MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

John C. Abell,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

April 12, 2024

Court of Appeals Case No.
23A-CR-1344

Appeal from the Morgan Superior Court

The Honorable Brian H. Williams, Judge

Trial Court Cause No.
55D02-2108-F4-1144

Memorandum Decision by Judge Foley
Judges Pyle and Tavitas concur.

Foley, Judge.

[1] John C. Abell ("Abell") did not personally appear for his jury trial. Abell was tried in absentia, and a jury found him guilty of Level 4 felony possession of methamphetamine,[1] Class A misdemeanor driving while suspended;[2] Class B misdemeanor possession of marijuana,[3] and Class C misdemeanor possession of paraphernalia.[4] The trial court imposed concurrent sentences for an aggregate sentence of ten years executed, identifying Abell's criminal history as a significant aggravating circumstance. Abell now appeals. He presents three issues, which we consolidate and restate as the following two issues:

I. Whether it was proper to hold the trial in absentia; and

II. Whether the trial court abused its sentencing discretion.

[2] We affirm.

Facts and Procedural History

[3] In August 2021, the State alleged that Abell committed the following offenses: (1) Level 4 felony possession of methamphetamine; (2) Class A misdemeanor driving while suspended; (3) Class B misdemeanor possession of marijuana;

---

[1] Ind. Code § 35-48-4-6.1(c).

[2] I.C. § 9-24-19-2.

[3] I.C. § 35-48-4-11(a)(1).

[4] I.C. § 35-48-4-8.3(b)(1).

and (4) Class C misdemeanor possession of paraphernalia. Abell personally attended a pre-trial conference on September 14, 2022, at which the trial court scheduled a jury trial for November 29, 2022. At that conference, the trial court also scheduled a final pre-trial conference for November 10, 2022. Although Abell's counsel attended the final pre-trial conference, Abell failed to personally appear. When the trial court inquired about the status of the case—"aside from [Abell's] failure to appear" —Abell's counsel made the following remarks:

> Well, Your Honor, we were on track for a trial here at the end of the month[,] I believe on the 29th. [Abell] contacted me this morning to follow up on that and . . . he had sent me a text, and I responded, ["W]e'll just talk in Court in a few minutes.["] And that's when I think his panic started to set in, not realizing that he had to be here for some reason[;] I can't explain that.

Tr. Vol. 2 p. 14. Counsel added: "He wanted me to apologize to the Court[;] he's looking for a ride to get [to Morgan County] as soon as possible. He's in Indianapolis." *Id.* The trial court issued a bench warrant for Abell's arrest, noting that Abell "was warrant eligible last time for failure to show up [on] time." *Id.* at 17. Regarding the scheduled trial date, Abell's counsel told the trial court: "[A]s far as the defense, we were planning on confirming." *Id.* at 15. The court then asked the State about the trial date. The State noted that it still had to confirm one witness's availability, but "should know by the end of the day." *Id.* The court then confirmed the trial date and asked the State to "let [the court] know for sure" by the end of the next business day. *Id.* Before

concluding the hearing, the court referred to the trial date and remarked: "It remains as set. He needs to show up or we will try him in absentia." *Id.* at 18.

[4] On November 29, 2022, Abell did not personally appear for his scheduled jury trial. Abell's counsel informed the court that counsel had corresponded with Abell within the last week, noting that Abell "sent [him] a message on the morning of [November] 24th." *Id.* at 21. The trial court then said: "It would be my intention to proceed. Anyone want a record on that?" *Id.* Abell's counsel did not say anything, and the State said: "[W]e're prepared to go forward." *Id.* Shortly thereafter, the trial court inquired about other preliminary matters and Abell's counsel said: "I don't think there's anything that we really need to address regarding my client's failure to appear at this point[.]" *Id.* at 23.

