MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Benjamin A. Duncan,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

February 29, 2024

Court of Appeals Case No.
23A-CR-1982

Appeal from the Bartholomew Circuit Court

The Honorable Kelly S. Benjamin, Judge

Trial Court Cause No.
03C01-2203-F4-1491

Memorandum Decision by Judge May
Judges Vaidik and Kenworthy concur.

May, Judge.

[1] Benjamin A. Duncan appeals the sentence imposed by the trial court following Duncan's plea of guilty to Level 4 felony sexual misconduct with a minor.[1] The trial court imposed a nine-year sentence and ordered six of those years served executed in the Department of Correction ("DOC"). Duncan alleges the order that he serve six years executed is inappropriate for his offense and his character. In light of the record before us, we see nothing inappropriate in his sentence and, accordingly, affirm.

Facts and Procedural History

[2] In January 2021, twenty-six-year-old Duncan was having trouble in his marriage and began living with his half-sister ("M.S."), her husband, and her fourteen-year-old daughter ("A.M.") Duncan began exchanging sexual text messages with A.M. and fondling A.M.'s body as the two cuddled at night after A.M.'s mother and stepfather went to bed. On February 24, 2021, A.M. spent time hanging out in the garage with Duncan while he was drinking alcohol. When A.M. decided to go to bed, Duncan followed her to her room, shut the door behind them, turned off the light, and told her that he was sorry. A.M. asked why he was sorry when he had not done anything wrong, and Duncan said, "not yet." (Appellant's App. Vol. 2 at 90.) Duncan sat on the A.M.'s bed

[1] Ind. Code § 35-42-4-9(a).

and began talking to A.M. and fondling her over her clothes. He then undressed her, fondled her naked body, performed oral sex on her, and had sexual intercourse with her. Before leaving her room, Duncan told A.M. not to tell anyone what had happened because he could go to prison. On March 11, 2021, Duncan again attempted to have sex with A.M., but she refused and left his room. Soon thereafter, A.M. revealed what had happened with Duncan to a family friend. The family friend told M.S. on March 16, 2021, and M.S. immediately called the police.

[3] Police began an investigation. A.M. was interviewed at Susie's Place in Bloomington, Indiana. Police were given access to A.M.'s social media and texting accounts to collect all interactions between A.M. and Duncan. Those messages included explicit discussion of sexual behavior between the two that occurred before the sexual intercourse on February 24, 2021, and of Duncan giving A.M. advice for future sexual behavior and suggesting they engage in sexual behavior.

[4] On March 21, 2022, the State charged Duncan with one count of Level 4 felony sexual misconduct with a minor. The Information alleged Duncan, while twenty-six years old, "did perform or submit to sexual intercourse or other sexual conduct" with A.M., who was between fourteen and sixteen years old. (Appellant's App. Vol. 2 at 13.) Duncan and the State reached a plea agreement that capped at six years any executed portion of the sentence imposed by the trial court. The parties appeared in court on May 8, 2023, for a change of plea hearing, during which Duncan admitted he had sexual

intercourse with A.M. when she was fourteen years old and he was twenty-six years old. The trial court accepted Duncan's guilty plea and ordered a Presentence Investigation.

[5] The trial court held a sentencing hearing on July 27, 2023. Duncan testified about wanting treatment for the sexual abuse he experienced when he was fifteen years old[2] and for his alcohol and addiction problems. On cross-examination, Duncan admitted that he had continued to use methamphetamine and marijuana during the prior two years, including the night before the sentencing hearing, while he had been out on bond in these proceedings and serving probation under a separate cause number. A.M. provided a victim impact statement that discussed the intense therapy she was receiving because she still had nightmares about Duncan and because she engages in self-harm to try to forget what Duncan had done to her. The trial court's sentencing order included the following aggravators and mitigators:

> The Court finds the following aggravating circumstances:
>
> 1. The defendant's prior criminal history.
>
> 2. While this case was pending and the defendant was out on bond, he committed additional crimes in Franklin County, Indiana. He has one case still pending.

---

[2] Duncan's half-sister, M.S., who is the mother of A.M., was convicted of a sex offense for having a sexual relationship with Duncan when he was fifteen and she was in her mid-twenties.

3. The defendant was in a position of trust with the victim and the crime was committed in her home.

4. The defendant makes excuses for his actions.

5. The defendant blames the victim.

6. The seriousness of the crime given the history of his family.

7. This offense caused significant harm to the victim.

8. It will depreciate the seriousness of the offense if prison time is not imposed.

The Court finds the following mitigating circumstances:

1. The defendant pled guilty; however, the Court does not give this great weight.

2. The defendant shows some remorse; however, the Court does not give this great weight.

(Appellant's App. Vol. 2 at 99-100.) The court imposed a nine-year sentence, suspended three years to probation, and ordered Duncan to spend six years in the DOC.

Discussion and Decision

[6] Duncan claims his sentence is inappropriate. Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence "if, after due consideration of the trial court's decision, [we] find that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Our determination "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." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008).

