

IN THE  
COURT OF APPEALS OF INDIANA

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CAUSE NO. 45A03-0910-CR-455

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CHARLES A. BOSWELL, JR.,

*Appellant (Defendant below),*

v.

STATE OF INDIANA,

*Appellee (Plaintiff below).*

Appeal from the Superior Court of Lake  
County, Criminal Division II

Cause No. 45G02-0611-FA-00067  
45G02-0702-FB-00013

Hon. Clarence D. Murray, Judge

**BRIEF OF APPELLEE**

**STATEMENT OF THE ISSUE**

Whether the trial court properly and appropriately sentenced Defendant to an executed term of twenty years pursuant to a plea agreement for bludgeoning an eighty-three year-old veteran and attempting to enter the residence of another person.

**STATEMENT OF THE CASE**

Nature of the Case

Charles A. Boswell, Jr. (“Defendant”) appeals his sentence for aggravated battery,<sup>1</sup> a class B felony and attempted residential entry,<sup>2</sup> a class D felony (App. 1–2, 53).

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<sup>1</sup> Ind. Code § 35-42-2-1.5.

<sup>2</sup> I.C. §§ 35-43-2-1.5, 35-41-5-1.

### Course of the Proceedings

On November 22, 2006, in Cause No. FA-00067, the State charged Defendant with Count I: Attempted murder,<sup>3</sup> a felony; Count II: Aggravated battery, a class B felony; Count III: Battery,<sup>4</sup> a class C felony; Count IV: Intimidation,<sup>5</sup> a class D felony; and Count V: Intimidation (App. 72–73, 75–76). On February 12, 2007, in Cause No. FB-00013, the State charged Defendant with Count I: Possession of cocaine,<sup>6</sup> a class B felony; and Count II: Trespass,<sup>7</sup> a class A misdemeanor (App. 7, 10–11). On June 19, 2009, the State amended the information, adding Count III: Attempted residential entry, a class D felony (App. 34–35). On the same day, based on stipulated factual bases, the Defendant pled guilty to aggravated battery, a class B felony in FA-00067, and attempted residential entry, a class D felony in FB-00013 (App. 36–40, 109–113; Tr. 14–15).

Defendant filed his notices of appeal in both causes on September 30, 2009 (App. 1–2, 65–66; Docket). On November 18, 2009, this Court consolidated the appeals (Docket). On December 30, 2009, the transcript was completed (Docket). Defendant timely filed his Brief of Appellant on January 29, 2010, by mail (Docket).

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<sup>3</sup> I.C. §§ 35-42-1-1, 35-41-5-1.

<sup>4</sup> I.C. § 35-42-2-1.

<sup>5</sup> I.C. § 35-45-2-1.

<sup>6</sup> I.C. § 35-48-4-6.

<sup>7</sup> I.C. § 35-43-2-2.

## STATEMENT OF FACTS

Eighty-three year-old Marine Corps veteran Anthony Udowski survived not only the Battle of Bloody Nose Ridge,<sup>8</sup> but also one of the worst beatings that the responding paramedic had seen in her entire career (App. 112; Tr. 85–86, 89, 95). In the early morning hours of November 22, 2006, Defendant pounded on the door of Anthony’s condominium in Munster, Indiana (App. 112). Defendant, high on cocaine, appeared to need assistance as he was shivering and wearing only a T-shirt (Tr. 41, 94). Anthony, who had helped those in need all of his life, opened the door and asked if he could assist Defendant in any way (Tr. 87–89, 94). Defendant replied: “Are you ready to die?” (Tr. 94). When Anthony turned away from the door, Defendant attacked him from behind and knocked Anthony to the ground (Tr. 94). Defendant repeatedly stomped on Anthony’s head and upper body (Tr. 94). When the Munster Police arrived on the scene, Defendant was still stomping on Anthony’s head (App. 112; Tr. 85).

After placing Defendant in handcuffs, the police went to Anthony’s apartment where his daughter Nancy Gustaitis and her husband Dr. John Gustaitis were staying as they were in the process of moving to a new home (Tr. 84–85, 102). The police would not allow Nancy to see her father, but they allowed Dr. Gustaitis to examine him to see if he could provide some assistance (Tr. 103). Dr. Gustaitis “couldn’t believe what [he] had seen” – despite serving in

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<sup>8</sup> The battle of Bloody Nose Ridge reportedly had the highest casualty rate of any battle during World War II and was the source of LIFE artist and war correspondent Tom Lea’s inspiration for his infamous illustration of battle-weary soldiers in “That 2,000 Yard Stare.” See Battle of Peleliu, Thomas C. Lea, III at <http://en.wikipedia.org>. For an excellent account of the battle, see Brig. Gen. Gordon D. Gayle, U.S. Marine Corps (ret.), *Bloody Beaches: The Marines at Peleliu in Marines in World War II Commemorative Series* (available at: <http://www.nps.gov/archive/wapa/indepth/extContent/usmc/pcn-190-003137-00/index.htm>).

