MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Michael A. Jones,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 30, 2022

Court of Appeals Case No. 22A-CR-1059

Appeal from the Vermillion Circuit Court

The Honorable Jill D. Wesch, Judge

Trial Court Cause No. 83C01-2007-F5-17

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Michael A. Jones (Jones), appeals his sentence following an open plea to operating a vehicle after lifetime suspension, a Level 5 Felony, Ind. Code § 9-30-10-17(a)(1); operating a vehicle with a breath alcohol content of .15 or more, a Class A Misdemeanor, I.C. § 9-30-5-1(b); and his adjudication as an habitual vehicle substance offender, I.C. § 9-30-15.5-2.

[2] We affirm in part, reverse in part, and remand with instructions.

ISSUES

[3] Jones presents three issues on appeal, which we restate as:

(1) Whether the trial court abused its discretion by omitting certain proffered mitigating circumstances from its sentencing statement;
(2) Whether Jones' aggregate sentence is inappropriate in light of the nature of the offenses and his character; and
(3) Whether remand for resentencing is required to correct the trial court's erroneous attachment of Jones' habitual offender enhancement.

FACTS AND PROCEDURAL HISTORY

[4] On June 20, 2020, while on patrol, Officer Brandon Mahady (Officer Mahady) of the Clinton City Police Department observed sixty-three-year-old Jones drive a vehicle through an intersection. Officer Mahady was familiar with Jones and knew that Jones' driver's license was under a lifetime suspension. Officer Mahady followed Jones to the parking lot of a local liquor store where he approached

Jones' stopped vehicle. As he stood next to Jones' car, the officer observed an open alcoholic beverage container on the rear floorboard of the car. Officer Mahady also noticed the odor of alcohol on Jones' breath as Jones pulled himself from his vehicle and admitted to the officer that his driving privileges had been suspended and he should not be driving. Jones informed Officer Mahady that he had consumed two beers about an hour prior. A portable breath test indicated hat Jones had a blood alcohol concentration (BAC) of 0.193. Jones agreed to submit to a chemical test, which showed a BAC of 0.194.

[5] On June 30, 2020, the State filed an Information, charging Jones with Count 1, operating a vehicle after lifetime suspension, a Level 5 Felony; Count 2, operating a vehicle with a BAC of .15 or more, a Class A Misdemeanor; and Count 3, Operating a vehicle while intoxicated, a Class C Misdemeanor. The State also filed a notice of vehicular substance offender enhancement under Indiana Code section 9-30-15.5-2. In its notice, the State alleged that Jones had three prior unrelated vehicular substance offenses, which occurred in October 2009, September 2008, and June 2003. On March 4, 2022, Jones pleaded guilty in an open plea.

[6] On March 30, 2020, the trial court conducted a sentencing hearing. During the hearing, evidence was presented that the instant offenses were merely the latest in a string of operating while under the influence (OWI) offenses stretching back thirty years. In 1990, he was convicted of OWI, a Class D felony, and was sentenced to two years in the Department of Correction (DOC), with one year suspended, and was ordered to participate in a treatment program. On July 26, 1998, he was

arrested for OWI-endangerment, a Class A misdemeanor, and OWI with a BAC of at least .08 but less than .15. He pleaded guilty to the endangerment charge and was sentenced to one year suspended to probation. Six months later, Jones was arrested for OWI with a BAC of .10%, a Class D felony, which was dismissed in February 2000. In November 2001, Jones was again arrested for OWI, a Class D felony, he pleaded guilty in March 2002, and was sentenced to three years in the DOC, which was suspended except for time served. Jones was later found to have violated his probation, was ordered to serve his suspended sentence, and was discharged unsatisfactorily from probation. In February 2003, Jones was charged with OWI and was alleged to be an habitual offender. He pleaded guilty to OWI, a Class D felony, in exchange for the State dismissing the habitual offender allegation. He was sentenced to one-and-a-half years in the DOC, with six months suspended to probation. In May 2005, Jones was charged with operating a vehicle after being adjudged an habitual traffic offender, a Class D Felony, and OWI, a Class D felony. Jones pleaded guilty to the first charge and the court ordered his driving privileges forfeited for life. Jones was again charged in April 2008 and July 2009 with OWI offenses, and he was charged in June 2012 with public intoxication. At the time of the instant offenses, Jones had accumulated six prior felony convictions involving alcohol and operating a vehicle, which had landed him at the DOC on three occasions. Jones' various periods of probation featured five petitions to revoke or modify his probation.

[7] At the close of the evidence, the trial court sentenced Jones to three years for the operating a motor vehicle after a lifetime suspension charge, to be served

concurrently with a one-year sentence for the operating a vehicle with a BAC of .15 or more charge. The trial court increased the sentence of the lifetime suspension conviction by attaching the habitual enhancement, resulting in an aggregate sentence of six years, with three years executed and three years served on home detention.

