



Michael Boone appeals his sentence for dealing in cocaine as a class B felony. Boone raises one issue, which we revise and restate as whether his sentence is inappropriate in light of the nature of the offense and the character of the offender. We affirm.

The relevant facts follow.<sup>1</sup> On or about July 13, 2010, a confidential informant (“CI”) went to 2191 Clark Road in Gary, Indiana, to attempt to purchase drugs from a woman named Robin. While the CI was at the door, Boone called to the CI from where he was standing in front of 2135 Clark Road. In exchange for forty dollars, Boone sold the CI “two (2) clear knotted plastic bags containing an off-white rocklike substance which later field tested positive for the presence of cocaine and weighed approximately 0.77 grams.” Appellant’s Appendix at 24. Boone knew that he was delivering cocaine to the CI.

On July 23, 2010, the State charged Boone with five counts of dealing in cocaine as class B felonies and one count of maintaining a common nuisance as a class D felony.<sup>2</sup> On December 16, 2010, the trial court held a guilty plea hearing at which Boone pled guilty pursuant to a plea agreement, filed in open court, to one count of dealing in cocaine as a class B felony. In exchange the State agreed to dismiss the other charges. On March 10, 2011, the court held a sentencing hearing at which the prosecutor noted that Boone faced a non-suspendible mandatory minimum sentence of six years. The court sentenced

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<sup>1</sup> The facts of the offense are taken from a “Stipulated Factual Basis” which was attached to the plea agreement as Exhibit A and filed in open court at the guilty plea hearing held on December 16, 2010. Appellant’s Appendix at 24. At the guilty plea hearing, Boone testified that he read the document and signed it, and that the statements contained therein are a correct recitation of the criminal acts committed.

<sup>2</sup> The five counts for dealing in cocaine listed five separate dates in July 2010 in which the State alleged Boone delivered cocaine.

Boone to twelve years with ten years executed and two years suspended to probation and stated:

In my opinion, you've once again – you've received the benefit of a very generous plea agreement in this case. When it was filed, it came in with a number of counts for dealing in cocaine and ultimately the parties reached an agreement to a plea of dealing in cocaine, as a Class B felony, for just one count. It is a non-suspendible sentence.

Moreover you were discharged as the State correctly points out twice from probation on prior occasions. That was leniency. The fact that you got probation. And here we are again.

Now, I have to make a distinction here, you talked about this drug problem that you have. But this is not possession. This is dealing. You're selling it. So whatever problem you may have, you're importing it to other people, to the community. That's a big difference.

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I'm certainly impressed with the showing of family support, Mr. Boone. You have a great family obviously and it's just unfortunate that we find ourselves in this situation again where you are back before the court on another case.

Transcript at 23-24.

The issue is whether Boone's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute 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." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Boone argues that his offense did “not appear to be remarkable or to constitute more than the garden variety of dealing offenses” and that thus the advisory sentence of ten years is appropriate. Appellant’s Brief at 8. In discussing Boone’s character, he notes that he pled guilty, that he had been employed for almost eleven years before committing the crime, that he showed remorse, and that the “court commented favorably on [his] family support . . . .” Id. Boone also argues that his past crimes are “either too remote or have a particular nexus to Boone’s illness as a drug addict” and that thus his criminal history “is not sufficient to irrevocably tarnish him to such an extent that the twelve (12) year sentence is appropriate.” Id. at 9

Our review of the nature of the offense reveals that Boone initiated a transaction in which he sold .77 grams of cocaine to a CI in exchange for forty dollars. Our review of the character of the offender reveals that Boone served in the Army National Guard and was honorably discharged in 1994. Boone pled guilty to one count of dealing in cocaine as a class B felony, and the State agreed to dismiss the remaining charges. At the sentencing hearing, Boone apologized “for having this case here,” stated that he “failed” with abstaining from drug use, and took “full responsibility for whatever the Court lays upon” him. Transcript at 22-23. As the trial court noted, Boone is married and has a “great family” that showed him support during his courtroom appearances. Id. at 24. However, Boone’s sister testified regarding the family’s decision initially to not post Boone’s bond, that they “agreed as a family[] that it’s time that he learned from his mistakes, and maybe this in some way would be able to demonstrate that he’s done with

those previous mistakes that he made in his youth as he just goes on into the other transition in his life.” Id. at 18.

Indeed, Boone has a lengthy criminal history. In 1983, Boone was convicted of burglary as a class B felony and sentenced to six years suspended with two years to be served on probation, and in 1985 Boone’s probation was revoked. In 1998, Boone was found guilty of driving while suspended on two separate occasions. In 2002, Boone was found guilty of driving while suspended as a class A misdemeanor and operating while intoxicated as a class A misdemeanor and was sentenced to eighty days with fifty-five days suspended. Boone was again placed on probation on these offenses, and again his probation was revoked. In 2003, Boone was found guilty of theft as a class D felony and was sentenced to one-and-one-half years, with that time again ordered to be served suspended to probation. However, less than six months into his probationary period, Boone’s probation was again revoked and his sentence was ordered to be served as executed time. In 2007, Boone was found guilty of possession of a controlled substance as a class A misdemeanor,<sup>3</sup> and he was sentenced to one year suspended “with conditions to complete LADOS program.” Appellant’s Appendix at 35. Boone was discharged unsatisfactorily from the LADOS program and from probation subsequent to the instant charges being filed.

Thus, particularly based upon Boone’s lengthy criminal history and that he was on probation at the time of the offense, we cannot say that Boone’s sentence of twelve years, with ten years executed and two years suspended to probation, is inappropriate in light of

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<sup>3</sup> This charge was initially filed as a felony.

the nature of the offense and the character of the offender.<sup>4</sup> See Rich v. State, 890 N.E.2d 44, 54 (Ind. Ct. App. 2008) (noting that committing “offenses while on probation is a substantial consideration in our assessment of [a defendant’s] character”), trans. denied.

For the foregoing reasons, we affirm Boone’s sentence for dealing in cocaine as a class B felony.

Affirmed.

BAKER, J., and KIRSCH, J., concur.

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<sup>4</sup> Boone also asserts in his brief that the court intended to impose a ten year sentence as demonstrated by its comments at sentencing. We note that the transcript states as follows:

THE COURT:

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I’m going to impose, however, the advisory sentence of twelve (12) years. Sentence is suspended after serving ten (10) years, two (2) years probation.

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[Boone’s Counsel]: Your Honor, may we approach the bench for a matter?

THE COURT: Yes.

DISCUSSION WAS HELD AT THE BENCH AND ON THE RECORD.

[Boone’s Counsel]: The advisory sentence is ten years.

THE COURT: I know, I said advisory first, I corrected myself. I’m imposing twelve.

[Boone’s Counsel]: I just wasn’t sure.

Transcript at 25-26. We do not find Boone’s argument persuasive.

Also, we note that Boone states in his brief that “[t]he penal code is based upon principles of reformation” and cites Article 1, Section 18 of the Indiana Constitution for the proposition. Appellant’s Brief at 9. To the extent that Boone suggests that his sentence violates the Indiana Constitution, we note that the Indiana Supreme Court has held that “particularized, individual applications are not reviewable under Article 1, Section 18 because Section 18 applies to the penal code as a whole and does not protect fact-specific challenges.” Ratliff v. Cohn, 693 N.E.2d 530, 542 (Ind. 1998), reh’g denied.