convictions for theft, burglary, forgery, escape, operating a vehicle while intoxicated, marijuana possession, and identity deception. Gaines had received probation on eleven occasions and had his probation unsuccessfully terminated twice. Gaines had also received community service, home detention, short jail terms, and executed sentences with the Department of Correction (DOC). While incarcerated, Gaines has received write-ups and has been placed on lockdown. Gaines was released from probation in April of 2019, and he was free on bond pending new charges of possession of methamphetamine, possession of a narcotic drug, and unlawful possession of a syringe when he

committed the instant offenses. By the time of sentencing, Gaines had three separate criminal matters pending for felony charges including two counts of possession of methamphetamine, possession of a narcotic drug, and three counts of unlawful possession of a syringe.

[9] Gaines reported to the presentence investigator that he had smoked or injected methamphetamine daily since 2000. Gaines also used heroin intravenously and had been administered Narcan for an overdose. Gaines reported using cocaine, hallucinogens, and, while serving home detention, spice. Gaines acknowledged that in the previous five years, his longest period of sobriety had been the eighteen months he had served in the Shelby County Jail following his 2018 conviction for possession of a narcotic drug. Despite having been previously court-ordered to do so, Gaines had never participated in any substance abuse treatment prior to 2021. Gaines last used drugs in March 2021.

[10] The trial court convened Gaines' sentencing hearing on April 1, 2021. Gaines' counsel argued for concurrent minimum executed sentences of ten years on the Level 2 felonies and six years for the habitual offender enhancement. The State argued that, in light of Gaines' substantial criminal record, a concurrent sentence of twenty-eight years for the Level 2 felonies, enhanced by eighteen years for being an habitual offender, was justified. The trial court noted that Gaines was just shy of sixty years old at sentencing and that it struggled with imposing what could be a life sentence for him. However, the trial court observed that Gaines' lifetime of criminal behavior could not be overlooked. The trial court found no mitigating circumstances. The trial court found

Gaines' criminal history, his failure to be rehabilitated, and the fact that he was out on bond when he committed the instant offenses as aggravating circumstances. The trial court sentenced Gaines to concurrent twenty-four-year sentences for his Level 2 felony convictions, one of which it enhanced by twelve years for being an habitual offender, to be served in the DOC. The trial court also found that it would consider a sentence modification in the last five years of that sentence.

[11] Gaines now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

[12] Gaines contends that his sentence is unduly harsh and requests that we reduce it. We will modify a sentence “only when we find that ‘the sentence is inappropriate in light of the nature of the offense and the character of the offender.’” *Wilson v. State*, 157 N.E.3d 1163, 1181 (Ind. 2020) (quoting Ind. Appellate Rule 7(B)). The principal role of such review is to attempt to leaven the outliers, and our independent power of review is not meant to achieve some other result that is perceived as more correct. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). Whether we modify a sentence turns on a “sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other facts that come to light in a given case.” *Id.* The defendant bears the burden to persuade the reviewing court that the sentence imposed is inappropriate. *Robinson v. State*, 91 N.E.3d 574, 577 (Ind. 2018).

[13] Gaines received concurrent¹ twenty-four-year sentences for his two Level 2 felony dealing in methamphetamine convictions. The sentencing range for a Level 2 felony is between ten and thirty years, with an advisory sentence of seventeen and one-half years. I.C. § 35-50-2-4.5. In addition, the trial court enhanced one of Gaines' convictions by twelve years for being an habitual offender, which was an enhancement approximately midway between the minimum and maximum it could have imposed under the general habitual offender statute. *See* I.C. § 35-50-2-8(i)(1) (providing that a trial court “shall sentence a person found to be a[n] habitual offender to an additional fixed term that is between . . . six (6) years and twenty (20) years” if that person is convicted of a Level 2 felony). Therefore, the trial court's aggregate thirty-six-year sentence was not the maximum it could have imposed for the offenses.

A. *Nature of the Offenses*

[14] Relying chiefly on this court's decision in *Schaaf v. State*, 54 N.E.3d 1041 (Ind. Ct. App. 2016), Gaines argues that “[h]igh-level dealing convictions are not always so serious so as to foreclose this [c]ourt from revising a sentence.” (Appellant's Br. p. 8). Schaaf was convicted of Class B felony and Class A felony heroin dealing as a result of two controlled buys that took place a month apart. *Id.* at 1042-43. The Class B felony charge arose from Schaaf's role in driving Randall Conliff to the site of the buy and being present as the

¹ The State incorrectly indicates twice in its appellate brief that the trial court ordered Gaines to serve his sentences “consecutively[.]” (Appellee's Br. pp. 5, 10).