Viet Nam himself (Tr. 103). During World War II, Anthony was awarded the purple heart<sup>9</sup> *three* times, losing an eye in the Battle of Guadalcanal (Tr. 86). Defendant had beaten Anthony's head so hard that Dr. Gustaitis had difficulty recognizing his own father-in-law (Tr. 103).

Unfortunately, Anthony's good eye suffered the brunt of Defendant's blows (Tr. 103–04). The treating physicians were skeptical of performing any additional surgery, fearing that Anthony would lose vision in his good eye (Tr. 104–05). Anthony's vision is now severely compromised (Tr. 104). As a result of the attack, Anthony has suffered from post-traumatic stress syndrome, requires round-the-clock care, lives in a controlled access home, and suffers from paranoid delusions (Tr. 106). Just a few weeks later, on February 10, 2007, Defendant attempted to gain entry into another residence in Munster, but was unsuccessful in his attempt (App. 40).

Additional facts from the record will be incorporated as necessary and cited accordingly.

#### **SUMMARY OF THE ARGUMENT**

The court acted within its discretion when sentencing Defendant. The record is equivocal at best regarding Defendant's alleged bipolar disorder. Defendant's own witness stated that there was "no history" of mental illness other than Defendant's falling out with his wife. Additionally, the nexus between Defendant's alleged mental illness and his crime, beating an eighty-three year old man, is non-existent. Therefore, the court acted within its discretion to reject Defendant's proffered mitigator. More importantly, Defendant's twenty-year sentence is entirely appropriate in light of his character and the nature of the offense.

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<sup>9</sup> A purple heart is a military honor awarded to men or women wounded or killed in service. *See* Purple Heart (available at: <http://www.tioh.hqda.pentagon.mil/awards/ph1.html>).

## ARGUMENT

### THE COURT PROPERLY AND APPROPRIATELY SENTENCED DEFENDANT.

The court properly sentenced Defendant. “[S]entencing is principally a discretionary function in which the trial court’s judgment should receive considerable deference.” *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008); *see also Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007) (“[S]entencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion.”). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances and reasonable inferences therefrom. *Anglemyer*, 868 N.E.2d at 490-91. A trial court may abuse its discretion by: (1) failing to enter a sentencing statement at all; (2) finding or omitting reasons not supported or supported by the record; or (3) or citing reasons that are improper as a matter of law. *Id.*

The court acted within its discretion to sentence Defendant to a twenty-year term. A person who commits a class B felony shall be imprisoned for a fixed term between six and twenty years, with an advisory sentence of ten years. I.C. § 35-50-2-5. The court imposed an eighteen-year sentence in Cause No. FA-00067 and a consecutive two year sentence in FB-00013 (App. 56). The court identified four aggravating factors: (1) the harm suffered by Anthony was significant and greater than necessary to prove the elements of the offense; (2) Defendant committed the aggravated battery while on bond and was charged with a total of six offenses while on bond; (3) Anthony, the victim, was eighty-three years old; and (4) the nature and circumstances indicated the beating was “unprovoked and incredibly vicious” (App. 55–56). In mitigation, the court considered: (1) Defendant’s plea; (2) Defendant’s substance addiction; and (3) Defendant’s remorse (App. 56). However, the court attached little weight to Defendant’s

substance abuse, because Defendant had monetary means to seek treatment, but failed to do so (App. 56).

Defendant claims the court abused its discretion by ignoring evidence of a mental illness, specifically bipolar disorder and depression. *See* Br. of Appellant at 8–10. In his sentencing memorandum, Defendant claims that his “undiagnosed and untreated” bipolar disorder was a significant contributing factor to Defendant’s crime (App. 47). Dr. Gary Durak, a licensed clinical psychologist, examined Defendant and stated that Defendant “had no history of any kind of previous mental disorder other than when he and his wife were struggling” (Tr. 36, 50). Dr. Durak stated that there was “*a possibility* of an underlying bipolar disorder” (Tr. 51) (emphasis supplied). Counsel referenced Dr. Durak’s written report during the sentencing hearing, but the report was not included in the record or admitted at the hearing (Tr. 58). *See* PSI at 11 (noting that records were requested). Based on the record before this Court, there is simply not enough evidence to document a “longstanding” mental illness as Defendant claims.

