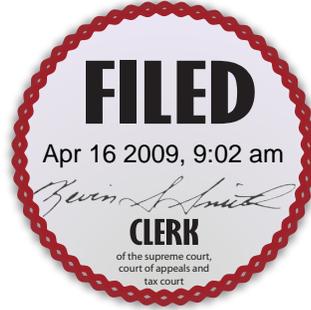


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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RIO P. HARPER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 20A03-0808-CR-409

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APPEAL FROM THE ELKHART SUPERIOR COURT  
The Honorable James W. Rieckhoff, Judge  
Cause No. 20D05-0701-FD-24

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**April 16, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

### Case Summary and Issue

Following a guilty plea, Rio Harper appeals his four and one-half year sentence for two counts of fraud and one count of receiving stolen property, all Class D felonies. On appeal, Harper argues his sentence is inappropriate in light of the nature of the offenses and his character. Concluding Harper's sentence is not inappropriate, we affirm.

### Facts and Procedural History

On the morning of December 21, 2006, Harper and his girlfriend purchased items from an Elkhart convenience store with a check card that Harper knew was stolen.<sup>1</sup> On January 11, 2007, the State charged Harper with two counts of fraud and one count of receiving stolen property, all Class D felonies. On October 15, 2007, Harper pleaded guilty to all three counts without the benefit of a plea agreement. On December 3, 2007, the trial court accepted Harper's plea and heard evidence on sentencing, finding that Harper's criminal history was an aggravating circumstance and that there were no mitigating circumstances. Based on these findings, the trial court sentenced Harper to consecutive terms of one and one-half years on each count, resulting in an aggregate sentence of four and one-half years. Harper now appeals.

### Discussion and Decision

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). In determining

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<sup>1</sup> According to police reports included in the record, the check card was stolen the night before from a woman who had been attacked by a man in the parking lot of a Goshen retailer. At Harper's sentencing hearing, the State argued Harper was the attacker, but the trial court rejected that argument, reasoning that it could not “speculate as to whether [Harper] was the one who committed the robbery . . . .” Transcript at 33.

whether a sentence is inappropriate, we examine both the nature of the offenses and the character of the offender, Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied, and recognize that 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). The burden is on the defendant to demonstrate that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Indiana Code section 35-50-2-7(a) states that the sentence range for a Class D felony is between six months and three years, with the advisory sentence being one and one-half years. Harper therefore received the advisory sentence for each of his three Class D felony convictions.

Regarding the nature of the offenses, we note the trial court found they were “serious” because the victim was “elderly.” Transcript at 33. The record indicates the victim was sixty-five years of age, see appellant’s appendix at 43, which is a valid aggravating circumstance, see Ind. Code § 35-38-1-7.1(a)(3) (stating the trial court may consider as an aggravating circumstance that “[t]he victim of the offense was . . . at least sixty-five years of age at the time the person committed the offense”). We therefore agree with the trial court that the offenses are more egregious than is typical.

Regarding Harper’s character, we note, as the trial court did, that Harper has a significant criminal history. According to the pre-sentence investigation report (the “PSI”), Harper was convicted of four counts of armed robbery in Wisconsin in 1986 and received a twelve-year sentence. One year later, Harper was convicted in Illinois of

armed robbery, armed violence,<sup>2</sup> and attempted murder and received a twenty-four year sentence. Harper was released on parole in May 1990 and convicted in Indiana in 1999 of Class A misdemeanor invasion of privacy, which apparently resulted in the revocation of his parole in relation to the Illinois sentence. From 2000 to April 2005, Harper then accumulated several vehicle-related offenses, including three misdemeanor convictions for driving with a suspended license and one misdemeanor conviction for operating a vehicle without financial responsibility.<sup>3</sup> Although the record does not disclose any convictions from the remainder of 2005 to the instant offenses in December 2006, neither was Harper leading a law-abiding life, as the PSI states he first tried cocaine during that time and continued to use it until September 2007.

Our supreme court has stated that the aggravating weight of a defendant's criminal history "varies based on the gravity, nature and number of prior offenses as they relate to the current offense." Wooley v. State, 716 N.E.2d 919, 929 n.4 (Ind. 1999). We acknowledge Harper's criminal history is somewhat unusual in that his initial encounters with the law involve very serious offenses, while his more recent offenses are relatively minor. Nevertheless, for more than half of the last twenty-five years, Harper has either been incarcerated or committing crimes and, more recently, not living a law-abiding life given his admitted cocaine use. We are therefore skeptical Harper has learned from his incarceration and conclude his pattern of criminal conduct comments negatively on his character.

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<sup>2</sup> Armed violence is the general description for a variety of firearm-related offenses. See 720 Ill. Comp. Stat. 5/33A-2.

<sup>3</sup> During this period, Harper also was arrested and charged with Class B felony criminal confinement and Class C felony battery, though those charges were eventually dismissed without prejudice by the State.

Harper contends that against the aggravating weight of his criminal history is his guilty plea, as well as support from his landlord, who testified that Harper had been a tenant for seven years, that he was a good worker, and that he “tries to stay out of trouble.” Tr. at 30. We acknowledge Harper’s guilty plea comments favorably on his character, as nothing in the record indicates it was a pragmatic decision or given in exchange for a substantial benefit. See Scheckel v. State, 655 N.E.2d 506, 511 (Ind. 1995) (observing that a guilty plea “demonstrates [a defendant’s] acceptance of responsibility for the crime and at least partially confirms the mitigating evidence regarding his character”); Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) (“[A] guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one.”), trans. denied. As for the endorsement from Harper’s landlord, the trial court acknowledged this testimony, but apparently concluded it did not offset Harper’s criminal history or the instant offenses, as it described the former as “very much against [Harper]” and the latter as “serious.” Tr. at 33.

Even if we concluded Harper’s guilty plea and his landlord’s endorsement offset his criminal history, such an offset is accounted for in the fact that Harper was sentenced to the advisory term for each offense. That those terms were ordered to be served consecutively is accounted for in the fact that the offenses are more egregious than is typical. Accordingly, we cannot say Harper’s four and one-half year sentence is inappropriate in light of the nature of the offenses and his character.

## Conclusion

Harper's sentence is not inappropriate in light of the nature of the offenses and his character.

Affirmed.

CRONE, J., and BROWN, J., concur.