[8] Jones now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Mitigating Circumstances*

[9] Jones contends that the trial court abused its sentencing discretion by omitting certain mitigating factors supported by the record and by failing to weigh aggravating and mitigating factors when aggravating his sentence. Previously, trial courts were required to properly weigh mitigating and aggravating factors during sentencing. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). Now, under the advisory sentencing scheme, trial courts no longer have such an obligation. *Id.* Instead, "once the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then 'impose any sentence that is . . . authorized by statute, and . . . permissible under the Constitution of the State of Indiana.'" *Id.*; *see also* I.C. § 35-38-1-7.1(d) (stating that a court may impose any sentence authorized by statute "regardless of the presence or absence of aggravating circumstances or mitigating circumstances"). A trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and

circumstances before it. *Heyen v. State*, 936 N.E.2d 294, 299 (Ind. Ct. App. 2010), *trans. denied*.

[10] In order to show that a trial court failed to identify or find a mitigating factor, the defendant must establish that the mitigating evidence is both significant and clearly supported by the record. *Anglemyer*, 868 N.E.2d at 493. While a failure to find mitigating circumstances clearly supported by the record may imply that the trial court improperly overlooked them, the trial court "is not obligated to explain why it has chosen not to find mitigating circumstances. Likewise, the court is not obligated to accept the defendant's argument as to what constitutes a mitigating factor." *Id*. The trial court is also not obligated to consider "alleged mitigating factors that are highly disputable in nature, weight, or significance." *Id*. On appeal, a defendant must show that the proffered mitigating circumstance is both significant and clearly supported by the record. *Rawson v. State*, 865 N.E.2d 1049, 1056 (Ind. Ct. App. 2007).

[11] Jones contends that the trial court failed to consider as mitigating circumstances the fact that Jones committed no offenses from 2012 to 2020, suffered significant personal loss prior to his present offense, has not been in trouble since the present offense, has decreased his drinking substantially since the present offense, and suffers from health problems.

[12] During its sentencing, the trial court noted that Jones had pleaded guilty without an agreed disposition and that he had health issues, but the court expressly stated that it could not overlook his extensive criminal record, spanning three decades. It

is well-settled that an extensive criminal history, especially one that reflects repeated crimes of the same nature, justifies an aggravated sentence. *See Williams v. State*, 891 N.E.2d 621, 632 (Ind. Ct. App. 2008). Jones now claims his instant offenses were brought about by the "significant personal loss" of his brother's passing. (Transcript Vol. II, p. 25). However, not only was it Jones' attorney who speculated that this loss "might have aggravated [Jones'] drinking problem," Jones himself appeared to disclaim the influence of this event when he affirmed that he had committed the instant offenses because "[he] was being stupid[.] [He] knew better. [He] shouldn't have been driving but [he] had that car." (Tr. Vol. II. p. 18). Likewise, Jones' claim of the absence of new criminal offenses between 2012 and 2020 ignores the reality of his forfeiture of driving privileges for life in 2005 while still incurring OWI convictions in 2008 and 2009. Equally unpersuasive is Jones' argument of decreased alcohol use since his current arrest as he described his present consumption after his arrest as "one or two" beers "every four or five hours." (Tr. Vol. II, p. 18).

[13] Accordingly, based on the facts before us, we cannot say that Jones' proffered mitigators are significant and supported by the record. Therefore, the trial court did not abuse its discretion by omitting these proffered mitigators.

II. *Appropriateness of Sentence*

[14] Next, Jones requests a downward revision of his sentence as he maintains that his aggravated sentence is inappropriate in light of the nature of the offenses and his character. Indiana Appellate Rule 7(B) provides that "[t]he [c]ourt may revise a

sentence authorized by statute if, after due consideration of the trial court's decision, the [c]ourt finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." The defendant bears the burden of persuading this court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). Whether we regard a sentence as inappropriate turns on "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." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). The principal role of appellate review is to "leaven the outliers," not achieve the perceived "correct" result in each case. *Id*. at 1225.

[15] The advisory sentence is the starting point selected by the General Assembly as a reasonable sentence for the crime committed. *Childress*, 848 N.E.2d at 1081. The sentencing range for a Level 5 felony is between one and six years, with an advisory sentence of three years; while a person who commits a Class A misdemeanor shall be imprisoned for a fixed term of not more than one year. I.C. §§ 35-50-2-6(b); 35-50-3-2. The trial court imposed a three-year sentence for Jones' Level 5 felony conviction, enhanced by an additional three years under the Vehicular Substance Offender Enhancement statute, I.C. § 9-30-15.5-2, for a total sentence of six years, with his one-year Class A Misdemeanor sentence to be served concurrently with his six-year sentence.

