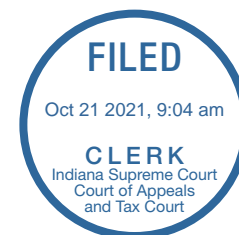


MEMORANDUM DECISION

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

Kyle Daniel Sexton,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 21, 2021

Court of Appeals Case No.
21A-CR-824

Appeal from the Dearborn
Superior Court

The Honorable Jonathan N.
Cleary, Judge

Trial Court Cause No.
15D01-2007-F2-000013

Tavitas, Judge.

Case Summary

- [1] Kyle Sexton appeals his twenty-six-year sentence for possession of methamphetamine, a Level 3 felony, enhanced by his status as an habitual offender. Sexton argues that his sentence is inappropriate in light of the nature of his offense and the character of the offender. Given Sexton's significant criminal history, his lengthy history of substance abuse, and the fact that he was on probation at the time of the instant offense, we do not find Sexton's sentence inappropriate. Accordingly, we affirm.

Issue

- [2] Sexton raises one issue, which we restate as whether his sentence is inappropriate in light of the nature of the offense and the character of the offender.

Facts

- [3] On July 13, 2020, Officer Austin Boggs of the Greendale Police Department was dispatched to a gas station where Sexton's vehicle was parked at a gas pump and Sexton was passed out in the driver's seat. Officer Boggs woke Sexton and smelled marijuana coming from the vehicle. Sexton gave Officer Boggs a false name and false date of birth. Sexton then refused to exit the vehicle, and Officer Boggs and other officers attempted to remove Sexton from the vehicle. During the struggle, Sexton kept trying to reach into his pants pocket. After Sexton was removed from the vehicle and secured, a search of Sexton's person revealed a loaded handgun in his pants pocket. A search of

Sexton's vehicle revealed thirty-eight grams of methamphetamine and other contraband.¹

[4] The State charged Sexton with possession with intent to deliver methamphetamine, a Level 2 felony; possession of a firearm by a serious violent felon, a Level 4 felony; possession of cocaine, a Level 6 felony; possession of a syringe, a Level 6 felony; two counts of possession of a controlled substance, Class A misdemeanors; resisting law enforcement, a Class A misdemeanor; possession of marijuana, a Class A misdemeanor; and false informing, a Class B misdemeanor. The State also alleged that Sexton is an habitual offender. In March 2021, Sexton agreed to plead guilty to an added count of possession of methamphetamine, a Level 3 felony, and his status as an habitual offender. The State agreed to dismiss the remaining charges.

[5] At Sexton's sentencing hearing, the trial court noted that Sexton: (1) has a significant criminal history, multiple probation violations, and the opportunity to participate in drug court; (2) has a "significant substance abuse history" and "zero evidence" that Sexton had "even attempted recovery since 2011," when he was removed from drug court, Tr. Vol. II pp. 103, 106; (3) has a child; and (4) pleaded guilty on the day of his jury trial. The trial court found that it had "no choice but [to] enter a stern sentence in this case based upon the significant criminal history which included being on active probation for robbery" when

¹ In conducting the sentencing hearing, the trial court took judicial notice of the evidence presented at the prior suppression hearing.

Sexton committed this offense. *Id.* at 106-07. The trial court sentenced Sexton to twelve years in the Department of Correction (“DOC”) enhanced by fourteen years for Sexton’s status as an habitual offender—for an aggregate sentence of twenty-six years in the DOC. Sexton now appeals.

Analysis

[6] The Indiana Constitution authorizes independent appellate review and revision of a trial court’s sentencing decision. *See* Ind. Const. art. 7, §§ 4, 6; *Jackson v. State*, 145 N.E.3d 783, 784 (Ind. 2020). Our Supreme Court has implemented this authority through Indiana Appellate Rule 7(B), which allows this Court to revise a sentence when a sentence is “inappropriate in light of the nature of the offense and the character of the offender.” Our review of a sentence under Appellate Rule 7(B) is not an act of second guessing the trial court’s sentence; rather, “[o]ur posture on appeal is [] deferential” to the trial court. *Bowman v. State*, 51 N.E.3d 1174, 1181 (Ind. 2016) (citing *Rice v. State*, 6 N.E.3d 940, 946 (Ind. 2014)). We exercise our authority under Appellate Rule 7(B) only in “exceptional cases, and its exercise ‘boils down to our collective sense of what is appropriate.’” *Mullins v. State*, 148 N.E.3d 986, 987 (Ind. 2020) (quoting *Faith v. State*, 131 N.E.3d 158, 160 (Ind. 2019)).

