

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.

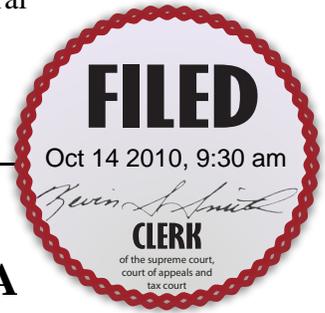
ATTORNEY FOR APPELLANT:

DERICK W. STEELE
Deputy Public Defender
Kokomo, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

KARL M. SCHARNBERG
Deputy Attorney General
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

LISA A. FOWLER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)
)

No. 34A04-1003-CR-171

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable William C. Menges, Jr., Judge
Cause No. 34D01-0801-FA-53

October 14, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

The State initially charged Lisa Fowler with class A felony dealing in cocaine. She pled guilty to possession of cocaine within 1000 feet of a youth program center, a class B felony. She entered the Drug Court Program but violated the terms of this Program. The trial court sentenced her to fifteen years, all executed. On appeal, Fowler claims that her sentence is inappropriate in light of the nature of the offense and character of the offender and that the trial court was biased against her and deprived her of due process. Because Fowler has failed to establish that her sentence is inappropriate, that the trial court was biased, or that a due process violation occurred, we affirm.

Facts and Procedural History

The facts most favorable to the trial court's judgment indicate that on Wednesday, July 4, 2007, at about 1:57 p.m., Fowler delivered 0.36 grams of cocaine to a confidential informant in exchange for fifty dollars. Fowler was later arrested and charged with dealing in cocaine, a class A felony under Indiana Code Section 35-48-4-1. On October 15, 2008, Fowler entered into a plea agreement, agreeing to plead guilty to the lesser included offense of possession of cocaine within 1000 feet of a youth program center, a class B felony under Indiana Code Section 35-48-4-6. The court accepted this plea agreement, deferred sentencing, and accepted Fowler into the Howard County Drug Court Program in lieu of imprisonment.

On January 22, 2010, Fowler violated the terms of her Drug Court placement, and the trial court issued a warrant for her arrest. She was arrested two days later when police found her staggering down the center of a city street with a BAC of 0.12%. On January

27, 2010, the court terminated Fowler's participation in the Drug Court Program.

On February 24, 2010, the trial court sentenced Fowler as follows:

Since her incarceration, she's served, when she was incarcerated on the outstanding warrant in connection with this case, she was also arrested on a charge of Public Intoxication and was sentenced to 6 days executed. She received credit for those 3 days, so before we start talking about the sanction time she has a total of 71 actual days in jail or 142 day-for-day credit. For her sanction, and this is where I'll disagree with Mr. Fleming [counsel for the State], is the first sanction she received was for 14 days from November 26th, 2008 to December 10th, 2008. That was because when she first entered the program she continued to dilute her urine screens and was actively using cocaine. She was sanctioned the second time on April 29th, 2009 through May 4th for 5 days and then again on June 18th, 2009 through July 8th, 2009 for 20 days. In-home detention is nothing but supervision and the one thing that occurred to me and became abundantly clear in the nature of the Drug Court Program is that you have more intense supervision with the Drug Court Program than you ever will with any other community-based corrections that are available. If you cannot successfully complete Drug Court, it's basically self-proving that your chance of success on in-home detention or probation is based on the concept that you're not going to be supervised as closely and therefore you'll be able to get away with violations. The other thing that I would note and I think Mr. Fleming has a good point, when somebody's in Drug Court and I meet with them as regularly as I do and have the reports I get to know them a lot better than I know most defendants. Lisa, we gave you lots and lots of opportunities and one of the things that is becoming abundantly clear is that you know what to say but you don't necessarily mean it. Your behavior shows that you're a predator. You had a relationship with an individual at Gilead House. When you began having problems with that relationship you struck out not only with that person but also at the Gilead House attempting to damage it. You had a relationship with an individual working for Family Service Association. You used that relationship in order to try and subvert what was being done in Drug Court and in doing so you not only became an active participant in this person's new criminal activity by you're [sic] jeopardizing and attempted to jeopardize the Domestic Violence Shelter Program. You've attempted [to] damage Open Arms and you've attempted to damage or at least threatened to try and damage the Drug Court Program. As I indicated, you continued to use cocaine while you were in Drug Court. You continued to use alcohol. When you were arrested on January 24th you tested .12. That wasn't just one or two drinks, that was just flat drunk. Over the course of your life you've received significant breaks.

Nevertheless you do have a significant criminal history. I find the criminal history to be an aggravating factor. I find your disregard for the rules, regulations, policies and procedures of the Drug Court Program to be an aggravating factor. I find no mitigating factors whatsoever. I think the aggravating factors substantially outweigh the mitigating factors. Accordingly I'm going to sentence you to the Indiana Department of Correction for a period of 15 years.

Tr. at 35-38. This appeal ensued.

Discussion and Decision

I. Sentencing Error

Fowler first contends that her sentence is inappropriate. Our standard of review is well-settled. This court “may revise a sentence authorized by statute if, after 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). Because reasonable minds may differ on the appropriateness of a sentence, due to the subjectivity involved in the sentencing process, it is generally inappropriate for a reviewing court to substitute its opinion for that of the trial court. *Corbett v. State*, 764 N.E.2d 622, 630 (Ind. 2002). The burden is on the defendant to persuade this court that a sentence is inappropriate. *Stewart v. State*, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007).

