

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



IN THE
Court of Appeals of Indiana

Robert J. Shepard, Jr.,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

April 26, 2024

Court of Appeals Case No.
23A-CR-2989

Appeal from the Henry Circuit Court
The Honorable Kit C. Dean Crane, Judge

Trial Court Cause No.
33C02-2310-F6-433

Memorandum Decision by Judge Foley
Judges Riley and Brown concur.

Foley, Judge.

- [1] Robert J. Shepard, Jr. (“Shepard”) pleaded guilty to Level 6 felony possession of methamphetamine,¹ Level 6 felony unlawful possession of a syringe,² and Class B misdemeanor possession of marijuana.³ The trial court imposed concurrent sentences, resulting in an aggregate sentence of 800 days executed in the Indiana Department of Correction (“the DOC”). Shepard now appeals, claiming his sentence is inappropriate. Although Shepard does not challenge the length of his sentence, he claims that imposing a fully executed sentence is inappropriate in light of the nature of the offenses and his character. We affirm.

Facts and Procedural History

- [2] In October 2023, the State charged Shepard with the following three counts: (1) Level 6 felony possession of methamphetamine; (2) Level 6 felony unlawful possession of a syringe; and (3) Class B misdemeanor possession of marijuana. At the initial hearing, Shepard told the trial court: “I am currently going to represent myself, and I’m going to throw myself on the mercy of the [c]ourt and enter a plea of guilty.” Tr. Vol. 2 p. 9. Shepard added: “I ask for -- please, give me a chance to get substance abuse [treatment]. I just want to get my life back

¹ Ind. Code § 35-48-4-6.1(a).

² I.C. § 16-42-19-18.

³ I.C. § 35-48-4-11(a)(1).

together and be a good dad.” *Id.* At that point, the court advised Shepard of his rights, including the right to counsel and the right to a jury trial.

[3] Shepard waived his rights and pleaded guilty as charged. In pleading guilty, Shepard admitted that, on October 18, 2023, law enforcement was dispatched to a church in New Castle, Indiana based on a report that someone was staying on church property and building bonfires. Law enforcement encountered Shepard in the woods behind the church property. Shepard was arrested on an existing warrant and, during a search of his person, Shepard admitted that he had “marijuana in his right sock, a needle in his . . . pocket, and crystal meth in his left sock.” *Id.* at 24. The ensuing search revealed a “used needle,” a “bag of marijuana,” and a “powdery white substance identified as crystal meth.” *Id.*

[4] The trial court entered judgments of conviction, set the matter for sentencing, and ordered preparation of a pre-sentence investigation report (“PSI”). The court also appointed counsel to represent Shepard at the sentencing hearing.

[5] The sentencing hearing was held on November 16, 2023. At the hearing, Shepard admitted that he had “an addiction issue[.]” *Id.* at 30. Shepard informed the court that, if he were released at some point in the case, he planned to seek treatment for his addiction. He spoke about his ten-year-old daughter, admitting that he “overdosed on her birthday last year” and “would like to make up for it this year.” *Id.* Shepard also admitted that, at some point in the past, he had been placed on reporting probation. As for the outcome of that placement, Shepard said: “I terminated -- I was unsuccessful. I had a drug

dependency problem at that time as well.” *Id.* at 31. Shepard—who at that point was forty-six years old—was also asked whether he had ever participated in inpatient treatment. Shepard indicated that it had “[b]een thirty years” since inpatient treatment. *Id.* When asked if he would like to tell the court anything, Shepard responded: “I am going to try to get help this time. You know, I’m forty-six. I can’t keep doing this. I mean, I’m wasting away. I want to leave something better for my daughter than . . . a dead junkie dad in a ditch[.]” *Id.*

[6] Regarding Shepard’s sentence, the State argued that Shepard’s criminal history was an aggravating circumstance. The State noted that Shepard had pleaded guilty to “five felony cases” and “ha[d] also violated the terms of his suspended sentence in four cases[,] . . . [t]he most recent one being in 2018.” *Id.* at 32.