[16] With respect to the nature of the offenses, Jones insists that "[w]ithout the alcoholism, the crimes would not have happened" and requests leniency with placement in a "treatment facility." (Appellant's Br. pp. 16, 17). He claims that

"[i]f he does not receive the treatment he needs, [he] is likely to serve his time and then go on to repeat the same behaviors, caught in a cycle of alcohol abuse and incarceration." (Appellant's Br. p. 17). However, Jones' own testimony during the sentencing hearing disclaims his argument. At the hearing, he admitted that he had a "[l]ittle bit" of an alcohol problem. (Tr. Vol. II, p. 18). The record reflects that even though he was offered substance abuse treatment in 1989 and 2008, these treatments were clearly unsuccessful. Although he was aware that Alcoholics Anonymous was available to him, he had stopped his involvement with the program more than a decade ago. Instead, he now describes his consumption of "one or two" beers "every four or five hours," as a perceived respectable level of reduced drinking. (Tr. Vol. II, p. 18).

[17] Jones has been on notice for the past fifteen years that he is not allowed to drive a vehicle after the forfeiture of his driving privileges for life in 2005. Despite this lifetime ban, Jones continued to drive and was arrested again in 2008, 2009, and for the current offense. There is no evidence in the record that Jones has ever sought treatment for his alcohol abuse on his own even though he has been ordered into treatment twice in the past. Nothing in the record suggests that Jones' insistence on ignoring Indiana law and driving is the result of his drinking as Jones' continued ownership and use of a vehicle suggests otherwise.

[18] Turning to Jones' character, we note that, at age sixty-three, Jones has accumulated six prior felony convictions involving alcohol while operating a vehicle, which had sent him to the DOC on three prior occasions. Various periods of probation resulted in five petitions to revoke or modify his probation. Jones has

repeatedly endangered public safety by drinking and driving, and his obstinate refusal to stop either behavior does not recommend leniency. This is underscored by Jones' blithe assurance to the trial court that he will have "no problem" in abstaining from alcohol while on probation. (Tr. Vol. II, p. 18). Rather, the evidence supports that Jones has had significant difficulty in foregoing alcohol and even while the instant offense was pending, Jones was imbibing "one or two" beers "every four or five hours." (Tr. Vol. II, p. 18). His criminal record is an impressive thirty-year collection of driving while intoxicated convictions, without any regard of the lifetime suspension of his driving privileges or the safety of the public. We find no "compelling evidence," placing Jones' character or his offense in a "positive light" and therefore conclude that the trial court's aggregate sentence is not inappropriate in light of Jones' character and the nature of the offense. *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

III. *Habitual Enhancement*

[19] Jones contends, and the State agrees, that the trial court incorrectly attached Jones' habitual enhancement to his conviction for operating a motor vehicle after lifetime suspension. The Habitual Vehicle Substance Offender statute provides that the State may only seek to have a person sentenced as a habitual vehicular substance offender for a vehicular substance offense. I.C. § 9-30-15.5-2. A "vehicular substance offense" is defined by Indiana Code section 9-30-15.5-1 as "any misdemeanor or felony in which operation of a vehicle while intoxicated, operation of a vehicle in excess of the statutory limit for alcohol, or operation of a vehicle with a controlled substance or its metabolite in the person's body," is a

material element. The elements of the operating a motor vehicle after lifetime suspension charge do not include intoxication or the presence of alcohol or controlled substances. I.C. § 9-30-10-17(a). Accordingly, the trial court incorrectly attached the habitual enhancement to Jones' operating a motor vehicle after lifetime suspension conviction. Rather, Jones' enhancement should have been attached to his sentence for operating while intoxicated with a BAC of .15 or more, which is a vehicular substance offense. *See* I.C. §§ 9-30-5-1(b); -15.5-1.

[20] While Jones and the State are in agreement that the habitual enhancement should attach to Jones' misdemeanor conviction, the parties disagree on the resulting term of the enhancement, with the State advocating to keep the original six-year aggregate sentence and Jones requesting a shorter, four-year total sentence. The Habitual Vehicle Substance Offender statute prescribes an enhancement of the sentence for an offense by a term of imprisonment between one and eight years. I.C. § 9-30-15.5-2(e); *Wheeler v. State*, 95 N.E.3d 149, 160 (Ind. Ct. App. 2018) (When applicable, the habitual vehicle substance offender enhancement increases the sentence for a Class A misdemeanor by one to eight years).

[21] We concluded that the aggravated sentence of six years was based on the trial court's discretion and was justified by the nature of Jones' offenses and his character. The aggregate length does not exceed the statutory authority, nor does an imposition of a five-year enhancement violate the Habitual Vehicle Substance Offender statute. Accordingly, we remand to the trial court with instruction to attach the habitual vehicle substance offender enhancement to his conviction of

operating a vehicle with BAC of .15 or more, a Class A misdemeanor, and to re-sentence Jones to the same aggregate sentence.

CONCLUSION

[22] Based on the foregoing, we conclude that the trial court did not abuse its discretion by omitting certain proffered mitigating circumstances; and that Jones' aggregate sentence is not inappropriate in light of the nature of the offenses and his character. We remand for resentencing to correct the trial court's erroneous attachment of Jones' habitual offender enhancement in accordance with the instructions provided.

[23] Affirmed in part, reversed in part, and remanded with instructions.

[24] Bailey, J. and Vaidik, J. concur