[5] The trial court then conducted a jury trial in absentia. The State's evidence related to a traffic stop conducted on August 19, 2021. Law enforcement initiated the traffic stop after noticing that a vehicle "went stationary at [an] intersection" where there were "no stop signs"—"nothing that depicts that [a] vehicle needs to stop." *Id.* at 133–34. Abell identified himself as the driver of the vehicle, providing his name and date of birth. During the encounter, the officer smelled a "strong odor of raw marijuana emitting from the vehicle." *Id.* at 141. The officer ran Abell's information and learned that Abell's license was suspended. When the officer confronted Abell about the suspension, Abell acknowledged that his license was suspended, noting that the suspension "[h]ad to do with child support[.]" *Id.* at 142. The officer retrieved his certified police

K-9 for a vehicle sniff, "giv[ing] him the command to find drugs." *Id.* at 152. The K-9 gave an alert on Abell's vehicle, which led to a search of the interior.

[6] Inside the vehicle, law enforcement found multiple plastic baggies. Some of the baggies contained a white crystalline substance. Other baggies contained a "green vegetation substance." *Id.* at 155. Law enforcement also found a digital scale and a "clear glass smoking device, commonly used to smoke a crystal substance." *Id.* On the scene, Abell told law enforcement that he had been "an addict for years and did not realize the crystal substance was inside the vehicle." *Id.* at 159. Abell also "freely admitted . . . that there was marijuana within the vehicle." *Id.* at 159–60. Abell was arrested. Subsequent lab testing indicated that one of the baggies contained 14.52 grams of methamphetamine, and another baggie contained 11.4 grams of marijuana. During a police interview, Abell told law enforcement that he smoked methamphetamine. As to the marijuana, when law enforcement asked Abell if "he was slinging it"—which is "slang for dealing"—Abell said, "yes, he was going to." *Id.* at 164.

[7] The jury found Abell guilty of all four counts. The trial court then entered judgments of conviction and confirmed that the "[c]urrent warrant remain[ed] outstanding[.]" *Id.* at 227. The court noted that it would wait to "set [the case] for sentencing [until] the defendant's brought into custody to answer[.]" *Id.* Abell was arrested in March 2023, and the arrest prompted the preparation of a presentence investigation ("PSI") report. During the preparation of the PSI report, Abell said that "he does not think it is right or legal to have found him guilty by a [j]ury [t]rial without him present." Appellee's App. Vol. 2 p. 11.

[8] Abell personally attended his sentencing hearing, which was held in May 2023. At one point, Abell's counsel asked Abell: "What was going on back when we had the trial and why weren't you here?" Tr. Vol. 2 p. 232. Abell responded: "I didn't think it was going to go, I thought it was going to be continued. But . . . I made a mistake." *Id.* Counsel also asked Abell about the "period of several months between the trial and when [he] w[as] picked up[.]" *Id.* Abell said that he had been "[c]leaning up [his] act" and "[s]obering up." *Id.* When asked to clarify, Abell added that he was "getting off of methamphetamine" and "[w]orking, trying to make arrangements to come turn [him]self in." *Id.*

[9] As of the sentencing hearing, Abell was fifty-one years old. The PSI report indicated that Abell began committing crimes in his early twenties, eventually amassing eight felony convictions in six separate cases. One felony conviction was for Class B felony dealing in a schedule II controlled substance. Another conviction was for Class D felony possession of methamphetamine. Abell had previously participated in recovery programming in the Indiana Department of Correction ("the DOC"). He had also violated the conditions of his probation.