Defendant relies on *Williams v. State*, 840 N.E.2d 433 (Ind. Ct. App. 2006), *reh’g granted, trans. not sought*, for the proposition that the trial court abused its discretion. The divided panel in *Williams*, however, noted that in cases where mental illness has been considered involved findings of guilty but mentally ill. *Id.* at 439 n.1 (citing *Weeks v. State*, 697 N.E.2d 28, 31 (Ind. 1998), *Archer v. State*, 689 N.E.2d 678, 686 (Ind. 1997), *Biehl v. State*, 738 N.E.2d 337, 340 (Ind. Ct. App. 2000), *trans. denied*). In dissent, Judge Riley reasoned that *Williams* had not shown a nexus between the mental illness and the crime. *Id.* at 440 (Riley, J., dissenting) Here, the nexus is even more tenuous than in *Williams*.

The evidence adduced at the sentencing hearing and in the pre-sentence investigation report shows that Defendant lived a productive life for many years. The closer nexus is between

Defendant's drug use and his senseless crime, not any mental illness. In fact, many of the letters in support of Defendant indicate that at one time Defendant was a kind, helpful, and caring member of the community. Defendant was a loving, caring father to his children (Tr. 47–48). For many years, Defendant was a productive member of society and held stable employment. Defendant's life spiraled out of control when his marriage failed and he began using cocaine on a daily basis, binging for days on end to the tune of four to five hundred dollars per day (Tr. 45–46, 52). To the extent Defendant claims the trial court should have afforded more weight to his “longstanding” mental illness flies in the face of the record, which shows that Defendant overcame earlier childhood disappointments over his own parents' divorce (Tr. 52–53). Undoubtedly Defendant was depressed over his failed marriage, but Defendant's depression does not justify or excuse his “unprovoked and incredibly vicious” attack on Anthony (App. 55–56). The nexus between Defendant's alleged mental illness and his crime is nonexistent. Therefore, the court did not abuse its discretion by failing to find Defendant's alleged mental illness a mitigating factor.

Moreover, Defendant's twenty-year sentence is entirely appropriate. This Court has the constitutional authority to revise a sentence if, after “due consideration” of the trial court's decision, this Court finds that the sentence is “inappropriate in light of the nature of the offense and the character of the offender.” See Ind. Appellate Rule 7(B); *Lopez v. State*, 869 N.E.2d 1254, 1257 (Ind. Ct. App. 2007). However, this Court's review under Appellate Rule 7(B) is deferential, though not excessively so, to the trial court's decision. *Stewart v. State*, 866 N.E.2d 858, 865 (Ind. Ct. App. 2007). The burden is on the defendant to persuade the appellate court that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080–81 (Ind. 2006) (interpreting previous presumptive sentencing scheme and noting the revised advisory sentencing

scheme). “The principal role of appellate review should be an attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived ‘correct’ result in each case.” *Cardwell*, 895 N.E.2d at 1225.

Regarding the nature of the offense, the trial court characterized it as a “bludgeoning” (App. 56). Defendant attacked Anthony, an eighty-three year-old man, and stomped on Anthony’s head so hard and so many times that Defendant severely damaged Anthony’s remaining good eye (Tr. 103–04). When the police arrived on the scene, Defendant was still stomping on Anthony’s head (App. 112; Tr. 85). Dr. Gustaitis, who happened to be staying with Anthony, did not even recognize his own father-in-law (Tr. 103). Anthony’s vision is now severely compromised (Tr. 104). Anthony, who lived independently prior to the attack, now has suffers from post-traumatic stress syndrome, requires round-the-clock care, lives in a controlled access home, and suffers from paranoid delusions (Tr. 104–06). The nature of the offense was sufficiently brutal to justify an enhanced sentence.

With respect to Defendant’s character, while there is evidence in the record suggesting positive aspects of Defendant’s character years ago, more recent events are indicative of Defendant’s poor character. The trial court noted that Defendant violated the conditions of his release and committed six new offenses while on bond (App. 56). The court noted that even though Defendant had substance abuse problems, he failed to seek any treatment despite having the means to do so. In light of the brutal nature of the offense and the more recent display of his poor character, Defendant has failed to carry his weighty burden of convincing this Court that his twenty-year sentence is inappropriate.

**CONCLUSION**

For all of the foregoing reasons, the State respectfully requests that this Court affirm the trial court's decision to impose an eighteen-year sentence for aggravated battery and a two-year sentence for attempted residential entry.

Respectfully submitted,

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