

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Zachary D. Gober,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 16, 2022

Court of Appeals Case No.
22A-CR-1338

Appeal from the Dearborn
Superior Court

The Honorable Sally A.
McLaughlin, Judge

Trial Court Cause No.
15D02-2011-F3-19

Mathias, Judge.

[1] Zachary D. Gober appeals his nine-year sentence after he pleaded guilty to Level 4 felony leaving the scene of an accident. Gober raises the following two issues for our review:

1. Whether the trial court abused its discretion when it sentenced him.
2. Whether his sentence is inappropriate in light of the nature of the offense and his character.

[2] We affirm.

Statement of the Facts

[3] In the early morning hours of November 1, 2020, Gober left a bar in Dearborn County, drove his vehicle erratically, and struck and killed Casey Webb as Webb walked near the roadway in a well-lit area. Gober did not stop and remain at the scene or contact emergency personnel but, instead, drove to his home where he lived with his parents. The next morning, Gober's father had Gober's vehicle towed to a different property. Gober's vehicle had conspicuous damage to the passenger's side and hood, and his father paid for the towing service in cash. Around this time, Gober also had "a large amount of information" deleted from his cell phone. Appellant's App. Vol. 2, p. 20.

[4] Meanwhile, about thirty minutes after the accident, another motorist observed Webb's body by the side of the road and called 9-1-1. When officers arrived, Webb was deceased. Law enforcement obtained surveillance footage from a nearby business that showed a truck striking Webb and then leaving the scene.

Officers released images of that truck to the public for assistance in identifying its owner.

[5] On November 3, Gober went with his mother to a local attorney, and Gober's attorney then contacted law enforcement and explained that Gober was the driver of the vehicle that had struck Webb. Gober then disclosed the location of the truck to law enforcement. Indiana State Police Officer and crash reconstructionist Matthew Holley studied the vehicle. Officer Holley concluded from the impact damage on the truck and at the scene of the accident that Gober had struck Webb from behind and caused Webb's body to be vaulted "onto the hood" and then over the vehicle. Tr. Vol. 2, p. 64. Officer Holley also knew from his training and experience that wires from a vehicle's headlight assembly are usually "hanging" from a vehicle after "a pedestrian has been struck." *Id.* at 65. However, on Gober's vehicle, "the whole entire assembly," including the wires, had been removed. *Id.*

[6] The State charged Gober with Level 3 felony leaving the scene of an accident, Level 4 felony operating while intoxicated, Level 4 felony leaving the scene of an accident, and Class B misdemeanor leaving the scene of an accident. On April 4, 2022, Gober entered into a written plea agreement with the State in which Gober agreed to plead guilty to the Level 4 felony leaving the scene of an accident charge. In exchange, the State agreed to dismiss the remaining charges. The parties further agreed that Gober's sentence would be determined by the court in its discretion, provided that the executed portion of his sentence would not exceed nine years in the Department of Correction.

[7] The court accepted Gober's guilty plea and set the matter for a sentencing hearing. The day before that hearing, Gober objected to the State's presentation of evidence on the grounds of relevance. At the hearing, Gober renewed his objections. The trial court overruled them and permitted the State to present its evidence.

[8] Following the hearing, the trial court sentenced Gober as follows:

[Gober] entered a plea agreement . . . and . . . asks the Court to consider that in [s]entencing. However, [Gober] received a benefit in exchange for his plea of guilty[] in that[] the State dismissed the other pending charges including . . . Failure to Stop after Accident causing Death While Intoxicated, a Level 3 Felony. Therefore, the Court gives the voluntary plea little weight as a mitigator.

In addition . . . the Court does not consider the allegations of Operating While Intoxicated, [which] was dismissed pursuant to the plea agreement, in [s]entencing.

. . . [A]ctions to avoid detection may be considered as an aggravator. In this case, [Gober] went to great lengths to evade detection by moving the truck involved in the crash, cutting cables on the vehicle, and deleting information from his phone. The Court gives this great weight in determining the sentence and finds they reflect negatively on [his] character.

