

Harmony S. SCOTT, Appellant-Defendant,
v.
STATE of Indiana, Appellee-Plaintiff.

Court of Appeals Case No. 20A-CR-1131.

Court of Appeals of Indiana.

Filed January 27, 2021.

Appeal from the LaPorte Circuit Court, Trial Court Cause Nos. 46C01-1506-F2-485, 46C01-1903-F6-369, 46C01-1706-F5-498, The Honorable Thomas J. Alevizos, Judge.

Attorney for Appellant: Jennifer L. Koethe, Navarre, Florida.

Attorneys for Appellee: Theodore E. Rokita, Attorney General of Indiana, Taylor Carpenter, Deputy Attorney General, Indianapolis, Indiana.

Weissmann, Judge.

[1] Harmony Scott presented substantial, uncontested evidence that she is a victim of human trafficking. Even so, the trial court refused to include her history of victimization as a mitigating circumstance in its sentencing order. Despite this mistake, Scott's fourteen-year sentence on one count of Level 3 felony robbery and three counts of Level 5 felony fraud is not inappropriate. Accordingly, we affirm.

Facts

[2] In 2015, Harmony Scott and her sister impersonated sheriff's deputies to get Tracy Lindsey to open her door. Then they attacked Lindsey with the butt of a pistol and a pair of scissors, forcibly entered Lindsey's home, and removed items. The State charged Scott with Level 2 felony burglary while armed with a deadly weapon; Level 3 felony robbery resulting in bodily injury; and Level 5 felony battery with a deadly weapon. She was already on probation in Texas for cocaine possession at the time of the crime. Her trial on the burglary, robbery, and battery charges ended in a mistrial in 2016 after the jury could not reach a unanimous verdict.

[3] In 2018, Scott illicitly withdrew thousands of dollars from her grandfather's bank account. The State charged her with nine counts of Level 5 felony fraud on a financial institution.

[4] In March 2019, Scott was charged with domestic battery in the presence of a juvenile for allegedly hitting her girlfriend while Scott's son was in the other room.

[5] At some point, Scott became a cooperating victim witness in a federal prosecution for human trafficking in the Eastern District of Wisconsin. She was referred to Indiana-based human trafficking

victim services in March 2019. The record does not clearly state when Scott allegedly was trafficked, but Scott reported having been in a relationship with her trafficker, who is the father of her child, from 2011 to 2018. Appellant's App. Vol. II p. 199. She says he forced her into prostitution. *Id.* One of Scott's witnesses indicated Scott was being trafficked at the time Scott robbed Lindsey. Tr. Vol. II p. 50.

[6] In December 2019, Scott pleaded guilty to Level 3 felony robbery for the 2015 attack against Lindsey and to three counts of Level 5 felony fraud for the 2018 theft from her grandfather. In exchange for her plea, the State agreed to cap sentencing for the robbery and fraud counts at ten and four years, respectively. The State also dismissed the burglary, battery, and domestic battery counts against Scott, along with five counts of fraud. Scott agreed to complete any substance abuse programs recommended by the court. She was later jailed for failing to comply with a court order to attend her pre-sentencing investigation interview.

[7] In its sentencing order, the trial court found the following aggravators:

- Scott has a criminal history;
- She committed crimes while a fugitive from Marion County and on probation from Texas, and later while out on bond for the burglary charge;
- She allegedly committed two more crimes for which the State dismissed charges;
- She repeatedly violated probation;
- She repeatedly violated her bond by leaving the county, using drugs, failing to report to her pre-sentencing investigation interview, and lying to probation officers; and
- The fraud charge was aggravated by the age of the victim, who was considerably older than sixty-five.

Appellant's App. Vol. II, pp. 229-30.

[8] The only mitigators in the trial court's sentencing order were Scott's acceptance of responsibility and guilty plea. Finding the aggravators far outweighed the mitigators, the trial court sentenced Scott to the maximum term under her plea agreement: fourteen years imprisonment. Scott now appeals her sentence.

Discussion and Decision

[9] Scott argues the trial court abused its discretion for failing to include her history as a trafficking victim, her remorse, and her substance abuse issues as mitigators. She also argues that her sentence is inappropriate in light of the nature of her crimes and her character. We find the trial court abused its discretion in failing to consider Scott's victimization, but the error was harmless. Additionally, we find Scott's sentence was not inappropriate under Indiana Appellate Rule 7(B).

