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# IN THE
# COURT OF APPEALS OF INDIANA

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| ROBERT A. SHANNON, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 45A04-1105-CR-258 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-1003-PC-25

**December 8, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## Case Summary

Robert A. Shannon ("Shannon") pled guilty to Reckless Operation of a Vehicle in a Highway Work Zone Causing Death, as a Class C felony.[1] He now appeals, raising for our review only whether his sentence is inappropriate under Appellate Rule 7(B).

We revise the sentence and remand with instructions.

## Facts and Procedural History

On March 16, 2010, Shannon was driving at a high rate of speed in a marked construction area on westbound I-80 in Lake County.[2] Christopher Jenkins ("Jenkins") was working in the construction area. Shannon's vehicle entered into the restricted portion of the construction area, passed protective barrels and other markers, and struck Jenkins. The force of the collision pushed Jenkins's body through the windshield of the vehicle and killed him. A subsequent crash reconstruction determined that Shannon was at fault.

On March 18, 2010, Shannon was charged with Reckless Homicide, as a Class C felony[3], and Failure to Stop at an Accident Involving Death to Another Person, as a Class C felony.[4] On June 11, 2010, the State amended the information, adding charges of Failure to Stop at an Accident Causing Serious Bodily Injury to Another Person while Operating While Intoxicated, as a Class B felony[5], the instant offense of Reckless Operation of a Vehicle in a Highway Work Zone Causing Death, Possession of a Controlled Substance, as a Class D

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[1] Ind. Code § 9-21-8-56(b) & (h).
[2] We take the facts from the written stipulation submitted to the trial court.
[3] I.C. § 35-42-1-5.
[4] I.C. §§ 9-26-1-1 & 9-26-1-8(a)(2).
[5] I.C. §§ 9-26-1-1 & 9-26-1-8(a)(3).

felony[6], Possession of Marijuana, as a Class A misdemeanor[7], and Possession of Paraphernalia, as a Class A misdemeanor.[8]

On March 31, 2011, Shannon and the State entered into a plea agreement whereby Shannon agreed to plead guilty to Reckless Operation of a Vehicle in a Highway Work Zone Causing Death, and the State agreed to dismiss all other charges. The plea agreement included a written stipulation of facts and left sentencing to the trial court.

On April 25, 2011, the trial court accepted Shannon's guilty plea and conducted a sentencing hearing, at the conclusion of which the court entered judgment against Shannon and sentenced him to seven years imprisonment, with one year suspended to probation.

This appeal followed.

**Discussion and Decision**

Shannon contends that his sentence is inappropriate under Appellate Rule 7(B). In Reid v. State, the Indiana Supreme Court reiterated the standard by which our state appellate courts independently review criminal sentences:

> Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence through Indiana Appellate Rule 7(B), which provides that a 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. The burden is on the defendant to persuade us that his sentence is inappropriate.

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[6] I.C. § 35-48-4-7(a).
[7] I.C. § 35-48-4-11.
[8] I.C. § 35-48-4-8.3(a) & (b).

876 N.E.2d 1114, 1116 (Ind. 2007) (internal quotation and citations omitted).

The Court more recently stated that "sentencing is principally a discretionary function in which the trial court's judgment should receive considerable deference." Cardwell v. State, 895 N.E.2d 1219, 1222 (Ind. 2008). Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented. See id. at 1224. One purpose of appellate review is to attempt to "leaven the outliers." Id. at 1225. "Whether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." Id. at 1224.

Shannon was convicted of Reckless Operation of a Vehicle in a Highway Work Zone Causing Death, as a Class C felony, which carries a sentencing range of two to eight years imprisonment, with an advisory term of four years. I.C. § 35-50-2-6(a). The trial court sentenced Shannon to seven years imprisonment, three years greater than the advisory term and one year below the statutory maximum sentence. Shannon now asks that we revise his sentence downward and order that he be placed in community corrections for some portion of this term.

The stipulated facts upon which the trial court could rely in imposing a sentence upon Shannon state that he "was driving … at a recklessly high rate of speed through a clearly marked construction zone" that "included caution barrels … spread out in a fashion to slowly reduce the speed of … traffic and to direct lane usage down to the far right lane." (App. 35.)

Jenkins "was working roadside construction in the far left lane alongside a co-worker" when Shannon "entered the prohibited construction area and struck [Jenkins]" such that "the force of the impact caused [Jenkins's body] to go through the windshield," that Jenkins died as a result, and that a crash investigation determined Shannon to be at fault. (App. 35.)