[Gober] asks the Court to consider his actions in having counsel notify [law enforcement] on November 3, 2020[,] of his involvement and his cooperation with the investigation after that time. The Court notes those actions as mitigating, but assigns little weight in balancing against the timing of the call being two

days after the crash after actions to avoid detection had occurred and a picture of the truck was on local media.

The Court gives some weight to [Gober's] statement of remorse to [Webb's] family. The Court finds his explanation that he thought he struck a deer was somewhat self-serving[] in that, although the crash occurred in “nano-seconds” . . . and it is unlikely but possible he thought . . . he struck a deer[,] the truck would have contained evidence that was not congruent with striking a deer and it would have been apparent on any examination of the vehicle that no deer was struck.

The Court finds it is a mitigator that [Gober] has no adult prior criminal history. The Court took judicial notice of the probable cause affidavit for [Gober's] juvenile adjudication submitted in evidence at a prior hearing. [There, Gober had] struck a teacher with his fist. The Court finds the actions, combined with acts of leaving the scene, and then taking actions to avoid detection[,] indicate a reflection of poor character.

The Court recognizes the young age of [Gober] as a mitigator. The Court also notes that [Gober] scored low on the IRAS tool. Further, the Court notes he did not violate conditions of pre-trial release. The Court notes[] that[,] although the Community Correction Program states that he would be eligible, . . . due to the serious nature of the crime and the actions of the defendant and the family in initially avoiding detection . . . [,] the Court will not consider in-home incarceration and finds [Gober] is in need of rehabilitation in a Penal Facility.

The Court notes the concerns of the victim's family and the impact on the family and the victim who was tragically killed at a young age. Although their suffering was significant, it is not greater than the elements to prove the commission of the crime. However, the Court finds that the acts to avoid detection and to

conceal potential evidence[,] combined with not turning [him]self in until over two . . . days later[,] are aggravating circumstances. The grief and anguish of not knowing what happened and the body not being discovered until over thirty . . . minutes from the crash caused an impact . . . greater than the elements of the crime.

Appellant’s App. Vol. 2, pp. 43-44 (citations omitted). The court then found that the aggravating circumstances outweighed the mitigating circumstances and sentenced Gober to nine years in the Department of Correction. This appeal ensued.

Discussion and Decision

1. Sentencing Discretion

[9] On appeal, Gober contends that the trial court abused its discretion when it sentenced him. As our Supreme Court has made clear:

We have long held that a trial judge’s sentencing decisions are reviewed under an abuse of discretion standard. An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.

McCain v. State, 148 N.E.3d 977, 981 (Ind. 2020) (cleaned up). Further:

One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the

reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law.

Anglemyer v. State, 868 N.E.2d 482, 490-91 (Ind.), clarified on other grounds on *reh'g*, 875 N.E.2d 218 (2007).

[10] Here, Gober first asserts that the trial court abused its discretion when it permitted the State to call non-victim witnesses at the sentencing hearing. According to Gober, [Indiana Code section 35-38-1-3 \(2021\)](#) states that “only the defendant is authorized to call witnesses” at a sentencing hearing. Appellant’s Br. at 9 (emphasis removed). But Gober did not object to the State’s calling of witnesses at the sentencing hearing on the ground that the State had no authority under the Indiana Code to call witnesses; his objections were premised on relevance, and he does not suggest on appeal that the trial court abused its discretion when it overruled those objections. Thus, Gober’s argument under [Indiana Code section 35-38-1-3](#) is not properly before us, and we do not consider it.

[11] Gober also asserts that the trial court abused its discretion in applying [Indiana Code section 35-38-1-7.1\(a\)\(1\)](#). That provision states that a trial court may consider the harm or injury “suffered by the victim” as an aggravating circumstance. *Id.* According to Gober, the trial court erred in expanding the scope of that provision from Webb “to Webb’s family.” Appellant’s Br. at 9.

[12] Gober’s argument is not well-taken. [Indiana Code section 35-38-1-7.1\(c\)](#) is clear that the statutorily identified aggravators and mitigators “do not limit the

matters that the court may consider in determining the sentence,” and our Supreme Court has long recognized the harm to a victim’s family as a proper aggravator. *See, e.g., Ajabu v. State*, 722 N.E.2d 339, 344 (Ind. 2000). We therefore hold that the trial court did not err when it considered the harm to Webb’s family, and the court did not abuse its discretion when it sentenced Gober.