confidential informant bought 10/100 of a gram of heroin from Conliff for \$50 in Schaaf's truck. *Id.* at 1042. The Class A felony charge arose after Conliff turned the same confidential informant away, and Schaaf, who was also present, sold the confidential informant 8/100 of a gram of heroin for \$50 within 1000 feet of a public park. *Id.* The trial court imposed aggravated fifteen and forty-year sentences for the Class B and Class A felony convictions, respectively, and ordered the sentences to be served concurrently, for an aggregate sentence of forty years. *Id.* at 1045. In reducing Schaaf's sentence to advisory, concurrent sentences, we found that his offenses were "relatively minor," given that both sales were to the same informant, both were monitored by law enforcement, and both involved "very small amounts of heroin." *Id.* In addition, we found it to be significant that Schaaf had not personally delivered the heroin in the Class B felony transaction and that the Class A felony transaction occurred because of a "failed police operation targeted at Conliff." *Id.* We observed that while Schaaf's criminal history, which consisted of six felonies and six misdemeanors, would have rendered less-than-advisory sentences inappropriate, the nature of his offenses rendered his above-advisory sentences inappropriately harsh. *Id.*

[15] We find *Schaaf* to be distinguishable from this case in several respects. While Gaines also dealt twice to the same informant in controlled buys, his offenses involved close to seven grams of methamphetamine each. As charged in the Information, the State was required to prove that Gaines dealt between five and ten grams of methamphetamine. I.C. §§ 35-48-4-1.1(a)(1) and (e)(2).

Therefore, Gaines' offenses cannot be said to have involved the "very small amounts" we found were relevant in Schaaf's offenses. *Schaaf*, 54 N.E.3d at 1045. Rather, the amount of methamphetamine Gaines dealt was greater than that necessary for the State to prove the offense, which does not militate for a reduction in Gaines' sentence.² In addition, unlike Schaaf, Gaines was the target of the controlled buys in this case, and he was the sole person dealing to Collins. As discussed in more detail below, Gaines' criminal record is significantly worse than Schaaf's, and therefore that factor does not provide the same counterbalance that we found rendered advisory sentences appropriate in Schaaf's case. *See id.*

[16] Gaines also directs our attention to the facts that the controlled buys took place in his apartment instead of outside where he could be seen by children and that there was no evidence that there were children actually present at the school during the buys. However, the State was only required to show that Gaines dealt in methamphetamine within 500 feet of a school property when a person younger than eighteen was "reasonably expected to be present." I.C. § 35-48-1-16.5(3)(B)(i). The State presented evidence that Gaines dealt methamphetamine within approximately 196 feet of a school property, which was much closer than required to prove the offenses and is a circumstance

² *Hubbert v. State*, 163 N.E.3d 958 (Ind. Ct. App. 2021), *trans. denied*, a case cited by Gaines in his reply brief, is distinguishable for the same reason. Hubbert was charged with Level 2 felony dealing in over ten grams of methamphetamine. *Id.* at 959. This court reduced his eighteen-year sentence in part because the amount of methamphetamine, the precise amount of which could not be discerned from the record, was "only a small amount over what was needed to make this a Level 2 felony." *Id.* at 960.

which renders his offenses more serious as a result. The buys took place between 1:00 p.m. and 1:30 p.m. on a Monday and a Friday. Prior to the first buy, cars had been lined up in the street near the school, and children were observed on the playground. This evidence supports a reasonable inference that school was in session at the time of the buys. Therefore, there was a very high probability that children were present on the school grounds at the time of the buys, not just a reasonable expectation of their presence. Accordingly, we do not find that Gaines' arguments regarding the nature of his dealing offenses to be persuasive, and we decline to revise his aggregate sentence.

B. *Character of the Offender*

[17] Gaines also contends that his sentence is inappropriate in light of his character. Upon reviewing a sentence for inappropriateness in light of the character of the offender, we look to a defendant's life and conduct. *Morris v. State*, 114 N.E.3d 531, 539 (Ind. Ct. App. 2018), *trans. denied*. Gaines argues that his age and his long-term drug abuse merit a reduction in his sentence.

[18] Gaines has amassed a criminal record that is stunning in its span, variety, and severity. When not incarcerated, Gaines has committed property crimes, crimes of violence, and drug offenses almost on a yearly basis since 1981. Gaines has received community service, probation, home detention, shorter jail terms, and executed sentences with the DOC. None of these lesser punishments has impacted his criminal behavior. Gaines was free on bond for a methamphetamine possession charge when he committed the instant methamphetamine dealing offenses, and he absconded from his jury trial in this

case. Gaines had three pending drug cases at the time of his sentencing in this matter. Gaines has not even behaved while he is in custody. We agree with the trial court's assessment of Gaines' criminal behavior that "if we equate your criminal record with a business resume[], you qualify with your criminal resume, for being chief of the board of criminals in Shelby County, Indiana, [be]cause you have dedicated your life to that process." (Appellant's App. Vol. II, p. 107).

[19] We are aware that Gaines was fifty-nine years old at the time that he was sentenced and that he may need substance abuse treatment. However, Gaines has had opportunities to address his substance abuse in the past and has failed to do so. Our supreme court has held that we should leave a trial court's sentence intact "unless overcome by compelling evidence portraying in a positive light the nature of the offense . . . and the defendant's character (such as substantial virtuous traits or persistent examples of good character)." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015). Having been presented with no such compelling evidence as to either Gaines' offenses or his character, we will not disturb the trial court's sentencing order.

CONCLUSION

[20] Based on the foregoing, we conclude that Gaines' sentence is not inappropriate given his offenses and his character.

[21] Affirmed.

[22] Robb, J. and Molter, J. concur