As for the nature of the offense, “the advisory sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed.” *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007). Fowler points to the facts that no physical injury occurred, that she was only within 1000 feet of the preschool briefly, and that no persons under the age of eighteen were within 1000 feet of the crime when it was

committed. We believe that Fowler mischaracterizes the true nature of the offense. As Fowler stipulated at the guilty plea hearing, she did not merely possess cocaine. Tr. at 24-25. She delivered 0.36 grams of cocaine to a confidential informant; that is, she was dealing cocaine.

Fowler next contends that the sentence was inappropriate in light of her character, pointing to her guilty plea and her drug dependency as evidence to support this contention. While a defendant's guilty plea can be looked upon favorably by a trial court, a plea alone does not require a court to deviate downward from an advisory sentence. *See Mull v. State*, 770 N.E.2d 308, 314 (Ind. 2002) (stating that "a guilty plea is not automatically a significant mitigating factor at sentencing") and *Abrajan v. State*, 917 N.E.2d 709, 713 (Ind. Ct. App. 2009) (stating that the defendant's "decision to plead guilty was purely pragmatic" because the State dismissed other charges and agreed to cap his sentence below the advisory sentence associated with his original charge).

Similar to *Abrajan*, Fowler's decision can accurately be classified as "purely pragmatic." The initial charge of dealing cocaine was a class A felony carrying a twenty-year minimum sentence, a fifty-year maximum sentence, and a thirty-year advisory sentence. Ind. Code § 35-50-2-4. By agreeing to plead guilty to possession of cocaine within 1000 feet of a youth program, a class B felony, Fowler was assured that the maximum sentence would be less than the advisory sentence under the original charge. *See* Ind. Code § 35-50-2-5 (statutory maximum sentence for a class B felony is twenty years, minimum sentence is six years, and advisory sentence is ten years).

Furthermore, Fowler received the added benefit of deferred sentencing and the ability to participate in the Drug Court Program.

As for Fowler's drug dependency, we note that her participation in the Drug Court Program has not been her first opportunity for treatment. Treatment has been offered to Fowler three previous times. Appellant's App. at 103. In this instance, participation in the Program included strict supervision. Yet, Fowler continued to use cocaine while participating in the Program. Tr. at 35. Fowler was also arrested for public intoxication two days after violating the terms of the Drug Court Program. Appellant's App. at 4.

Additionally, Fowler has a lengthy criminal history beginning in 1990. Besides the present felony charge, Fowler has been convicted of one prior adult felony and six prior adult misdemeanors. *See id.* at 96-104. The majority of her previous charges and convictions related to substance abuse, some involving alcohol and at least one involving cocaine. In sum, Fowler has failed to carry her burden to prove that the sentence imposed in this case was inappropriate in light of the nature of the offense and the character of the offender.

II. Sentencing Bias and Due Process Violations

Fowler next contends that "[t]he trial court developed a bias against [her] as a result of their close dealings during the course of the drug court program." Appellant's Br. at 3. She further asserts that the "trial court considered factors and issues not before it at sentencing exemplifying a negative bias against [her] depriving her of her constitutionally granted due process rights." *Id.*

There can be no doubt that a trial before an impartial judge is an essential element of due process. *In re Murchison*, 349 U.S. 133, 136 (1955); *Marcum v. State*, 725 N.E.2d 852, 856 (Ind. 2000). Moreover, “the sentencing process [as well as the trial itself] must satisfy the requirements of the Due Process Clause.” *State v. McCormick*, 397 N.E.2d 276, 277 (Ind. 1979) (quoting *Gardner v. Florida*, 430 U.S. 349, 357 (1977)). In Indiana, the law presumes that a judge is unbiased and unprejudiced. *Garland v. State*, 788 N.E.2d 425, 433 (Ind. 2003). To rebut this presumption, a defendant must establish from the judge’s conduct actual bias or prejudice that places the defendant in jeopardy. *Smith v. State*, 770 N.E.2d 818, 823 (Ind. 2002). Such actual bias is shown when the trial court “expresse[s] an opinion of the controversy over which the judge is presiding,” *id.* at 823, or when the court’s remarks impart an appearance of partiality. *Everling v. State*, 929 N.E.2d 1281, 1288 (Ind. 2010).

Fowler alleges generally that the trial court evidenced bias against her but points to very little in support of this allegation. There are no accusations that the court formed an opinion as to the controversy or that there was partial or unfair treatment. Fowler’s true contention appears to be that she was deprived of due process based on the trial court’s consideration of her behavior while participating in the Drug Court Program and the fact that she allegedly was not presented an opportunity to contest this information.

We note, however, that Fowler’s behavior was documented in the presentence investigation report, which she had an opportunity to refute at the sentencing hearing, but she failed to do so. Tr. at 31. Fowler’s criminal history was also included in the presentence investigation report, and other remarks the trial court made dealt generally

with the circumstances that led to her termination from the Drug Court Program. Appellant's App. at 101-103. We must agree with the State that a judge's experience with a defendant affords a better opportunity to "craft a sentence particularly suited to the individual defendant." Appellee's Br. at 10. A court may always look at the defendant's behavior that occurred while the defendant was under its supervision. Taking a defendant's behavior into account in sentencing is not error, especially when the behavior in question occurred during the same proceeding. We find that Fowler has failed to show that bias or deprivation of due process occurred. Consequently, we affirm.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.