[10] At the hearing, the State sought an aggravated sentence of ten years in the DOC for the Level 4 felony conviction. The State also asked that the sentences run concurrently, for an aggregate sentence of ten years. When Abell's counsel was given the opportunity to respond, he agreed with the aggregate length of the sentence, stating: "Your Honor, the ten years, I can't say is not a reasonable request by the State. There are aggravators out there. I agree and appreciate that the State's not requesting any type of consecutive. I think everything

should be concurrent underneath that Level 4." *Id.* at 244. Counsel added that he "would ask the Court to consider a split sentence, or possibly some type of step down type sentence" that would involve "some time in the DOC with either a specific carrot or milestone for him to reach, but then he may come back and either automatically or at least specifically request modification[.]" *Id.*

[11] In pronouncing its sentence, the trial court reflected on evidence that Abell was dealing drugs. The trial court also reflected on Abell's criminal history, stating: "You have an atrocious criminal history. Not the worst I've seen. Is it significant? Absolutely. Does it call for an aggravated sentence? Absolutely." *Id.* at 245. The trial court then commented on Abell's conduct and testimony:

> You don't have to come to your trial, but obviously not showing up and the circumstances and the way you did it, [that] doesn't give me a whole lot of thought that you're really taking any of this serious[ly] until you absolutely have to, and then you come in here all contrite, telling me about how you['ve] gotten clean, on your own, and a miracle has occurred, and I'm skeptical. That's all I can say.

Id. at 245–46. The court then identified a single significant aggravating factor—Abell's criminal history—and pronounced an aggregate sentence of ten years:

> The court will find as an aggravating factor, the defendant has [a] significant criminal history. The idea that I'm punishing him for dealing, we'll take that off. I'm not doing that at this point. I think that's somewhat baked into the idea that we're going to punish people with large quantities of methamphetamine in a more significant way than those that have smaller or personal use amounts, and just kind of leave it at that. Criminal history is

> enough for a significant aggravator. Also he's violated the terms of pretrial release or bond by failing to appear without explanation. I think the State got this right when [it] said ten years.

Id. at 246. The trial court ultimately imposed ten years in the DOC for Level 4 felony possession of methamphetamine. As for the remaining counts, the court imposed 182 days for Class A misdemeanor driving while suspended, 180 days for Class B misdemeanor possession of marijuana, and sixty days for Class C misdemeanor possession of paraphernalia. The court ordered all counts to run concurrently, for an aggregate sentence of ten years executed. Abell appeals.

Discussion and Decision

I. Trial in Absentia

[12] Abell claims that the trial court erred by holding a trial in absentia. According to Abell, the trial court erred because Abell "had not knowingly, voluntarily, or intelligently waived his right" to attend the jury trial. Appellant's Br. p. 5.

[13] Both the United States Constitution and the Indiana Constitution "afford defendants in a criminal proceeding the right to be present at all stages of their trial." *Jackson v. State*, 868 N.E.2d 494, 498 (Ind. 2007) (citing U.S. Const. amend. VI and Ind. Const. art. 1, § 13). "However, a defendant may be tried in absentia if the trial court determines that the defendant knowingly and voluntarily waived that right." *Id.* "The best evidence that a defendant knowingly and voluntarily waived [the] right to be present at trial is the 'defendant's presence in court on the day the matter is set for trial.'" *Lampkins*

v. State, 682 N.E.2d 1268, 1273 (Ind. 1997) (quoting *Fennell v. State*, 492 N.E.2d 297, 299 (Ind. 1986)), *modified on other grounds on reh'g*. Thus, if "a defendant fails to appear for trial and fails to notify the trial court or provide it with an explanation," the court "may conclude [that] the defendant's absence is knowing and voluntary and proceed with trial" so long as "there is evidence that the defendant knew of his scheduled trial date." *Jackson*, 868 N.E.2d at 498 (quoting *Freeman v. State*, 541 N.E.2d 533, 535 (Ind. 1989)). Put differently, "[t]he continued absence of a defendant who knows of his obligation to be in court, when coupled with a failure to notify the court and provide it with an explanation, constitutes a knowing and voluntary waiver." *Martin v. State*, 457 N.E.2d 1085, 1086 (Ind. 1984). Still, "a defendant who has been tried in absentia 'must be afforded an opportunity to explain [the] absence and thereby rebut the initial presumption of waiver.'" *Brown v. State*, 839 N.E.2d 225, 227 (Ind. Ct. App. 2005) (emphasis removed) (quoting *Ellis v. State*, 525 N.E.2d 610, 612 (Ind. Ct. App. 1987)), *trans. denied*. "As a reviewing court, we consider the entire record to determine whether the defendant [effectively] waived [the] right to be present at trial." *Id.* (quoting *Soliz v. State*, 832 N.E.2d 1022, 1029 (Ind. Ct. App. 2005), *trans. denied*).

