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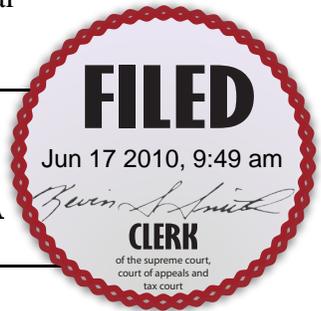
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**IN THE  
COURT OF APPEALS OF INDIANA**

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BYRON D. THOMAS,  
Appellant- Defendant,

vs.

STATE OF INDIANA,  
Appellee- Plaintiff,

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No. 20A03-0904-CR-182

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APPEAL FROM THE ELKHART SUPERIOR COURT  
The Honorable George W. Biddlecome, Judge  
Cause No. 20D03-0609-FA-51

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**June 17, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

## Case Summary and Issue

Byron Thomas appeals his sentence following guilty pleas to dealing in cocaine, a Class A felony, and dealing in cocaine, a Class B felony. Thomas raises one issue: whether his forty-year sentence is inappropriate in light of the nature of his offenses and his character. Concluding Thomas's plea agreement has waived review of this issue, we affirm.

## Facts and Procedural History

The State charged Thomas with Count I, dealing in cocaine by possessing three or more grams of cocaine with intent to deliver, a Class A felony, and Count II, dealing in cocaine by delivering cocaine, a Class B felony. At his guilty plea hearing, Thomas admitted committing Count I on September 12, 2006, and committing Count II on September 6, 2006.

Thomas entered into a written plea agreement with the State whereby he agreed to plead guilty to Counts I and II in exchange for the State's withdrawing a motion to amend the charging information to add a third count of dealing in cocaine as a Class A felony.<sup>1</sup> The State also agreed to dismiss Class A misdemeanor and traffic infraction charges against Thomas in a separate case. The plea agreement left sentencing to the trial court's discretion and contained the following waiver provision:

The defendant understands that he may have the right to appeal his sentence under Indiana Appellate Rule 7B. Notwithstanding that right, by pleading guilty under this agreement, the defendant knowingly, intelligently, and voluntarily waives his right to challenge the sentence on the basis that it is erroneous, and waives his right to have appellate review of his sentence under Indiana Appellate Rule 7B[.]

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<sup>1</sup> The third count would have alleged Thomas, on September 11, 2006, knowingly delivered three or more grams of cocaine.

Appellant's Appendix at 54. The agreement was signed by Thomas and initialed by him next to the above-quoted provision. At the guilty plea hearing, the trial court asked Thomas if he understood he was foregoing his right to appeal his sentence "based upon the argument that the sentence imposed was inappropriate in light of the nature of the offense or offenses or . . . in light of the character of the offender, you," and that "such an appeal would not be open" to him. Transcript at 16. Thomas replied affirmatively. The trial court accepted the plea agreement and Thomas's guilty pleas.

On April 2, 2009, the trial court held a sentencing hearing at which it sentenced Thomas to forty years on Count I and fifteen years on Count II, to be served concurrently. Thomas now appeals his sentence.

#### 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). However, Thomas's written plea agreement expressly waived his right to review of his sentence under Appellate Rule 7(B). Our supreme court has held a defendant may, as part of a written plea agreement, waive the right to appellate review of his sentence. Creech v. State, 887 N.E.2d 73, 75 (Ind. 2008). The trial court's "[a]cceptance of the plea agreement containing the waiver provision is sufficient to indicate that, in the trial court's view, the defendant knowingly and voluntarily agreed to the waiver." Id. at 77. Thomas's appellate brief mentions the waiver provision only once and makes no argument that it is unenforceable or otherwise inapplicable. We must conclude Thomas

has relinquished the right to appeal his sentence on the grounds it is inappropriate, which is his sole claim on appeal.<sup>2</sup> We further note that in the absence of waiver, we would not find Thomas's forty-year sentence inappropriate: the sentence is midway between the advisory and maximum sentences for a Class A felony, see Ind. Code § 35-50-2-4, and Thomas's criminal history of fourteen prior convictions at age thirty-two weighs significantly against his character.

### Conclusion

Thomas's plea agreement waived review of his claim his sentence is inappropriate. The sentence is therefore affirmed.

Affirmed.

FRIEDLANDER, J. and KIRSCH, J., concur.

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<sup>2</sup> The State, in its brief, requests that this court order sanctions of appellate attorney fees and the return of any public defender fee for what it implicitly contends is a frivolous appeal. However, this court ordered the trial court to either appoint counsel for Thomas to perfect this appeal or, alternatively, find after a hearing that Thomas was not indigent and therefore not entitled to appointment of appellate counsel. The trial court then appointed counsel for Thomas, and Indiana law required counsel to file an advocative brief. See Mosley v. State, 908 N.E.2d 599, 608-09 (Ind. 2009) (holding counsel may neither file an Anders brief nor withdraw on the basis that the appeal is frivolous). Therefore, the sanctions requested by the State would not be an equitable or fair result.