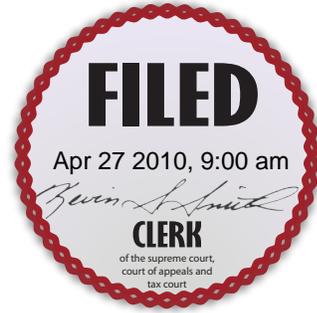


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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JOSE L. NIETO,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 02A03-0911-CR-527

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APPEAL FROM THE ALLEN SUPERIOR COURT  
The Honorable Kenneth R. Scheibenberger, Judge  
Cause No. 02D04-0903-FD-235

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**APRIL 27, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**SULLIVAN, Senior Judge**

Defendant-Appellant Jose L. Nieto (“Nieto”) challenges his sentence for a Class D felony, Failure to Register as a Sex Offender, under Ind. Code § 11-8-8-17. The conviction was premised upon I.C. § 11-8-8-11, which requires a sex offender registrant to notify the appropriate law enforcement authority of a change of address within seventy-two hours of such change. Following a guilty plea, Nieto was sentenced to an enhanced term of two years’ incarceration.<sup>1</sup>

Nieto contends that the sentence is inappropriate in light of the nature of the offense and the character of the offender. See Indiana Rules of Appellate Procedure, Rule 7B. He claims that he should have received the advisory sentence of one and one-half years with six months of that sentence suspended. Although no written sentencing statement by the court is contained in the record before us, the judgment of conviction does contain a hand-written insertion by the court to the effect that as an aggravating circumstance “Prior attempts at rehab have failed” and that there were “[n]o mitigators.” (Appellant’s App. at 11). Furthermore, the record of the sentencing hearing contains the court’s recitation of aggravation as:

Looks like you got plenty of mercy at one time. You got a suspended sentence on this deviate conduct and residential entry, and you blew it on probation . . . Then you got released to probation . . . Got released, your sentence was modified for something you did wrong; you got a 60 day sentence, returned to probation with six months home detention addition; you left home detention, so you got your probation revoked; then you got released to parole, and three months later, you committed this offense.

(Transcript of the Record of Proceedings at Sentencing, pp. 6-7). (Judge’s comments).

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<sup>1</sup> The advisory sentence for the Class D felony is one and one-half years. The maximum permissible enhancement is an additional one and one-half years. Ind. Code § 35-50-2-7.

It is Nieto's position that the offense itself is of a "run of the mill nature." (Appellant's Br. 4). In this respect, he apparently relies upon the Affidavit of Probable Cause which set forth that Nieto on December 10, 2008, listed an address as his current address when in fact he had not resided at that address "for approximately five days." (Appellant's App. at 9). The address listed was that of a motel and Nieto claims that it was not "within an appropriate location pursuant to the sex offender registry." The implication was that he moved from that location in order to be in compliance, that he "exhibited a desire to change his life style" (Appellant's Br. at 4) and that "other than this technical violation [he] had not re-offended." Id.

With respect to his character, Nieto posits that "given a timely entry of a plea of guilty, remorse exhibited, prior employment, a dependent child, and educational aspirations, an advisory sentence is indicated." (Appellant's Brief at 5). He asserts that the mitigating circumstances were ignored by the court.

We note that Nieto admits to a prior criminal record but attempts to diminish that record by claiming that "[n]early all of [his] criminal history relates to abuse of alcohol and marijuana [and that] [h]is sole sex conviction occurred in 2003."<sup>2</sup>

Although a different sentencing authority might have imposed the advisory sentence, the court here was within its discretion to view Nieto's criminal record and his

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<sup>2</sup> It appears from the information before us that Nieto, age twenty-five, had three juvenile delinquency adjudications, six misdemeanor convictions and four felony convictions, including the sex offense which triggered the sex offender registration requirement. Apparently, he also had had a revocation of probation on several occasions.

failure to respond favorably to prior leniencies as an aggravator and to disregard his claim of mitigating circumstances. Accordingly, we hold that the sentence imposed was not inappropriate.

The judgment is affirmed.

KIRSCH, J., and BARNES, J., concur.