MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Derek A. Wethington,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

April 17, 2024

Court of Appeals Case No.
23A-CR-2547

Appeal from the Henry Circuit Court

The Honorable Bob A. Witham, Judge

Trial Court Cause No.
33C01-2304-F1-000005

Memorandum Decision by Judge Felix
Chief Judge Altice and Judge Bradford concur.

Felix, Judge.

Statement of the Case

[1] Derek Wethington was convicted of burglary as a Level 1 felony after he pled guilty but mentally ill. The trial court sentenced him to 35 years in the Indiana Department of Correction (the "DOC"). Wethington raises a single issue on appeal: Whether his sentence is inappropriate under Indiana Appellate Rule 7(B) in light of his character and the nature of the offense.

[2] We affirm.

Facts and Procedural History

[3] On April 25, 2023, 86-year-old Delbert Wilhelm and his 84-year-old wife returned to their New Castle, Indiana home after a one-week postoperative appointment for a surgical procedure implanting a pacemaker and defibrillator in Wilhelm. Wilhelm decided to nap in a recliner on the home's first floor, and his wife went to their upstairs bedroom. Wethington kicked in the back door to the home and, when Wilhelm investigated, repeatedly struck Wilhelm, causing multiple fractures to Wilhelm's face, "including a nasal septum fracture, maxillary sinus fracture and contusions and lacerations." Tr. Vol. II at 6–7. Wethington then fled; Wilhelm's neighbor observed Wethington running from the area, asked Wethington if he could help him, and reported that Wethington was "talking incoherent and . . . screamed." *Id.* at 17.

[4] Shortly after the attack on Wilhelm, law enforcement officers located Wethington nearby in an apartment parking lot, where he had broken windows in two vehicles, and was sitting in one of the vehicles. When the officers tried to get Wethington out of the vehicle, he fought and "violently thrash[ed] about" with the officers. In the struggle, one officer suffered a sprained and bruised wrist.

[5] The State charged Wethington with burglary as a Level 1 felony,[1] aggravated battery as a Level 3 felony,[2] battery against a public safety official as a Level 6 felony,[3] resisting law enforcement as a Level 6 felony,[4] two counts of unauthorized entry of a motor vehicle as Class B misdemeanors,[5] and two counts of criminal mischief as Class B misdemeanors[6]. Under a plea agreement, Wethington pled guilty but mentally ill to burglary as a Level 1 felony in return for the State dismissing the remainder of the charges. Sentencing was left to the trial court's discretion.

[6] At the sentencing hearing on September 28, 2023, Wethington testified that he had been diagnosed ten years earlier with bipolar depression and "[m]ild

---

[1] Ind. Code §§ 35-43-2-1 and -1(4).

[2] *Id.* § 35-42-2-1.5(2).

[3] *Id.* §§ 35-42-2-1(C)(1) and 1(E)(2) (2023).

[4] *Id.* §§ 35-44.1-3-1(A)(1) and -1(c)(1)(B)(ii) (2023).

[5] *Id.* § 35-43-4-2.7(D).

[6] *Id.* § 35-43-1-2(A) (2023).

schizophrenia." Tr. Vol. II at 33. He had been on medication for those conditions through a subsidized program but had previously stopped taking them when he became employed and was no longer eligible for Medicaid. On the day of the attack in April 2023, Wethington had been out of work for three or four months. Wethington testified that, on that day: "I seen [sic] a whole bunch of faces in my head that I didn't recognize that were after me with guns and telling me what to do and telling me to run hard or else I would get killed." *Id.* at 34.

[7] Wethington's father's fiancée testified on behalf of Wethington's family at the sentencing hearing. Wethington had lived with his father and his father's fiancée for ten years. She testified that Wethington's income when he was employed had eliminated his eligibility for treatment at a health facility "without racking up a bunch of money, so he just tried to tough through it." Tr. Vol. II at 29–30. She believed Wethington had been off his medication for about two years.

