MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Chivis Cook,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 29, 2023

Court of Appeals Case No. 22A-CR-3023

Appeal from the Floyd Superior Court

The Honorable Carrie K. Stiller, Judge

Trial Court Cause No. 22D01-2109-F1-1503

Memorandum Decision by Judge Kenworthy
Judges Bailey and Tavitas concur.

Kenworthy, Judge.

Case Summary

[1] The State charged Chivis Cook with Level 1 felony attempted murder,[1] two counts of Level 5 felony criminal recklessness,[2] and Class A misdemeanor resisting law enforcement.[3] The State sought a sentencing enhancement for Cook's use of a firearm during the offense.[4] Under the terms of his plea agreement, Cook pleaded guilty to one count of Level 5 criminal recklessness and left sentencing to the discretion of the trial court. In exchange, the State agreed to dismiss the other charges and sentence enhancement. The trial court accepted the plea agreement and sentenced Cook to six years, with five years served in the Indiana Department of Correction and one year suspended to probation.

[2] Cook now appeals, raising two issues for our review:

> 1. Did the trial court abuse its discretion when sentencing Cook?
>
> 2. Is Cook's sentence inappropriate in light of the nature of the offense and Cook's character?

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[1] Ind. Code §§ 35-42-1-1 (2018) & 35-41-5-1 (2014).

[2] I.C. § 35-42-2-2(b)(2)(A) (2019).

[3] I.C. § 35-44.1-3-1(a)(1) (2021).

[4] I.C. § 35-50-2-11 (2021).

[3] Determining the trial court did not abuse its discretion and Cook's sentence is not inappropriate, we affirm.

Facts and Procedural History

[4] Around 8:00 p.m. on Friday, September 10, 2021, Cook was purchasing food at Rally's restaurant, located at the intersection of Vincennes Street and Spring Street in New Albany, Indiana. Jacob Cline and his friend were also at Rally's. Cook and Cline appeared to have a friendly interaction at the walk-up window. As they were leaving the restaurant, Cline "walked up to [Cook] and punched him." *Tr. Vol. 1* at 44. Cline later told a detective during an interview he "decided to fight [Cook.]" *Id.* at 45. Cook pointed a gun at Cline and fired six shots in his direction. Two off-duty police officers who happened to be at a tattoo parlor across the street ran to Cook and arrested him.

[5] The State charged Cook with Level 1 felony attempted murder, two counts of Level 5 felony criminal recklessness, and Class A misdemeanor resisting law enforcement. Later, the State amended Cook's charging information, adding a firearm sentencing enhancement.

[6] Cook entered a plea agreement with the State in which Cook pleaded guilty to one count of Level 5 criminal recklessness and left sentencing to the discretion of the trial court. In exchange, the State agreed to dismiss the other charges and sentencing enhancement.

[7] At Cook's sentencing hearing, the State argued Cook "was at a high risk level to reoffend" because he "was a party to a battery within the jail in July [2022]."

Id. at 48. The State also played surveillance videos of the shooting. Several witnesses testified there were multiple people and vehicles near Cook, including "a person working the drive-thru," "someone [in a vehicle] in the drive thru," Cline's friend standing next to him, "[m]ultiple cars going around," a "little girl at the Rally's," and "two . . . people walking a dog." *Id.* at 30–31, 64–65. Several businesses were near Rally's, including the Reisz Building, a barber shop, a tattoo parlor, and the Calumet Club, which hosts weddings and other events. Spring Street is a "main thoroughfare" and is "utilized quite frequently on a Friday[.]" *Id.* at 29.

[8] The trial court considered applicable aggravating and mitigating factors under Indiana Code Section 35-38-1-7.1(a) and (b). The trial court accepted the plea agreement and sentenced Cook to six years, with one year suspended to probation.

[9] Cook now appeals. Additional facts are provided as necessary.

1. The trial court did not abuse its discretion when sentencing Cook.

[10] Cook argues the trial court abused its discretion "when it considered Cook's criminal history and the nature and circumstances of the crime as aggravating circumstances." *Appellant's Br.* at 9. Specifically, Cook argues "the major reason the trial court found Cook's criminal history aggravating was because it concluded that one of Cook's felonies was for possessing a concealed weapon under cause number *18-F-9693*." *Id.* at 12. And, "even if the trial court

correctly ascertained that the conviction was for a felony," it failed to correctly weigh Cook's prior convictions. *Id.* at 13. Cook also argues the trial court erred by using the material elements of the crime as aggravators—"that Cook discharged a weapon" and "that Cook created a 'highly dangerous situation.'" *Id.* at 15.