I. Abuse of Discretion

[10] Sentencing is a discretionary function of the trial court, which we review only for an abuse of discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007). A trial court abuses its discretion 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)). To facilitate our review, the trial court must detail its rationale in a sentencing statement. *Id.* A trial court abuses its discretion by omitting from this statement mitigators clearly supported by the record and advanced for consideration. *Id.* at 491. Scott bears the burden of showing "the mitigating evidence is both significant and clearly supported by the record." McElfresh v. State, 51 N.E.3d 103, 112 (Ind. 2016) (citing Anglemyer, 868 N.E.2d at 493).

[11] Turning first to Scott's claims that the trial court failed to consider her remorse and history of drug abuse as mitigating factors, we find no error. At sentencing, the trial court adequately addressed Scott's contrition, stating:

I finally got a picture of a somewhat contrite and remorseful Harmony. Absolutely no showing of remorse throughout the process.... All of a sudden it's come to you.... I didn't use it as an aggravator that you weren't remorse[ful] because I finally saw it today....

Tr. Vol. II p. 72. This observation supported the trial court's acceptance of Scott's plea deal, though the court indicated a longer sentence likely would have been appropriate. The court also adequately considered Scott's continued drug use, finding it to be an aggravator. A trial court does not abuse its discretion in considering a history of drug abuse to be an aggravator, rather than a mitigator. *See, e.g., Rose v. State*, 810 N.E.2d 361, 366-67 (Ind. Ct. App. 2004) (holding that the trial court did not abuse its discretion in finding addiction was not a mitigating circumstance).

[12] Scott's history as a trafficking victim is another matter. Although trafficking is not listed as a mitigator in our criminal code, courts may consider factors beyond those enumerated by statute. Ind. Code § 35-38-1-7.1(c). Traumatic experiences are commonly included as mitigators. *See, e.g., Davis v. State*, 971 N.E.2d 719, 724 (Ind. Ct. App. 2012) (finding that the trial court properly considered defendant's psychological issues, including PTSD, to be "of some mitigating weight."); Kilgore v. State, 720 N.E.2d 1155, 1156 (Ind. 1999) (affirming trial court's inclusion of defendant's "broken home" as a mitigator); Merrill v. State, 716 N.E.2d 902 (Ind. 1999) (affirming consideration of defendant's "dysfunctional family life" as a mitigator); Ind. Code § 35-38-1-7.1(b)(13) (including PTSD among statutorily enumerated mitigating circumstances).

[13] The record clearly supports Scott's assertion that she is a victim of human trafficking. Scott presented two witnesses who met her in their work with Indiana's statewide human trafficking task force, Indiana Protection for Abused and Trafficked Humans (IPATH). The U.S. Attorney's Office for the Eastern District of Wisconsin referred Scott to these services and, with Scott's assistance, is prosecuting her trafficker. The pre-sentencing investigation report (PSI) also documents Scott's history of being trafficked. Appellant's App. Vol. II, pp. 194, 199, 201. The State did not contest any of this evidence.

[14] Scott's history as a trafficking victim is significant because it clearly coincided with her criminal prosecution. At the beginning of this case, it appears Scott was being trafficked; at the end, she was assisting in the prosecution of her trafficker. Representatives from IPATH testified extensively to the

effects of these experiences on Scott, including nightmares, flashbacks, and trouble sleeping. Tr. Vol. II p. 23. Scott was also afraid of being alone, particularly after the Eastern District of Wisconsin failed to redact her address in a court filing in the trafficking case. *Id.* at 23, 37. One of the IPATH advocates stated that in "many, many, many, many incidences [Scott] was forced to do things that she did not want to do and did not have an option if she wanted to live ..." *Id.* at 42. When that advocate began to testify to how consistent exposure to trauma like trafficking can change the biology of the brain, the trial court cut her off, saying, "I don't need this. I've been on seminars." *Id.* at 34-35.

[15] Perhaps the trial court disbelieved Scott's report of her own mental condition—an assessment we would not second-guess. See Pickens v. State, 767 N.E.2d 530, 535 (Ind. 2002) ("Without evidence of some impermissible consideration by the court, we accept its determination of credibility."). However, in refusing to consider trafficking a mitigating circumstance, the court effectively found that Scott experienced no trauma whatsoever. To support such a finding, the trial court would have to conclude either that Scott was never trafficked at all and had hoodwinked the IPATH advocates and federal prosecutors in Wisconsin or that her victimization had no traumatic effect. Tr. Vol. II p. 35. Both conclusions are clearly against the logic and effect of the facts before the court.

[16] At the very least, Scott's history of victimization was relevant to the aggravators the trial court identified. Scott left the state in violation of probation and bond *to return to her trafficker* and later to *assist in her trafficker's prosecution*. Her addiction issues persisted, at least in part, *because she had been trafficked*. And testimony indicated she failed to show up for her pre-sentencing investigation interview because that process resurfaced the trauma *of being trafficked*.