[8] One of Wilhelm's sons testified at the sentencing hearing regarding Wilhelm's condition following the attack by Wethington. Prior to the attack, Wilhelm and his wife had lived independently and were able to care for themselves in the home they had shared for 49 years. Following the attack, Wilhelm had been hospitalized in a trauma ward for nine days after which he "had to go to an assisted living facility in Indy." Tr. Vol. II at 21. Another son also testified that the doctors said Wilhelm was "not in the position to live at home alone, because of his condition. He is unstable. They [the doctors] don't want [his

family] to leave him alone at this particular point." *Id.* at 23. As a result, one of Wilhelm's sons had moved his parents to be near his home in Bloomington, Illinois, and the family was in the process of selling Wilhelm's New Castle home. That son also testified that Wilhelm "wakes up numerous times in the night and he still sees [Wethington's] face in front of him coming at him . . . virtually every night." *Id.* at 24.

[9] At sentencing, the State requested a 30-year sentence, arguing as aggravators that the particular harm suffered by the victim was greater than necessary to prove the elements of the offense and that Wilhelm was well over 65 years old. Wethington argued for a 20-year sentence, noting that he had "accept[ed] responsibility for his actions by pleading guilty in a rather expeditious manner." Tr. Vol. II at 39. He also argued as a mitigator his "limited criminal history," which includes a 2005 Class D felony theft conviction, a 2007 misdemeanor conviction for contributing to the delinquency of a minor in Virginia, and his significant mental health history. *Id.*

[10] Following all testimony at the sentencing hearing, the trial court sentenced Wethington to 35 years executed in the DOC. The trial court noted that Wethington was "able to function when he was on his medications" and that the employment "apparently interrupted" whether he could continue to receive those medications. Tr. Vol. II at 40. The court also noted that, although he was presumably again eligible for Medicaid, Wethington had not resumed his medications since becoming unemployed again. The aggravators found by the trial court include that the harm on Wilhelm was "very significant and was

greater than the elements necessary to prove the commission of the offense"; Wilhelm's wife also suffered because the couple could no longer live in their home or independently; Wethington's history included a prior felony theft conviction and a probation violation; and Wilhelm's age was 86 years old at the time of the attack. *Id.* at 40–41. As mitigators, the trial court found that Wethington had accepted responsibility, entering a guilty plea, but that such mitigator carried less weight because Wethington also benefitted by the dismissal of several charges. The court also found as a mitigator Wethington's mental health but determined such mitigator to be diminished by the fact that he historically had no issues when medicated but took no steps to resume medication after his employment had ended in 2022. Wethington now appeals his sentence.

Discussion and Decision

[11] Wethington asks us to review his sentence pursuant to Indiana Appellate Rule 7(B). The Indiana Constitution authorizes us to independently review and revise a trial court's sentencing decision. *Faith v. State*, 131 N.E.3d 158, 159 (Ind. 2019) (citing Ind. Const. art. 7, §§ 4, 6; *McCain v. State*, 88 N.E.3d 1066, 1067 (Ind. 2018)). That authority is implemented through Appellate Rule 7(B), which permits us to 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." *Faith*, 131 N.E.3d at 159 (quoting Ind. Appellate Rule 7(B)).

[12] Our role under Rule 7(B) is to "leaven the outliers," *Faith*, 131 N.E.3d at 159–60 (quoting *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008)), and we reserve that authority for "exceptional cases," *Mullins v. State*, 148 N.E.3d 986, 987 (Ind. 2020) (quoting *Faith*, 131 N.E.3d at 160). Generally, we affirm a trial court's sentencing decision unless it is "overcome by compelling evidence portraying in a positive light the nature of the offense . . . and the defendant's character." *Stephenson v. State*, 29 N.E.3d 111, 111–12 (Ind. 2015). In conducting this analysis, "we are not limited to the mitigators and aggravators found by the trial court." *Brown v. State*, 10 N.E.3d 1, 4 (Ind. 2014).

In looking at the nature of the offense, we start with the advisory sentence. *Brown*, 10 N.E.3d at 4 (citing *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007)). Wethington was convicted of burglary with serious bodily injury as a Level 1 felony. *See* I.C. § 35-43-2-1(4). For a Level 1 felony, a person "shall be imprisoned for a fixed term of between twenty (20) and forty (40) years, with the advisory sentence being thirty (30) years." Ind. Code § 35-50-2-4(b). Here, the trial court sentenced Wethington to 35 years to be served in DOC.