[14] In *Jackson*, the Indiana Supreme Court considered the propriety of holding a trial in absentia. In that case, our Supreme Court pointed out that the defendant was aware of the trial date because the defendant had personally attended the pre-trial hearing when the trial court scheduled the trial. *See Jackson*, 868 N.E.2d at 498. The Court considered a post-trial affidavit the

defendant submitted, wherein the defendant claimed he "was 'led to believe' his trial would not go forward" as scheduled. *Id.* The Court determined that this type of affidavit did not bear on the issue of waiver, noting that "[e]ven if [the defendant's] absence was in reliance on counsel's advice," that fact would "not negate [the effective] waiver of his right to be present at his jury trial." *Id.* at 499; *see also id.* at 498 (noting that reliance on counsel's advice "may support an ineffective assistance of counsel claim" but, based on the limited record, that type of claim was "left to post-conviction procedures"). The Court ultimately concluded that the defendant's "knowledge of the trial date coupled with a lack of explanation for his absence supported a determination" that the defendant knowingly and voluntarily waived the right to attend his jury trial. *Id.* at 499.

[15] Here, the record indicates that Abell personally attended the pre-trial hearing at which the trial court scheduled the case for a jury trial on November 29, 2022. When Abell did not personally appear on November 29, 2022, the trial court conducted a trial in absentia. Ahead of sentencing, Abell was afforded the opportunity to explain his absence. Abell's testimony indicated that, despite knowing that the matter was scheduled for trial, Abell elected to be absent because he anticipated a continuance. Indeed, Abell testified: "I didn't think it was going to go, I thought it was going to be continued. But . . . I made a mistake." Tr. Vol. 2 p. 232. To the extent Abell suggests he was erroneously advised that there would be a continuance, we must reject that argument, just as our Supreme Court did in *Jackson*. *See Jackson*, 868 N.E.2d at 499 (focusing on evidence that the defendant knew his trial date, noting that "[e]ven if [the]

absence was in reliance on counsel's advice, it does not negate [the defendant's] waiver of his right to be present at his jury trial"). All in all, the record reflects that Abell was aware of his trial date and, without explanation, did not appear for his trial. Abell's subsequent explanation indicated only that Abell thought that the case would be continued. Adhering to our Supreme Court's decision in *Jackson*, we conclude that the record supported conducting a trial in absentia.[5]

II. Sentencing Discretion

[16] Abell argues that the trial court abused its sentencing discretion because, at sentencing, the trial court remarked about Abell's absence from his jury trial.

[17] "[S]entencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007). "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.'" *Id.* (quoting *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006)).

[18] If the trial court deviates from the advisory sentence for a felony conviction, the court "shall issue a statement of the court's reasons for selecting the sentence that it imposes[.]" I.C. § 35-38-1-1.3. The trial court's sentencing statement

---

[5] In light of *Jackson*, we need not further address Abell's contention that the trial court should have taken other measures, such as ordering a continuance, or should have conducted further inquiry regarding Abell's "mistake in believing the jury [trial] was not going or [the trial] was continued." Appellant's Br. p. 5 (separately focusing on the lack of further inquiry regarding the basis for Abell's mistaken belief); *see also id.* at 15 (suggesting that the court should have questioned Abell about "how [the] misunderstanding took place").

must be "reasonably detailed." *Anglemyer*, 868 N.E.2d at 490. Moreover, if the trial court's sentencing statement "includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." *Id.* The court abuses its sentencing discretion if the sentencing statement "explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but . . . the reasons given are improper as a matter of law." *Id.* at 490–91. Moreover, Indiana Code Section 35-38-1-7.1 contains a non-exhaustive list of potential aggravating factors. One aggravating factor is where the defendant has "a history of criminal or delinquent behavior." I.C. § 35-38-1-7.1(a)(2).