Regarding Shepard’s criminal history, the PSI reflected that Shepard was convicted of multiple misdemeanors when he was eighteen years old. One of those convictions was for Class A misdemeanor conversion in 1995. By the time Shepard reached his early twenties, he had been convicted of additional misdemeanor offenses, including Class B misdemeanor public intoxication in 1996 and Class A misdemeanor possession of marijuana in 1999 and 2000. Shepard was also convicted of Class C felony burglary in 2007. In that felony case, Shepard was placed on formal probation. Shepard submitted a positive drug screen in 2008 and admitted to violating a condition of his probation. At that point, he was continued on probation, with an order to obtain “substance abuse evaluation/treatment” with a particular provider. Appellant’s App. Vol. 2 p. 33. Shepard submitted additional positive screens, which led to the

revocation of his probation and placement in the DOC. Shepard later committed additional felonies: Class D felony auto theft in 2011; Level 6 felony criminal recklessness in 2015; Level 6 felony battery against a public safety official in 2018; and Level 6 felony domestic battery in 2019.

[7] When interviewed for the PSI, Shepard said that he had been homeless for about one year. The PSI reflected that Shepard was diagnosed with bipolar disorder in 2007. Shepard said that “he took [prescribed] medications for about [one] year” but “was continuing to drink too much [and] use drugs.” *Id.* at 29. Regarding substance abuse, Shepard admitted that “alcohol ha[d] been a big problem for him since childhood” and he “had to ‘drink daily to maintain.’” *Id.* Shepard noted that he also uses marijuana, which he started using when he was eight years old. As for other substances, Shepard referred to heroin as “the ‘bees knees[.]’” *Id.* He began using heroin when he was thirteen, and last used heroin about one month before the PSI interview. Before using heroin, Shepard used other opiates, such as morphine, and “there was a time when he was using 600mg of morphine per day.” *Id.* Regarding treatment, Shepard said he went to “Mirage Retreat when he was 17 years old.” *Id.* Thereafter, he “attended self-help meetings at various times over the years.” *Id.* Shepard also attended a class in jail and at one point participated in intensive outpatient treatment.

[8] Based on Shepard’s criminal history and other information gathered for the PSI, the Indiana Risk Assessment System classified Shepard as having a “Very High” risk of reoffending. *Id.* at 36. The State asked the trial court to take that risk level “into consideration” when sentencing Shepard. Tr. Vol. 2 p. 32. The

State also asked the trial court to “take into consideration that [Shepard] did, in fact, plead guilty to the charges[.]” *Id.* The State ultimately recommended that the trial court impose a sentence of 800 days in the DOC. As for Shepard, he argued that “it is a mitigating factor that he[] accepted responsibility for his actions.” *Id.* at 33. Shepard sought the opportunity for placement outside the DOC, noting that he admits “he has a drug problem,” admits “he needs help,” and “would ask for the [c]ourt to fashion a sentence where he can get that help.” *Id.* Shepard ultimately sought a somewhat longer sentence than the State requested but sought to serve the sentence in an alternative placement.

[9] The trial court identified one aggravating circumstance, which was that Shepard had “an extensive history of criminal or delinquent activity.” *Id.* at 34. The trial court also identified one mitigating circumstance, which was that Shepard “did accept responsibility” and “did so at the soonest opportunity.” *Id.* As for Shepard’s request for placement outside the DOC, the court said: “You have had ample opportunities for rehabilitation. You haven’t been successful. I’m hoping . . . that[,] following this period of incarceration[,] . . . you finally get it. I’m hoping this does it for you.” *Id.* The trial court chose to impose 800 days in the DOC for each Level 6 felony and forty-four days in the Henry County Jail for the Class B misdemeanor. The court ran the sentences concurrently, for an aggregate sentence of 800 days executed. Shepard now appeals.

Discussion and Decision

[10] Shepard asks us to revise his sentence under Appellate Rule 7(B), claiming the sentence imposed is inappropriate in light of the nature of the offenses and his character. In seeking sentence revision, Shepard does not challenge the trial court's decision to impose an aggregate sentence of 800 days. Rather, he challenges the court's decision to impose a fully executed sentence in the DOC.

