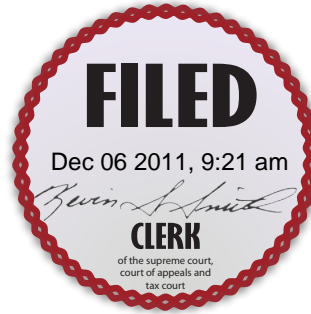


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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MICHAEL ANTHONY CASTILLO, )

Appellant- Defendant, )

vs. )

No. 45A03-1104-CR-154

STATE OF INDIANA, )

Appellee- Plaintiff, )

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Thomas P. Stefaniak, Jr., Judge  
Cause No. 45G04-1005-MR-00007

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**December 6, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Chief Judge**

## Case Summary and Issue

While standing on a street corner in a residential area, Michael Anthony Castillo exchanged gunshots with a passing vehicle containing several men. One of Castillo's shots killed the driver of the vehicle, and the State charged him with murder. Castillo pleaded guilty to reckless homicide, a Class C felony, and the trial court sentenced him to 2,900 days in prison, just twenty-two days shy of the eight-year maximum sentence.<sup>1</sup> Castillo raises two issues for our review, which we restate as 1) whether the trial court abused its discretion by giving Castillo a highly elevated sentence to send a personal philosophical message; and 2) whether his sentence is inappropriate. Concluding the trial court abused its discretion by using an improper aggravating factor, but that Castillo's sentence is not inappropriate in light of the nature of the offense and his character and we are confident the trial court would have imposed the same sentence without considering the improper aggravating factor, we affirm the trial court's sentence.

## Facts and Procedural History

In April 2010, Castillo, a member of the Imperial Gangster gang, was standing on a street corner in a residential area when a car drove by containing members of the Spanish Gangster Disciples gang. Multiple shots were fired by both the men in the vehicle and Castillo. One of Castillo's shots hit the driver, Peter Santos, Jr., in the head and killed him. The State charged Castillo with murder, a felony, and reckless homicide, a Class C felony. Castillo pleaded guilty to reckless homicide, and in exchange the State dismissed the murder charge.

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<sup>1</sup> The trial court and the parties referenced Castillo's sentence as twenty days below the maximum possible sentence, but they failed to include an extra day for each of the two leap years that will take place during his sentence.

At Castillo's sentencing hearing, the trial court stated the following mitigating and aggravating circumstances:

[I]n mitigation, the Court finds that the defendant pled guilty and accepted responsibility causing the State of Indiana the – or saving the State of Indiana the necessity of trial. However, a Murder charge is being dismissed in exchange for his plea of guilty, which is a drop of three felony classes.

The Court is expressly rejecting the arguments made by defense counsel analogous to the statute the defendant acted under strong provocation and/or self defense because of the fact that the defendant was on a street corner with a handgun, the car driven by – with rival gang members is something that could be expected when somebody is standing on a street corner with a handgun. They are clearly asking for trouble. And clearly ready for trouble when it finds them. [sic]

In aggravation, the Court finds that prior attempts at acting in the best interest of the child as a juvenile in the State of Oklahoma had been unsuccessful. Defendant was found or adjudicated on a simple Possession in Oklahoma. Also was arrested a short time – within a short period of time from that first offense of vandalism to a vehicle, series of vehicles [sic]. The defendant leaves the State of Oklahoma, comes back to the area, gets picked up for Possession of Marijuana in Hammond, gets 356 [sic]<sup>2</sup> days of probation on September 28th, 2009. And while on probation, this offense occurred.

After considering the aggravating factors and the mitigating factors and the substantial drop in penalty range of three felony classes, the Court finds that the aggravating factors added with the facts and circumstances of the case heavily outweigh the mitigating factors.

Transcript at 251-52. The trial court sentenced Castillo to 2,900 days in the Indiana Department of Correction. After stating the sentence, the trial court further explained:

The reason I am giving you twenty days short of the maximum is because there is caselaw out there that requires only the maximum to go to the worst of the worst. You, sir, clearly are not the worst of the worst. But if you continue in your behavior as you have in the past, you will qualify under that category.

Furthermore, Mr. Castillo, you got a substantial drop in penalty range of three felony classes. And under these circumstances, I think our State legislature ought to take a look at an intermediary step between

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<sup>2</sup> The transcript of the sentencing hearing states 356 days, but Castillo's actual probation period was 365 days.

Murder and Reckless Homicide and have a Reckless Homicide step-up for a class B felony when it involves gang activity. Because Mr. Peter Santos who testified here is correct. People go to jail or prison in this State for drugs much longer than they do when there is a death involved.

Id. at 254.

## Discussion and Decision

### I. Abuse of Discretion

A trial court may abuse its discretion by failing to enter a sentencing statement, entering findings of aggravating and mitigating factors unsupported by the record, omitting factors clearly supported by the record and advanced for consideration, or giving reasons that are improper as a matter of law. Anglemyer v. State, 868 N.E.2d 482, 490-91 (Ind. 2007), clarified on reh’g, 875 N.E.2d 218 (2007). “When one or more aggravating circumstances cited by the trial court are invalid, the court on appeal must decide whether the remaining circumstance or circumstances are sufficient to support the sentence imposed.” Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005). If we cannot say with confidence that the trial court would have imposed the same sentence without considering the improper aggravating circumstance or circumstances, remand for resentencing may be the appropriate remedy. Anglemyer, 868 N.E.2d at 491.