[13] Since the trial court deviated from the advisory sentence, we consider "whether there is anything more or less egregious about the offense committed by the defendant that makes it different from the 'typical' offense accounted for by the legislature when it set the advisory sentence." *T.A.D.W. v. State*, 51 N.E.3d 1205, 1211 (Ind. Ct. App. 2016) (quoting *Holloway v.* State, 950 N.E.2d 803, 806–07 (Ind. Ct. App. 2011)), as amended (May 26, 2023). We also consider

whether the offense was "accompanied by restraint, regard, and lack of brutality." *Stephenson*, 29 N.E.3d at 122.

[14] Wethington acknowledges that the nature of the offense was "disturbing," and that "the nature of the offense in this case, standing alone, could support an aggravated sentence . . . ," Appellant's Br. at 9, and we agree.[7] Wethington broke into the home of an 86-year-old man who had just undergone a surgical procedure to insert a pacemaker and defibrillator. Additionally, Wilhelm was 86 years old, well over the 65-year age consideration to qualify as an aggravating circumstance under Indiana Code section 35-38-1-7.1(a)(3) (2023). The injuries Wethington inflicted on Wilhelm included multiple facial fractures that hospitalized the latter for nine days in a trauma ward, rendered him no longer able to live independently in the home he and his wife had shared for 49 years, and caused Wilhelm to have trouble sleeping due to nightly visions of the attack.

[15] Still, Wethington argues that his sentence is inappropriate in light of his character. Appellant's Br. at 9. We cannot agree. Wethington had received

[7] We acknowledge a division in this court's opinions regarding whether an appellant must prove each prong independently to render a sentence inappropriate. *Cf. Davis v. State*, 173 N.E.3d 700, 705–06 (Ind. Ct. App. 2021) (holding failure to demonstrate inappropriateness of sentence under both prongs waives review under App. R. 7(B)), *with Dean v. State*, 222 N.E.3d 976, 990 n.6 (Ind. Ct. App. 2023) (holding appellant need not prove each prong independently renders a sentence inappropriate), *trans. denied*. We subscribe to the balancing approach in which an appellant need not independently prove each prong to show that a sentence is inappropriate. *See State v. Stidham*, 157 N.E.3d 1185, 1195 (Ind. 2020); *Connor v. State*, 58 N.E.3d 215, 219 (Ind. Ct. App. 2016); *see also Davis v. State*, 173 N.E.3d 700, 707-09 (Ind. Ct. App 2021) (Tavitas, J., concurring in result).

diagnoses of bipolar depression and schizophrenia at least ten years before the offense. As pointed out by the trial court, Wethington did not have "issues . . . involv[ing] the criminal justice system" during the time he was managing his mental health with medication. Tr. Vol. II at 41. Wethington said he could no longer afford his medication while he was employed in 2022, but, upon becoming unemployed again, Wethington took no steps to resume treatment for his mental health conditions. Wethington also has a criminal history that includes a 2005 felony conviction for theft as a Class D felony (with an admitted probation violation), a 2006 conviction for possession of marijuana/has oil/hashish as a Class A misdemeanor, and a 2007 conviction for contributing to the delinquency of a minor as a misdemeanor. He also has demonstrated nothing in his past to show he has been a positive influence on his community, his friends, or even his family. While we "'cannot foreclose the possibility' of considering for 7(B) purposes 'the role of a defendant's mental illness in the commission of a crime,' *Oberhansley v. State*, 208 N.E.3d 1261, 1271 (Ind. 2023) (quoting *Helsley v. State*, 43 N.E.3d 225, 229 (Ind. 2015)), a person who pleads guilty but mentally ill "'is not automatically entitled to any particular credit or deduction from his otherwise aggravated sentence' simply by virtue of being mentally ill." *Weeks v. State*, 697 N.E.2d 28, 30 (Ind. 1998) (quoting *Archer v. State,* 689 N.E.2d 678, 684 (Ind. 1997)). Wethington has not presented circumstances in which his mental illness warrants a finding that his sentence is inappropriate under Appellate Rule 7(B).

Conclusion

[16] Wethington concedes that the nature of the offense is egregious, and he has not demonstrated that his character warrants a finding that his 35-year sentence for of burglary as a Level 1 felony is inappropriate. Therefore, we affirm Wethington's sentence.

[17] Affirmed.

Altice, C.J., and Bradford, J., concur.

ATTORNEY FOR APPELLANT

Cara Schaefer Wieneke
Wieneke Law Office, LLC
Brooklyn, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Indiana Attorney General

Robert M. Yoke
Deputy Attorney General
Indianapolis, Indiana