[11] We review a trial court's sentencing decisions for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. A trial court abuses its discretion at sentencing if it (1) fails to enter a sentencing statement; (2) relies on aggravating or mitigating factors not supported by the record; (3) fails to find aggravating or mitigating factors that are supported by the record and advanced for consideration; or (4) relies on reasons that are improper as a matter of law. *Cardwell v. State*, 895 N.E.2d 1219, 1223 (Ind. 2008). "Because the trial court no longer has any obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence, . . . a trial court can not now be said to have abused its discretion in failing to 'properly weigh' such factors." *Anglemyer*, 868 N.E.2d at 491.

[12] "Generally, the 'nature and circumstances' of a crime is a proper aggravating circumstance." *McCann v. State*, 749 N.E.2d 1116, 1120 (Ind. 2001). But "[w]here a trial court's reason for imposing a sentence greater than the advisory sentence includes material elements of the offense, absent something unique about the circumstances that would justify deviating from the advisory sentence, that reason is 'improper as a matter of law.'" *Gomillia v. State*, 13 N.E.3d 846, 852–53 (Ind. 2014) (quoting *Anglemyer*, 868 N.E.2d at 491).

[13] Cook argues the trial court relied on an improper aggravator[5] by mischaracterizing Cook's prior conviction for possession of a concealed weapon as a felony when it should have been a misdemeanor. We disagree. The trial court did not definitively conclude the conviction was for a felony offense. Rather, the court expressed uncertainty about whether the offense was a felony.[6] And the trial court did not appear to rely on whether the offense was a felony; instead, it focused on the similarity of that offense to the offense before it.[7]

[14] Cook then claims that even if the trial court correctly decided the conviction was for a felony, it articulated the incorrect legal standard for determining whether a criminal history is aggravating. He argues "whether a defendant's

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[5] Cook only clarifies the nature of the trial court's alleged error in his reply brief, neglecting in his initial brief to mention the trial court relied on an aggravator that was improper as a matter of law.

[6] The trial court stated:

> [T]hen you have Case Number—this is the first felony that is listed here. . . when Mr. Cook pled guilty to Charge 2, Carrying a Concealed Deadly Weapon on July 9, 2018, and was sentenced to one hundred eighty (180) days in jail . . . and that appears to have been a felony, uh, by the case number.

Tr. Vol. 1 at 83. And later: "I will note that the information provided to the Court does not indicate whether that crime in Kentucky was . . . sentenced as a felony, but . . . the case number indicates it was charged as a felony." *Id.* at 84.

[7] The trial court stated, "[T]his crime also, Criminal Recklessness, . . . related to . . . the use of a deadly weapon as well." *Id.* at 84. And later:

> [T]he Criminal Recklessness that has been pled guilty to of waiving a gun, pointing a gun, running with a gun in a high traffic, busy area, with lots of people and vehicles nearby, um, coupled with the prior criminal history, um, including the, um, concealing a deadly weapon, uh, cause, uh, support that position that the Court has just stated.

Id. at 88.

[sentence] should be enhanced based upon prior convictions turns on the weight of those convictions." *Appellant's Br.* at 13.

[15] For this claim, Cook relies solely on *Duncan v. State*, 857 N.E.2d 955, 959 (Ind. 2006), a decision handed down before our Legislature passed Indiana Code Section 35-38-1-7.1(a)(2).[8] Indiana Code Section 35-38-1-7.1(a)(2) permits the trial court to consider a person's history of criminal or delinquent behavior as an aggravator. Therefore, a defendant's criminal history may *always* be considered an aggravating factor. Cook essentially argues the trial court failed to ascribe the correct weight to Cook's prior convictions; this argument is not supported by current law. *See* Ind. Appellate Rule 46(A)(8)(a); *see also Anglemyer*, 868 N.E.2d at 491.

[16] Next, Cook claims the trial court abused its discretion by considering material elements of the offense as aggravators. He correctly notes a trial court may not use a factor comprising a material element of an offense as an aggravating circumstance. *See Henderson v. State*, 769 N.E.2d 172, 180 (Ind. 2002). But "a court may look to the particularized circumstances of the criminal act." *Id.* That is, "[a]lthough the particular manner in which a crime is committed may constitute an aggravating factor, a trial court should specify why a defendant deserves an enhanced sentence under the particular circumstances." *Id.* (Internal citations omitted.)

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[8] The first version of Indiana Code Section 35-38-1-7.1 was effective in 2008.

