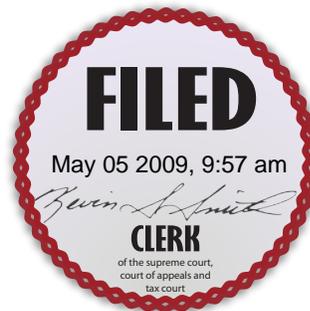


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JUAN C. GAMBOA,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 02A04-0811-CR-637

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Kenneth Scheibenberger, Judge
Cause No. 02D04-0804-FD-326

May 5, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Juan Gamboa pled guilty to possession of cocaine as a Class D felony and was sentenced to one and one-half years in the Department of Correction. On appeal, he argues that his sentence is inappropriate in light of the nature of the offense and his character. Concluding that Gamboa's sentence is not inappropriate in light of his offense and his criminal history and substance abuse, we affirm.

Facts and Procedural History¹

On April 11, 2008, while conducting a routine parole search of Gamboa's Fort Wayne residence, Allen County Police Department officers found cellophane containing an off-white powdery substance underneath the cushions of the couch on which Gamboa was sitting. The substance was field-tested and identified as cocaine. The officers also found in the residence digital scales dusted with residue that tested positive for cocaine. Appellant's App. p. 9.

On April 17, 2008, the State charged Gamboa with possession of cocaine as a Class D felony² and possession of paraphernalia as a Class A misdemeanor.³ On August 12, 2008, Gamboa pled guilty to possession of cocaine in exchange for the State's dismissal of the possession of paraphernalia charge. The trial court later accepted

¹ Gamboa did not provide us with the record of the factual basis proceeding for his guilty plea. At the sentencing hearing, Gamboa acknowledged that the information in the pre-sentence investigation report ("PSI") was correct. Sent. Tr. p. 5. We thus rely on the PSI, which incorporates the Affidavit of Probable Cause for Warrant and Arrest, to provide the facts underlying Gamboa's offenses.

² Ind. Code § 35-48-4-6(a).

³ Ind. Code § 35-48-4-8.3(b).

Gamboa's guilty plea and sentenced him to one and one-half years in the Department of Correction. Gamboa now appeals.

Discussion and Decision

On appeal, Gamboa contends that his sentence is inappropriate in light of the nature of the offense and his character.⁴ Although a trial court may have acted within its lawful discretion in imposing a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences 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.” *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218 (Ind. 2007)). The burden is on the defendant to persuade us that his or her sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

Regarding the nature of the offense, nothing in the record persuades us that the advisory⁵ sentence is inappropriate for Gamboa’s possession of cocaine while on parole. Regarding the character of the offender, the PSI reveals that Gamboa has a criminal

⁴ Gamboa frames his argument solely as whether his sentence is inappropriate. The State construes Gamboa’s argument as including the waived contention that the trial court abused its discretion by failing to give mitigating weight to his history of substance abuse. To the extent that Gamboa’s argument contains this assertion, we observe that whether a trial court has abused its discretion by improperly recognizing aggravators and mitigators when sentencing a defendant and whether a defendant’s sentence is inappropriate under Indiana Appellate Rule 7(B) are two distinct analyses. *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008). Because Gamboa frames his argument as one made under Indiana Appellate Rule 7(B), we so confine our discussion.

⁵ Ind. Code § 35-50-2-7(a) (“A person who commits a Class D felony shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years.”).

history and substance abuse problem. The PSI indicates that, as a juvenile, Gamboa had a true finding of delinquency for attempted theft. As an adult, Gamboa has convictions for public intoxication, disorderly conduct, minor consuming alcohol, false informing, and Class B felony dealing in cocaine or narcotic drug. Gamboa has in total, not counting the juvenile finding, seven misdemeanor convictions and one felony conviction. Gamboa has had a misdemeanor sentence suspension revoked and probation revoked due to his recidivism.

Many of these offenses and sentence violations are related to substance abuse. Gamboa, twenty-four years old, has been drinking since he was twelve years old and began using cocaine when he was seventeen years old. Until his arrest, Gamboa had been drinking from the age of fourteen and using cocaine from the age of twenty-one on a daily basis. Gamboa has been ordered to undergo treatment programs before, but he has found them unhelpful. Sent. Tr. p. 8. Although he admitted guilt to the present offense, he received a benefit through the State's dismissal of the second charge. Nothing about Gamboa's character renders his sentence inappropriate. In sum, Gamboa has not carried his burden of persuading us that his sentence is inappropriate based upon the nature of the offense and his character.

Affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.