[19] Here, the lead offense was a Level 4 felony conviction. The sentencing range for a Level 4 felony was between two and twelve years, with an advisory sentence of six years. I.C. § 35-50-2-5.5. The trial court chose to impose an aggravated sentence of ten years. In selecting an aggravated sentence, the trial court identified a single aggravating factor—Abell's criminal history—and remarked that Abell's criminal history was "atrocious." Tr. Vol. 2 p. 245.

[20] On appeal, Abell argues that the trial court abused its sentencing discretion because, in pronouncing Abell's sentence, the trial court at one point referred to Abell's absence from the jury trial. Abell directs us to the following remarks:

> You don't have to come to your trial, but obviously not showing up and the circumstances and the way you did it, [that] doesn't give me a whole lot of thought that you're really taking any of

> this serious[ly] until you absolutely have to, and then you come in here all contrite, telling me about how you[']ve] gotten clean, on your own, and a miracle has occurred, and I'm skeptical. That's all I can say.

Tr. Vol. 2 p. 245. According to Abell, the trial court's remarks indicated that the court improperly "considered [Abell's] . . . absence at trial as an aggravating consideration in sentencing[.]" Appellant's Br. p. 17. However, the State argues in response that Abell mischaracterizes the trial court's remarks. The State asserts that the trial court's remarks did not relate to an aggravating factor, but instead served to "explain[] why [the court] was 'skeptical' and unpersuaded by [Abell's] claims of mitigation, and why it was rejecting placement" outside of the DOC. Appellee's Br. p. 21. The State adds that, even assuming that the trial court identified an improper aggravating factor, Abell is not entitled to relief because the aggravated sentence is supported by a valid aggravating factor. The State directs us to caselaw for the proposition that "a sentence may be affirmed based on a valid aggravating factor even where the court also relied on an invalid aggravator[.]" *Id.* at 23 (citing *Baumholser v. State*, 62 N.E.3d 411, 417 (Ind. Ct. App. 2016)). Indeed, the State points out that, even if the court identified an improper aggravating factor, an appellate court need not remand for resentencing if it can "say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." *Anglemyer*, 868 N.E.2d at 491.

[21] We agree with the State that the challenged remarks speak more to the trial court's rejection of a proffered mitigating factor than the identification of an

aggravating factor. And, even assuming that the court's stray remarks resulted in some form of sentencing error, this case would not warrant remand. That is, when the State sought a ten-year sentence, Abell agreed with the overall length of the sentence. As for placement in the DOC, the trial court determined that Abell had "an atrocious criminal history" that "call[ed] for an aggravated sentence[.]" Tr. Vol. 2 p. 245; *see also id.* at 246 ("Criminal history is enough for a significant aggravator."). Further, Abell's criminal history involved prior opportunities at rehabilitation and violations of the conditions of probation. Thus, based on the record, we can say with confidence that the trial court would have imposed the same sentence due to Abell's criminal history alone. Therefore, Abell has not persuaded us of reversible error affecting his sentence.

Conclusion

[22] The record supported the trial court's decision to conduct a jury trial in absentia. Moreover, to the extent that the trial court's remarks at sentencing resulted in sentencing error, Abell has not identified reversible error.

[23] Affirmed.

Pyle, J., and Tavitas, J., concur.

ATTORNEY FOR APPELLANT

Kristal D. White
Law Office of Gary M. Selig, P.C.
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Ellen H. Meilaender
Supervising Deputy Attorney General
Indianapolis, Indiana