[11] Under Appellate Rule 7(B), we “may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the [c]ourt finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Moreover, “[t]he place that a sentence is to be served is an appropriate focus for application of [this] review and revise authority.” *Biddinger v. State*, 868 N.E.2d 407, 414 (Ind. 2007). When exercising our authority to revise a sentence under Appellate Rule 7(B), “[o]ur principal task is ‘to attempt to leaven the outliers’—not to achieve a ‘correct’ result in every case.” *Ramirez v. State*, 174 N.E.3d 181, 201–02 (Ind. 2021) (quoting *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008)). Furthermore, “[w]hen we review a sentence under Appellate Rule 7(B), we show the trial court ‘considerable deference.’” *Oberhansley v. State*, 208 N.E.3d 1261, 1267 (Ind. 2023) (quoting *Cardwell*, 895 N.E.2d at 1222). “This ‘deference should prevail unless overcome by compelling evidence portraying in a positive light the nature of the offense’ and ‘the defendant’s character.’” *Id.* (quoting *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015)). All in all, the defendant bears the burden of persuading us that the trial court's sentence is inappropriate. *Ramirez*, 174 N.E.3d at 202.

[12] Here, the trial court imposed concurrent sentences of 800 days in the DOC for each Level 6 felony and forty-four days in jail for the Class B misdemeanor, resulting in an aggregate sentence of 800 days executed in the DOC. The trial court’s sentencing arrangement was authorized by statute. *See* Ind. Code §§ 35-50-2-7 (establishing a sentencing range of six months to 2.5 years for a Level 6 felony, with a one-year advisory sentence), 35-50-3-3 (authorizing “a fixed term of not more than one hundred eighty . . . days” for a Class B misdemeanor).

[13] Regarding the nature of the offenses, the Indiana Supreme Court has identified several examples of compelling evidence that supports revising the sentence under Appellate Rule 7(B). Those examples include evidence that the criminal conduct was “accompanied by restraint, regard, and lack of brutality.” *Oberhansley*, 208 N.E.3d at 1271 (quoting *Stephenson*, 29 N.E.3d at 122). Here, Shepard asserts that “[t]here was nothing particularly remarkable about his offenses,” which involved the possession of methamphetamine, marijuana, and a syringe. Appellant’s Br. p. 7. We note, however, that Shepard possessed these items in the woods behind a church, where he was reportedly staying. The contraband was concealed on his person, posing less risk to others. Still, Shepard’s decision to bring a used syringe and drugs into the woods behind a church presented at least some risk to those who might pass through the woods. In sum, we discern nothing compelling about the nature of Shepard’s offenses that would support revising the sentence under Appellate Rule 7(B).

[14] Turning to the character of the offender, our Supreme Court has identified “substantial virtuous traits” and “persistent examples of good character” as

compelling evidence supporting sentence revision. *Oberhansley*, 208 N.E.3d at 1271 (quoting *Stephenson*, 29 N.E.3d at 122). Yet, even if the record contains examples of the defendant’s good character, a history of criminal conduct weighs against granting relief. *See id.* at 1272. As for his character, Shepard asserts that “he suffered from a long-term drug addiction that . . . had left him with nothing.” Appellant’s Br. p. 7. Shepard points out that “[t]his addiction began when [he] was only eight years old,” and he argues that he “expressed a sincere desire” to overcome the addiction. *Id.* at 8. Shepard also points out that “he accepted responsibility for his actions at his earliest opportunity.” *Id.* Regarding his character, Shepard acknowledges that his criminal history “support[ed] an [aggravated] sentence.” *Id.* However, Shepard maintains that the trial court’s sentence of “800 days, all incarcerated, [is] inappropriate in light of the minor nature of the offenses and Shepard’s character[.]” *Id.*

[15] Here, the record indicates that Shepard accepted responsibility for his actions. Indeed, Shepard cooperated with law enforcement during the search of his person, he was candid about his possession of contraband, and he took responsibility for his conduct by electing to plead guilty at his initial hearing. These actions generally reflect well on his character. Still, Shepard has an extensive criminal history, which included prior opportunities to participate in rehabilitative services outside the DOC. And, so far, Shepard has been unable to overcome his addiction outside the DOC. Shepard’s lack of success outside the DOC ultimately led the trial court to select a fully executed sentence, remarking: “You have had ample opportunities for rehabilitation. You haven’t

been successful. I'm hoping . . . that[,] following this period of incarceration[,] . . . you finally get it. I'm hoping this does it for you." Tr. Vol. 2 p. 34.

[16] All in all, having considered the nature of Shepard's offenses and his character, Shepard has not persuaded us to disturb the trial court's placement decision.

[17] Affirmed.

Riley, J., and Brown, J., concur.

ATTORNEY FOR APPELLANT

Cara Schaefer Wieneke
Wieneke Law Office, LLC
Brooklyn, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

George P. Sherman
Supervising Deputy Attorney General
Indianapolis, Indiana