[7] “The principal role of appellate review is to attempt to leaven the outliers.” *McCain v. State*, 148 N.E.3d 977, 985 (Ind. 2020) (quoting *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008)). Our role is “not to achieve a perceived correct sentence.” *Id.* “Whether a sentence should be deemed inappropriate ‘turns on

our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case.” *Id.* (quoting *Cardwell*, 895 N.E.2d at 1224). Deference to the trial court’s sentence “should prevail 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, 122 (Ind. 2015).

[8] When determining whether a sentence is inappropriate, the advisory sentence is the starting point the legislature has selected as the appropriate sentence for the crime committed. *Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014). Sexton was convicted of a Level 3 felony. Indiana Code Section 35-50-2-5(b) provides: “A person who commits a Level 3 felony (for a crime committed after June 30, 2014) shall be imprisoned for a fixed term of between three (3) and sixteen (16) years, with the advisory sentence being nine (9) years.” Sexton was also found to be an habitual offender, which allowed for an enhancement of six years to twenty years. Ind. Code § 35-50-2-8. The trial court imposed an aggregate sentence of twenty-six years. Sexton faced a maximum aggregate sentence of thirty-six years.

[9] We begin by analyzing the nature of the offense. Our analysis of the “nature of the offense” requires us to look at the nature, extent, and depravity of the offense. *Sorenson v. State*, 133 N.E.3d 717, 729 (Ind. Ct. App. 2019), *trans. denied*. Sexton was found passed out in the driver’s seat of his vehicle, which

was parked at a gas station next to a gas pump. Sexton struggled with officers and kept reaching for his pants pocket, which officers later discovered contained a loaded handgun. A search of Sexton's vehicle revealed thirty-eight grams of methamphetamine and other contraband. Thus, the nature of the offense reveals that Sexton possessed an extremely large amount of methamphetamine and struggled with officers while a loaded handgun was in his possession.

[10] Next, we consider the character of the offender. Our analysis of the character of the offender involves a "broad consideration of a defendant's qualities," *Adams v. State*, 120 N.E.3d 1058, 1065 (Ind. Ct. App. 2019), including the defendant's age, criminal history, background, and remorse. *James v. State*, 868 N.E.2d 543, 548-59 (Ind. Ct. App. 2007). "The significance of a criminal history in assessing a defendant's character and an appropriate sentence varies based on the gravity, nature, proximity, and number of prior offenses in relation to the current offense." *Sandleben v. State*, 29 N.E.3d 126, 137 (Ind. Ct. App. 2015) (citing *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006)), *trans. denied*. "Even a minor criminal history is a poor reflection of a defendant's character." *Prince v. State*, 148 N.E.3d 1171, 1174 (Ind. Ct. App. 2020) (citing *Moss v. State*, 13 N.E.3d 440, 448 (Ind. Ct. App. 2014), *trans. denied*).

[11] Thirty-one-year-old Sexton amassed a significant criminal history and lengthy history of substance abuse. Sexton has juvenile adjudications for possession of marijuana and illegal consumption of an alcoholic beverage, along with multiple probation violations. As an adult, Sexton has prior convictions for possession of marijuana, theft, possession of paraphernalia, resisting law

enforcement, possession of methamphetamine, escape, and robbery resulting in bodily injury. He has multiple pending criminal matters in Hamilton County, Ohio. Sexton also violated probation and drug court requirements many times; he was terminated from drug court in January 2012. In fact, Sexton was on probation for his robbery conviction at the time of his arrest in the instant matter, and he had an active warrant for his arrest for a probation violation allegation. Sexton admitted that he has an addiction to heroin and that he has overdosed two or three times. Since his termination from drug court, Sexton has made no effort to deal with his addictions.

[12] We acknowledge that Sexton pleaded guilty, that the death of his sister contributed to his drug usage, and that he has a daughter with whom he is close. Given, however, Sexton's significant criminal history, lengthy substance abuse addiction, and the fact that he was on probation at the time of the instant offense, we simply cannot say the twenty-six-year sentence is inappropriate.

Conclusion

[13] Sexton's sentence is not inappropriate. We affirm.

[14] Affirmed.

Mathias, J., and Weissmann, J., concur.