[17] The trial court mentioned its refusal to consider Scott's circumstances after determining her sentence, saying:

In not finding any specific aggravator^[1] for her alleged ordeal, I will point out what I indicated earlier, [Scott] has had a substance abuse problem by her own admission that predates her involvement with this trafficker by ten years, she's been in trouble with the law prior to this as well.

Tr. Vol. II p. 73. But Scott's history of being trafficked is not irrelevant simply because it is not solely responsible for her addiction issues or criminal history. We find that the court's refusal to count Scott's history of being trafficked as a mitigator was clearly erroneous.

[18] Having found an irregularity in a trial court's sentencing decision, "we have the option to remand to the trial court for clarification or new sentencing determination, to affirm the sentence if the error is harmless, or to reweigh the proper aggravating and mitigating circumstances independently at the appellate level." McElfresh, 51 N.E.3d at 112 (citing Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005)). Here, the trial court's error was harmless.

[19] Scott's history as a human trafficking victim is significant but must be considered in the context of the many uncontested aggravating circumstances, including her extensive criminal history, the age of her fraud victim, and her record of lying to the court, service providers, and the Department of Corrections. Additionally, the trial court contemplated rejecting the plea agreement because of the

sentencing cap, as its "findings would indicate[] a sentence at least three years longer." Tr. Vol. II p. 72. In light of these factors, the trial court likely would have reached the same fourteen-year sentence even after duly considering Scott's history of being trafficked.

II. App. R. 7(B)

[20] Next, Scott challenges her sentence under Indiana Appellate Rule 7(B). Even when a trial court has not abused its discretion in sentencing, independent appellate review and revision are permitted. Anglemyer, 868 N.E.2d at 491 (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)). This Court "may revise a sentence authorized by statute 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." App. R. 7(B). We conduct this review with "substantial deference" to the trial court because the "principal role of [our] review is to attempt to leaven the outliers, and not to achieve a perceived correct sentence." Knapp v. State, 9 N.E.3d 1274, 1292 (Ind. 2014) (quotations and citations omitted).

[21] Scott's character arguments are unavailing. Scott argues that her sentence is inappropriate because she needs addiction treatment and therapy to help her process the trauma she experienced as a victim of human trafficking. As the trial court noted, however, the Indiana Department of Corrections offers such resources. Tr. Vol. II, pp. 73-74. Scott also argues that her criminal history is not "the worst." Appellant's Br. p. 22. But even a minor criminal history can "speak poorly to [a defendant's] character." Quintanilla v. State, 146 N.E.3d 982, 989 (Ind. Ct. App. 2020). Scott has not convinced us her character warrants resentencing.

[22] The nature of the offense also fails to demand sentencing relief. Though Scott does not argue the nature of offense prong of Rule 7(B), we are obligated to consider it in our analysis. Reis, 88 N.E.3d at 1104.^[2] Lindsey, the victim in the robbery conviction, testified that she suffers from post-traumatic stress and social anxiety as a result of Scott's actions, saying, "I don't trust anybody anymore." Tr. Vol. II p. 56. After Scott was released on bond for the violent robbery, Scott proceeded to commit several counts of fraud. The compounding nature of Scott's crimes compounds their overall seriousness. Neither the character of the offender nor the nature of the offense demonstrates demonstrate Scott's sentence is inappropriate.

[23] Because the trial court's abuse of discretion was harmless and Scott has not shown that her sentence was inappropriate, we affirm the trial court's judgment.

Mathias, J., and Altice, J., concur.

[1] The State contends the trial court meant to say "mitigator" here. Appellee's Br. p. 12.

[2] Some panels of this Court have found that defendants who fail to argue both the "character" and "nature of offense" prongs have waived their Rule 7(B) claims. See, e.g., Anderson v. State, 989 N.E.2d 823, 827 (Ind. Ct. App. 2013); Sanders v. State, 71 N.E.3d 839, 843 (Ind. Ct. App. 2017) *trans. denied*; Moon v. State, 110 N.E.3d 1156, 1162-63 (Ind. Ct. App. 2018), *trans. denied*. Others have disagreed. See, e.g., Connor v. State, 58 N.E.3d 215, 219 (Ind. Ct. App. 2016); Reis v. State, 88 N.E.3d 1099, 1103 (Ind. Ct. App. 2017); Turkette v. State, 151 N.E.3d 782, 786 (Ind. Ct. App. 2020), *trans. denied*. In Shoun v. State, our Supreme Court did not find waiver where a defendant exclusively challenged his sentence under the character prong. 67 N.E.3d 635 (Ind. 2017). We follow our Supreme Court's example here.

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