Though the trial court determined that Shannon's recklessness was "so extreme" and Jenkins's death "so heinous as to shock the senses" (App. 37), we find nothing in the written stipulation of facts that makes the nature of Shannon's offense particularly egregious with respect to the charged offense. We therefore conclude that there are no facts pertinent to the nature of the offense that warrant a sentence substantially above the advisory level.

As to his character, Shannon has one prior misdemeanor conviction for Reckless Driving in 2004 after an offense committed in 2002, for which he successfully completed probation, and has no other prior criminal history or arrest record. The trial court found this to be a significant aggravating factor in imposing a sentence above the advisory level. In addition, during the presentencing investigation Shannon admitted to some use of alcohol and marijuana until sometime in 2010.

Yet Shannon has remained productively employed from 1995 until the time of the instant offense, despite a back injury that required surgical treatment and pain medication. Though he did not complete high school, he earned a GED in 1995. He pled guilty here and the State, numerous members of both Shannon's and Jenkins's families, and the trial court all acknowledged the sincerity of Shannon's deep remorse for his conduct. Shannon's family members testified that he carried a picture of Jenkins with him, and he changed his cell phone

screensaver to show a picture of Jenkins. Numerous friends, relatives, and acquaintances submitted letters on Shannon's behalf to the trial court indicating that he was a good father and a generous and caring individual who frequently provided assistance to the elderly and the sick. Several members of Jenkins's family also opined that Shannon is a decent person who made a tragic error. Shannon had suicidal thoughts after the instant offense and voluntarily sought mental health and substance abuse treatment.

In light of the nature of Shannon's offense and his character, we conclude that the trial court's imposition of seven years imprisonment, with one year suspended to probation, is inappropriate. Though his conduct here is relatively undistinguished and his remorse apparently sincere, a revision to the advisory sentence is not entirely warranted because of his prior misdemeanor conviction for reckless driving. We therefore revise Shannon's sentence downward to six years imprisonment, with two of those years suspended to probation, and remand this matter to the trial court with instructions to issue an amended sentencing order and to issue or make any other documents or docket entries necessary to impose the revised sentence consistent with this opinion, without a hearing.

Revised and remanded.

MATHIAS, J., concurs.

CRONE, J., dissents with opinion.

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**CRONE, Judge, dissenting**

I respectfully disagree with the majority's determination that Shannon has met his burden of establishing that his sentence is inappropriate in light of the nature of the offense and his character. Regarding the former, the majority finds "nothing in the written stipulation of facts that makes the nature of Shannon's offense particularly egregious with respect to the charged offense." Slip op. at 5. The stipulation specifically states that Shannon drove "at a recklessly high rate of speed through a clearly marked construction zone," which "included caution barrels east of the scene which were spread out in a fashion to slowly reduce the speed of westbound traffic and to direct lane usage down to the *far right lane*." Appellant's App. at 35 (emphasis added). According to the stipulation, Jenkins "was

working roadside construction in the *far left lane*." *Id*. (emphasis added). At Shannon's sentencing hearing, the trial court remarked,

> Now, Mr. Jenkins was working in the far left lane. That's about as safe as he could work and do his job. It was a way from the traffic altogether when he was struck and killed.
>
> This is distinguishable, as I said earlier, some types of cases, the law contemplates, may get the minimum sentence. But it's distinguishable from the type of case wherein someone is, shall we say, sideswiped by a motorist who was inattentive or intoxicated or whatever. In this case, Mr. Shannon went from well, he was never in the far right lane of traffic. He was obviously in the far left lane where traffic was being directed away from when Mr. Jenkins was struck and killed. One would not expect this type of accident to ordinarily take place in a construction zone, because of the distance between where the -- where Mr. Jenkins was working and where motorists should have been.

Tr. at 69-70. I agree with the trial court's assessment of the egregious nature of Shannon's offense and, unlike the majority, believe that it "warrant[s] a sentence substantially above the advisory level" of four years. Slip op. at 5.

As for Shannon's character, he was convicted of misdemeanor reckless driving in 2004. Apparently, he learned nothing from his encounter with the criminal justice system and repeated his reckless behavior in a construction zone, with tragic consequences for Christopher Jenkins and his loved ones. Shannon reaped a substantial benefit from pleading guilty, in that the State dropped numerous charges that could have resulted in a much longer sentence. After due consideration of the trial court's decision, I cannot conclude that Shannon has established that his seven-year sentence is inappropriate in light of the nature of the offense and his character. Therefore, I respectfully dissent.