2. Indiana Appellate Rule 7(B)

[13] Gober also asserts that his nine-year sentence is inappropriate under [Indiana Appellate Rule 7\(B\)](#). Under this Rule, we may modify a sentence that we find is “inappropriate in light of the nature of the offense and the character of the offender.” [Ind. Appellate Rule 7\(B\)](#). The defendant bears the burden of persuading this Court that the sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). This determination “turns on our sense of the culpability of the defendant, the severity of the crime, the damage done others, and myriad of other factors that come to light in a given case.” *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). Sentence modification under [Rule 7\(B\)](#), however, is reserved for a “rare and exceptional case.” *Livingston v. State*, 113 N.E.3d 611, 612 (Ind. 2018) (per curiam).

[14] When conducting our review under [Rule 7\(B\)](#), we generally defer to the sentence imposed by the trial court. *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). Our role is to “leaven the outliers,” not to achieve what may be perceived as the “correct” result. *Id.* Thus, we will not modify the court’s sentence unless the defendant produces compelling evidence portraying in a

positive light the nature of the offense—such as showing restraint or a lack of brutality—and the defendant’s character—such as showing substantial virtuous traits or persistent examples of positive attributes. *Robinson v. State*, 91 N.E.3d 574, 577 (Ind. 2018); *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[15] Gober pleaded guilty to a Level 4 felony. The sentencing range for a Level 4 felony is between two and twelve years, with an advisory term of six years. *I.C. § 35-50-2-5.5*. Gober’s plea agreement capped any executed portion of his sentence at nine years, which is the sentence the trial court ordered him to serve in the Department of Correction. In doing so, the court found as aggravating circumstances Gober’s “actions to avoid detection” and waiting two days to inform law enforcement of his involvement; the “grief and anguish” suffered by Webb’s family; and Gober’s prior juvenile adjudication. Appellant’s App. Vol. 2, pp. 43-44. The court found as mitigating circumstances that Gober had pleaded guilty, though the court assigned “little weight” to the plea as Gober also had numerous other charges dismissed; Gober’s “actions in having counsel notify” law enforcement and his “cooperation” with the investigation “after that time,” though, again, the court assigned this mitigator little weight because it happened two days after the accident and only after law enforcement had published pictures of Gober’s vehicle on local media; Gober’s statement of remorse; Gober’s lack of an adult criminal history; and Gober’s low IRAS score and that he did not violate conditions of pretrial release. *Id.*

[16] Gober argues on appeal that his nine-year sentence is inappropriate in light of the nature of the offense because “he believed he had hit a deer” and he “did

not intentionally strike Webb.” Appellant’s Br. at 10-11. He also asserts that his “attempts at concealment were short-lived and only went so far.” *Id.* at 11. As to his character, he argues that he is at a low to moderate risk to reoffend; he expressed remorse; he accepted responsibility; he surrendered and cooperated; he does not have an adult criminal history; and he was found as likely to respond affirmatively to probation or a short term of incarceration.

[17] But we cannot say that Gober’s sentence is inappropriate in light of the nature of the offense. Gober’s attempts at concealment belie his contention that he believed he hit a deer. And his attempts at concealment lasted until law enforcement published pictures of Gober’s vehicle on local media two days later. Meanwhile, Webb’s family suffered not knowing the facts of what had happened or whether a responsible driver in Gober’s position may have been able to save Webb’s life.

[18] Nor can we say that Gober’s sentence is inappropriate in light of his character. Although Gober surrendered, cooperated, and accepted responsibility, we agree with the trial court that those mitigating circumstances here are entitled to little weight in light of the dismissed charges and the timing of Gober’s cooperation. And Gober’s reliance on his remorse, criminal history, and other factors were likewise considered by the trial court in the first instance. Gober does not otherwise present evidence showing “substantial virtuous traits or persistent examples of good character” of his character. *Robinson*, 91 N.E.3d at 577. Therefore, our deference to the trial court’s sentence prevails, and we affirm Gober’s sentence.

[19] Affirmed.

Robb, J., and Foley, J., concur.