[17] The elements of Cook's offense are outlined in the charge against him:

> Chivis J. Cook did recklessly, knowingly, or intentionally perform an act that created a substantial risk of bodily injury to another person by shooting a firearm into an inhabited dwelling or other building or place where people are likely to gather, to wit: an alley where Jacob Cline was standing.

[18] *Appellant's App. Vol. 2* at 34. Cook points to the trial court's language during sentencing: "And the State also requested the Court to take additional aggravating factors into consideration in this case . . . . That being the, uh, discharge of a weapon in a public area with many people actively in the . . . area being, um, a highly dangerous situation[.]" *Tr. Vol. 1* at 85. Cook argues the trial court "expressly found as aggravating the fact that Cook discharged a weapon." *Appellant's Br.* at 15. And Cook says the creation of a "highly dangerous situation" is inherent in the elements of firing a weapon in an area where people are likely to congregate and creating a risk of substantial bodily injury to another person. *Id.* at 15–16.

[19] We disagree with Cook's characterization of the trial court's statements as considering the elements of the crime as aggravators. Rather, the trial court considered circumstances unique to Cook's case. The State specifically charged Cook only with "shooting a firearm into . . . an alley where Jacob Cline was standing." *Appellant's App. Vol. 2* at 34. The trial court noted the weapon was discharged "in a public area with many people actively in the . . . area[.]" *Tr. Vol. 1* at 85. The trial court found that the public location and presence of

multiple people created a "highly dangerous situation." *Id.* These facts exceeded the elements of the charged offense.

[20] The trial court properly considered Cook's criminal history and relied on circumstances unique to Cook's case. We find no abuse of discretion.

2. Cook's sentence is not inappropriate.

[21] Cook argues his sentence is inappropriate in light of his character and the nature of the offense. Indiana Appellate Rule 7(B) gives this Court the authority to revise a sentence if, "after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." We "reserve our 7(B) authority for exceptional cases." *Faith v. State*, 131 N.E.3d 158, 160 (Ind. 2019). That is, we apply Rule 7(B) "not to achieve a perceived 'correct' sentence, but rather to leaven the outliers." *Schuler v. State*, 112 N.E.3d 180, 189 (Ind. 2018). We do not determine "whether another sentence is more appropriate"—we decide only "whether the sentence imposed is inappropriate." *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012) (internal quotations omitted).

[22] "[S]entencing is principally a discretionary function in which the trial court's judgment should receive considerable 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 (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). We "impose on the defendant the burden of persuading us that a revised sentence is warranted." *McCallister v. State,* 91 N.E.3d 554, 566 (Ind. 2018).

[23] For the nature of the offense, Cook points out no witnesses testified about "how badly or even if Jacob Cline was injured." *Appellant's Br.* at 20. Cline admitted he punched Cook "and decided to fight him," *Tr. Vol. 1* at 45, and Cook says that "the trial court was correct to identify as mitigating circumstances the fact that Jacob Cline facilitated and/or provoked the offense and that Cook acted under strong provocation," *Appellant's Br.* at 20. Cook argues the record is "otherwise silent about the nature of the offense." *Id.* at 21. But the offense at hand goes far beyond the required elements for criminal recklessness. To convict Cook of criminal recklessness, the State needed only to show Cook fired a gun *once* where people were *likely* to gather. *See* I.C. § 35-42-2-2(b)(2)(A). The record shows Cook fired a gun at Cline *six* times in a public area where many people were *actually* walking and driving. Cook received considerable consideration as part of his plea agreement: dismissal of attempted murder and other charges, as well as a firearm sentencing enhancement. The trial court imposed a sentence consistent with the terms of the plea agreement Cook accepted. And his sentence includes an opportunity for modification after serving two years if Cook successfully completes a substance treatment program.

[24] Cook claims the maximum sentence for the crime of criminal recklessness—six years—is inappropriate given his character. He points to testimony from his mother and ex-girlfriend that he is a "wonderful father" who has consistently provided for his and his ex-girlfriend's children. *Tr. Vol. 1* at 61. The probation officer testified Cook successfully completed probation for a misdemeanor. But Cook also has a criminal history—as noted earlier—which includes at least one felony and a conviction involving the illegal possession of a gun. And Cook took part in a battery while in prison for this offense. In sum, Cook's sentence is not inappropriate in light of the nature of his offense and his character.

Conclusion

[25] The trial court did not abuse its discretion when sentencing Cook, and Cook's sentence is not inappropriate. Accordingly, we affirm.

[26] Affirmed.

Bailey, J., and Tavitas, J., concur.