> Our review is deferential to the trial court's decision, and our goal is to determine whether the appellant's sentence is inappropriate, not whether some other sentence would be more appropriate. We consider not only the aggravators and mitigators found by the trial court, but also any other factors appearing in the record. The appellant bears the burden of demonstrating his sentence [is] inappropriate.

George v. State, 141 N.E.3d 68, 73-74 (Ind. Ct. App. 2020) (internal citations omitted).

[7] In particular, Duncan asserts neither the nature of his offense nor his character "warrant[s] imposition of a six (6) year executed sentence." (Appellant's Br. at 10.) "The place that a sentence is to be served is an appropriate focus for application of our review and revise authority." *Biddinger v. State*, 868 N.E.2d 407, 414 (Ind. 2007). "Nonetheless, we note that it will be quite difficult for a defendant to prevail on a claim that the placement of his or her sentence is inappropriate." *Fonner v. State*, 876 N.E.2d 340, 343 (Ind. Ct. App. 2007). "Additionally, the question under Appellate Rule 7(B) is not whether another

sentence is more appropriate; rather, the question is whether the sentence imposed is inappropriate. A defendant challenging the placement of a sentence must convince us that the given placement is itself inappropriate." *Id.* at 344.

[8] "Our analysis of the nature of the offense requires us to look at the nature, extent, heinousness, and brutality of the offense." *Pritcher v. State*, 208 N.E.3d 656, 668 (Ind. Ct. App. 2023). As our Indiana Supreme Court has explained, "compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality)" may lead to a downward revision of the defendant's sentence. *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015). "When considering the nature of the offense, we first look to the advisory sentence for the crime." *McHenry v. State*, 152 N.E.3d 41, 46 (Ind. Ct. App. 2020). When a sentence deviates from the advisory sentence, "we consider whether there is anything more or less egregious about the offense as committed by the defendant that distinguishes it from the typical offense accounted for by our legislature when it set the advisory sentence." *Madden v. State*, 162 N.E.3d 549, 564 (Ind. Ct. App. 2021).

[9] The sentencing range for a Level 4 felony is two to twelve years, with an advisory sentence of six years. Ind. Code § 35-50-2-5.5. The trial court imposed a nine-year sentence and ordered Duncan to serve six of those years in the DOC. We see nothing inappropriate about Duncan serving the advisory sentence in the DOC based on the nature of his offense. A.M. was Duncan's fourteen-year-old niece, and he took advantage of her admiration of him for his own sexual gratification while living in the house with her. The State charged

Duncan with a single count of sexual misconduct with a minor based on the intercourse that occurred on February 24, 2021, but the police reports and discussions between A.M. and Duncan over social media indicate both: (1) Duncan had been grooming A.M. for weeks before the intercourse by fondling her breasts and genitals while cuddling after the other adults in the house went to bed; and (2) Duncan fully intended, and tried, to repeat his crime in March 2021. As a result of Duncan's crime, A.M. was suicidal and engaging in self-harm. A six-year executed sentence is not inappropriate.

[10] Nor do we find his sentence inappropriate for his character. "When considering the character of the offender, one relevant fact is the defendant's criminal history." *Johnson v. State*, 986 N.E.2d 852, 857 (Ind. Ct. App. 2013). Duncan was adjudicated a delinquent for dealing drugs in 2010; in the summer of 2022, he was charged and convicted of possession of methamphetamine, marijuana, and paraphernalia; and in December of 2022, Duncan was charged with residential entry while out on bond in the present case and while serving probation for the possession case. An offender's continued criminal behavior after judicial intervention reveals a disregard for the law that reflects poorly on his character. *Kayser v. State*, 131 N.E.3d 717, 724 (Ind. Ct. App. 2019). Moreover, Duncan has young children that he should be supporting emotionally and financially, but a protective order prevents Duncan from seeing his children and he is at least $8,000.00 behind in child support payments. Duncan claimed at sentencing that he wanted treatment for his drug and alcohol issues, which he alleged were partially responsible for his crime, but

he spent two years out on bond during these proceedings and, rather than seek treatment, continued using drugs up through the night before sentencing. We do not find ourselves "overcome by compelling evidence portraying in a positive light . . . the defendant's character (such as substantial virtuous traits or persistent examples of good character)." *Oberhansley v. State*, 208 N.E.3d 1261, 1271 (Ind. 2023) (quoting *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015)).

Conclusion

[11] Neither Duncan's offense nor his character causes us to see his six-year executed sentence as inappropriate for his Level 4 felony sexual misconduct with a minor. We accordingly affirm.

[12] Affirmed.

Vaidik, J., and Kenworthy, J., concur.

ATTORNEY FOR APPELLANT

R. Patrick Magrath
Alcorn Sage Schwartz & Magrath, LLP
Madison, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Indiana Attorney General
Indianapolis, Indiana

Andrew A. Kobe
Section Chief, Criminal Appeals
Indianapolis, Indiana