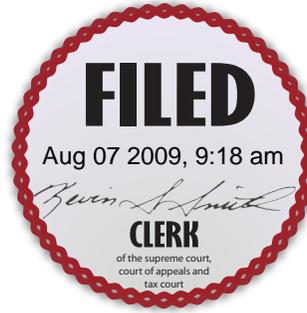


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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THOMAS E. NOWACZYK,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 20A05-0904-CR-234

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APPEAL FROM THE ELKHART SUPERIOR COURT  
The Honorable Stephen R. Bowers, Judge  
Cause No. 20D02-0601-FC-53

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**August 7, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

## STATEMENT OF THE CASE

Thomas E. Nowaczyk appeals the sentence imposed by the trial court after his plea of guilty to battery resulting in serious bodily injury, a class C felony.

We affirm.

### ISSUE

Whether Nowaczyk's suspended six-year sentence is inappropriate in light of the nature of the offense and his character.

### FACTS

On March 1, 2005, the State charged Nowaczyk with battery with a deadly weapon and battery causing serious bodily injury, both class C felonies. On February 9, 2009, Nowaczyk filed with the trial court his signed plea agreement with the State. Nowaczyk agreed to plead guilty to battery causing serious bodily injury, a class C felony; the State agreed to dismiss the other battery charge; and with respect to sentencing, the parties agreed that "all time shall be suspended." (App. 54). The agreement also contained a provision, initialed by Nowaczyk, stating that he

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 is erroneous, and waives his right to have appellate review of his sentence under Indiana Appellate Rule 7B.

(App. 57).

At a guilty plea hearing that same day, the trial court advised Nowaczyk of the numerous rights he was "giving up" by entering a plea to guilty, including "the right to

appeal the sentence imposed by this court,” which “your plea bargain agreement specifically waives.” (Feb. 9, 2008 Tr. at 9). Nowaczyk confirmed to the trial court that he “underst[oo]d that.” *Id.* Nowaczyk confirmed that “[u]nderstanding all the rights” that had been explained to him, he still wanted to plead guilty; and he admitted that on February 26, 2005, he “got into an argument” with D.P. and “knowingly touched her in a rude manner . . . that resulted in extreme pain.” *Id.* at 11, 12.

On March 19, 2009, the trial court held the sentencing hearing. Nowaczyk urged the trial court to impose a suspended four-year sentence, and the State sought a suspended six-year sentence. The trial court summarized its considerations: as aggravating circumstances, Nowaczyk’s criminal history, his failure to appear, and that he acted to protect his illegal property -- marijuana; as mitigating circumstances, his guilty plea -- for which he “receive[d] a very favorable plea agreement,” and the victim’s admitted intent to steal his marijuana -- not “provocation . . . sufficient to taking a hammer to [her].” (Mar. 19, 2009 Tr. at 5). The trial court then sentenced Nowaczyk to six years, all suspended “on reporting probation.” *Id.* at 6. After several subsequent sentencing advisements, the trial court concluded the hearing by stating that Nowaczyk had “the right to appeal the sentence imposed” and the process for pursuing such an appeal. *Id.* at 8.

### DECISION

Nowaczyk argues that his six-year sentence is “inappropriate given the nature of the offense and the character of the defendant,” *i.e.*, that revision of his sentence is warranted under Indiana Appellate Rule 7(B). Nowaczyk’s Br. at 5. He acknowledges

that a defendant “may effectively waive the right of appellate review of a sentence,” *id.* at 7, pursuant to our Supreme Court’s holding in *Creech v. State*, 887 N.E.2d 73 (Ind. 2008). However, he makes no attempt to distinguish the circumstances of his plea agreement and advisements by the trial court from those in *Creech*, and we find *Creech* to be directly on point.<sup>1</sup>

In *Creech*, Creech was charged with a class C felony, and the plea agreement left his sentence to the discretion of the trial court but capped the executed portion at six years. The plea agreement also stated that Creech waived his right to appeal his sentence.<sup>2</sup> At neither the guilty plea hearing nor the sentencing hearing did the trial court question Creech about the provision waiving his appellate rights. “[A]fter Creech had pled and his sentence had been pronounced,” the trial court advised him “that he had the right to appeal his sentence.” *Id.* at 74 (emphasis added). Creech argued that “his agreement to waive appeal was not voluntary and intelligent.” *Id.* Our Supreme Court addressed the underlying issue: “whether, through a plea agreement, a defendant can

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<sup>1</sup> Nowaczyk also cites to *Ricci v. State*, 894 N.E.2d 1089 (Ind. Ct. App. 2008), a case we do not find to be on point – the critical distinction being that in *Ricci*, the trial court expressly advised him that in his plea agreement, Ricci had “not give[n] up [his] right to appeal” the sentence imposed and “would [have] a right to appeal sentencing.” *Id.* at 1090. Thus, because the *Ricci* “trial court . . . clearly and unambiguously stated at the plea hearing that . . . according to its reading of the agreement, Ricci had not surrendered the right to appeal his sentence,” we found that Ricci had not waived his right to appeal his sentence. *Id.* at 1093. Here, the trial court clearly and unambiguously advised Nowaczyk that in his plea agreement, he was agreeing to give up his right to appeal his sentence.

<sup>2</sup> Specifically, the provision stated as follows:

I understand that I have a right to appeal my sentence if there is an open plea. An open plea is an agreement which leaves my sentence to the Judge’s discretion. I hereby waive my right to appeal my sentence so long as the Judge sentences me within the terms of my plea agreement.

*Id.* at 74.

waive altogether his right to appellate review of his sentence.” *Id.* It then expressly held that “a defendant may waive the right to appellate review of his sentence as part of a written plea agreement.” *Id.* at 75.

Turning to the issue of whether Creech had waived this right, and Creech’s argument that his waiver was not knowing and voluntary “because the court made statements at the close of the sentencing hearing that led him to believe that he retained the right to appeal,” our Supreme Court found “the statements at issue are not grounds for allowing Creech to circumvent the terms of his plea agreement.” *Id.* at 76. It reasoned that “[b]y the time the trial court erroneously advised Creech of the possibility of appeal, Creech had already pled guilty and received the benefit of the bargain.” *Id.* at 77.

We note one distinction between *Creech* and the case here: at the guilty plea hearing, the trial court expressly advised Nowaczyk that his “plea bargain agreement specifically waive[d]” his “right to appeal the sentence imposed by this court.” (Feb. 9, 2008 Tr. at 9). After being so advised, Nowaczyk confirmed that he understood that he was waiving this right, and that he still wanted to plead guilty. Such establishes that his waiver was “knowing and voluntary.” 887 N.E.2d at 73.<sup>3</sup>

With respect to the facts relied upon in *Creech*, the circumstances here mirror those. Specifically, the trial court had accepted Nowaczyk’s guilty plea, and it had pronounced his sentence -- six years, all of which was suspended, consistent with the

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<sup>3</sup> Nowaczyk asserts that his “mental state, and his competency to assist counsel” should be considered as indicating his “issue with understanding legal process.” Nowaczyk’s Br. at 8. In that regard he simply directs us to his two competency evaluations. However, we find therein no mention of any problem “understanding legal process,” *id.*, and one evaluator found him of “average to above average intellect.” (App. 72).

agreement. At that point, Nowaczyk had “received the benefits of his bargain.” *Id.* at 77.

Therefore, the trial court’s subsequent reference to appellate rights is of no moment. *Id.*

Affirmed.

ROBB, J., and MATHIAS, J., concur.