Castillo contends the trial court abused its discretion by improperly aggravating his sentence in order to send a personal or philosophical message. In Scheckel v. State, 655 N.E.2d 506, 510 (Ind. 1995), our supreme court concluded that the trial court’s “statements concerning the purposes of criminal punishment and the morality of the Legislature’s sentencing statute reveal that the sentencing process was used for sending a personal philosophical message” and that a trial court’s desire to send such a message is an improper reason to aggravate a sentence. Here, the trial court’s statement regarding

our legislature and the gap between the murder and reckless homicide statutes depicts the trial court's subjective philosophy concerning the morality of the legislature's sentencing statutes. Although the statement was not made while the trial court was listing Castillo's aggravating circumstances, the statement was made soon thereafter and in the context of the trial court's explanation for Castillo's enhanced sentence. Thus, although it was not explicitly an aggravating circumstance, the trial court abused its discretion by considering an improper reason while aggravating Castillo's sentence.

After concluding the trial court abused its discretion, our next question is whether we can say with confidence that the trial court would have imposed the same sentence without taking into consideration the improper aggravating factor. We address this issue in the context of our analysis of the nature of Castillo's offense and his character.

## II. Inappropriateness

This court has 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." Ind. Appellate Rule 7(B). We may "revise sentences when certain broad conditions are satisfied," Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005), and we recognize the advisory sentence "is the starting point the legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). When examining the nature of the offense and the character of the offender, we may look to any factors appearing in the record. Spitler v. State, 908 N.E.2d 694, 696 (Ind. Ct. App. 2009), trans. denied. The burden is on the defendant to demonstrate that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Appellate review is largely an "attempt to leaven the

outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived ‘correct’ result in each case.” Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008).

Castillo was convicted of a Class C felony offense. “A person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years.” Ind. Code § 35-50-2-6(a). The trial court sentenced Castillo to 2,900 days, twenty-two (22) days shy of the maximum eight-year sentence permitted by statute. Castillo argues that neither his offense nor his character are the “very worst” imaginable and thus do not warrant a sentence that is essentially the maximum. Brief of Appellant at 4 (citing Westmoreland v. State, 787 N.E.2d 1005, 1011 (Ind. Ct. App. 2003) (stating that “[i]n considering the ‘nature of the offense,’ the maximum enhancement permitted by law should be reserved for the very worst offenses and offenders.”)).

In regard to the nature of Castillo’s offense, witness testimony revealed that he shot at the vehicle more than once and in a residential area. In doing so, he put multiple lives in jeopardy. While the evidence is unclear, the incident appears to have been gang-related and witness testimony indicates Castillo fired at the car first and was then shot at by someone in the car.<sup>3</sup> In any event, the trial court expressly denied Castillo’s suggestion that he was acting in self defense, reasoning that when a gang member stands on a street corner with a weapon and finds himself in a gunfight with a rival gang, his participation is not devoid of guilt. We are inclined to agree and find Castillo’s gang membership to be significant.

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<sup>3</sup> A different witness thought someone in the car fired first.

In regard to Castillo's character, although the majority of his prior criminal record consists of juvenile findings, we note that he was only eighteen years old at the time of the incident and nineteen years old at sentencing. Despite his young age, his record includes one misdemeanor possession of marijuana conviction, a conviction he was on probation for at the time of this offense. He is admittedly a member of a gang and uses marijuana regularly. He failed to graduate high school or obtain a GED. Although he pleaded guilty to reckless homicide, the trial court determined that he did not accept responsibility because he blamed his missteps on others rather than himself. Further, his plea was made in exchange for a dismissal of the murder charge against him.

Despite the trial court's statement that Castillo is not yet the worst of the worst, we conclude that for an eighteen-year-old, Castillo is among the worst of the worst. His criminal record includes several offenses. He is admittedly a member of a gang, uses marijuana regularly, and failed out of school. He shot more than once at a vehicle with several passengers and in a residential area, and he did so while on probation for another offense. The incident was caused by gang rivalry, and some evidence shows Castillo was the initial shooter. The circumstances of a reckless homicide conviction for an eighteen-year-old do not get much worse. We conclude Castillo's sentence is not inappropriate in light of the nature of his offense and character and further conclude the trial court would have imposed the same sentence even if it had not taken into consideration an improper aggravating factor.

#### Conclusion

We conclude that even though the trial court abused its discretion by expressing its personal philosophical beliefs, Castillo's sentence is not inappropriate in light of the

nature of his offense and his character and we are confident the trial court would have imposed the same sentence even without the improper aggravating factor. We therefore affirm the trial court's sentence.

Affirmed.

BARNES, J., and BRADFORD, J., concur.