

Gregory Fording (“Fording”) pleaded guilty in Cass Superior Court to Class B felony dealing in methamphetamine. Fording appeals his fourteen-year sentence arguing that it is inappropriate in light of the nature of the offense and the character of the offender. He also argues that his sentence constitutes cruel and unusual punishment because he suffers from kidney failure. We affirm.

Facts and Procedural History

On January 26, 2010, Fording was charged with Class B felony dealing in methamphetamine. On April 12, 2010, Fording agreed to plead guilty to the offense. The plea agreement provided that the executed portion of his sentence would be capped at fourteen years. Fording also agreed to waive the right to appeal his sentence.

During the May 10, 2010 sentencing hearing, Fording testified that he suffers from polycystic kidney disease and is in the final stage of kidney failure. Sentencing Tr. p. 5. He receives dialysis treatments three times each week. Further, he testified that he requires a kidney transplant, but cannot qualify for one if he is incarcerated. *Id.* at 7. Yet, Fording also admitted to daily cigarette and marijuana use and to using methamphetamine and cocaine, which he acknowledged was not “good for [his] kidneys[.]” *Id.* at 12.

The trial court found that Fording’s guilty plea, medical condition and hardship to his three dependents were mitigating circumstances. The court also considered the following aggravating circumstances: Fording’s prior criminal history, failed attempts at probation, and the fact that he was on probation when he committed this offense.

Fording was then ordered to serve a fourteen-year sentence in the Department of Correction. Fording now appeals his sentence.

Discussion and Decision

Fording argues that his fourteen-year sentence is inappropriate in light of the nature of the offense and the character of the offender. He also argues that his sentence violates the Indiana and United States Constitutional provisions against cruel and unusual punishment because of his medical condition. The State argues that Fording waived his right to appeal his sentence.

Fording knowingly signed the plea agreement and acknowledged discussing its terms with counsel. Plea Hearing Tr. pp. 8-9. The agreement provides that

the defendant understands that there will be no appellate review of the sentence. The Defendant acknowledges that he/she has discussed this matter with counsel, and hereby makes a knowing and voluntary waiver of appellate review of the sentence imposed by the trial court. Defendant may still appeal any illegal sentence which may be imposed.

Appellant's App. p. 11. Further, the plea agreement provides that the Defendant "hereby waives any right to challenge the trial court's finding on sentencing, including the balancing of mitigating and aggravating factors and further waives his right to have the Indiana Court of Appeals review his sentence under Indiana Appellate Rule 7(B)." *Id.* at 12. Yet, the court advised Fording of his right to appeal the sentence at the conclusion of the sentencing hearing.

Our supreme court has held that a defendant may waive the right to appellate review of his sentence as part of a written plea agreement. Creech v. State, 887 N.E.2d 73, 75 (Ind. 2008). In that case, Creech and the State entered into a plea agreement,

which provided “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. There, as in the case before us, the trial court advised Creech at the conclusion of the sentencing hearing that he had a right to appeal his sentence even though the plea agreement included a waiver of that right. On appeal, the court rejected Creech’s argument that he did not knowingly, voluntarily, and intelligently waive his right to appeal his sentence because the trial court’s statement at the close of the sentencing hearing gave him the impression he still had that right. Specifically, our supreme court observed:

Creech does not claim that the language of the plea agreement was unclear or that he misunderstood the terms of the agreement at the time he signed it, but rather claims that his otherwise knowing and voluntary plea lost its knowing and voluntary status because the judge told him at the end of the sentencing hearing that he could appeal.

By the time the trial court erroneously advised Creech of the possibility of appeal, Creech had already pled guilty and received the benefit of his bargain. Being told at the close of the hearing that he could appeal presumably had no effect on that transaction.

Id. at 76-77; see also Akens v. State, 929 N.E.2d 265, 267 (Ind. Ct. App. 2010); Ricci v. State, 894 N.E.2d 1089, 1092 (Ind. Ct. App. 2008), trans. denied (stating “it is clear that under Creech, a trial court’s incorrect advisement at the conclusion of a defendant’s sentencing hearing has no effect on an otherwise knowing, voluntary, and intelligent waiver of the right to appeal his sentence.”)

Because Fording received the benefit of his bargain before the trial court mistakenly advised Fording of his right to appeal his sentence, we conclude that Fording

waived the right to appeal the appropriateness of his sentence under Indiana Appellate Rule 7(B).

Waiver notwithstanding, we would conclude that Fording's fourteen-year sentence is not inappropriate in light of the nature of the offense and the character of the offender. In reviewing a defendant's sentence under Indiana Appellate Rule 7(B), we give due consideration to the trial court's decision. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade this court that his sentence is inappropriate. Id.

While there is nothing particularly egregious about the nature of Fording's offense, Fording's character more than supports the fourteen-year sentence. At age thirty-two, Fording has amassed two felony convictions and ten misdemeanor convictions, including a Class C felony battery by means of a deadly weapon conviction, a Class D felony possession of chemical reagent or precursors with intent to manufacture conviction, a Class A misdemeanor possession of marijuana conviction, and three misdemeanor battery convictions. Moreover, Fording's presentence investigation report lists numerous probation violations.

While it is true that Fording suffers from a serious and debilitating illness, Fording admits to daily cigarette and marijuana use and use of methamphetamine and cocaine. Fording acknowledged that use of illegal substances causes further harm to his kidneys. Furthermore, in the past, Fording was ordered to complete both inpatient and outpatient substance abuse programs, yet he never successfully completed any such program. For

these reasons, even absent waiver, we would hold that Fording's fourteen-year sentence is not inappropriate in light of the nature of the offense and the character of the offender.

Finally, Fording argues that his fourteen-year sentence constitutes cruel and unusual punishment because "Fording's extremely poor health makes it a certainty that incarceration will cause him to suffer more and ultimately result in a premature death." Appellant's Br. at 7.¹ "The constitutional prohibition against cruel and unusual punishments proscribes atrocious or obsolete punishments and is aimed at the kind and form of the punishment, rather than the duration or amount." Dunlop v. State, 724 N.E.2d 592, 597 (Ind. 2000). Punishment is considered cruel and unusual if it "makes no measurable contribution to acceptable goals of punishment, but rather constitutes only purposeless and needless imposition of pain and suffering." Ratliff v. Cohn, 693 N.E.2d 530, 542 (Ind. 1988) (quoting Douglas v. State, 481 N.E.2d 107, 112 (Ind. 1985)).

In support of his argument, Fording relies on Naked City, Inc. v. State, 460 N.E.2d 151 (Ind. Ct. App. 1984), in which our court held that incarcerated persons are entitled to reasonable medical care and "challenges to the mere adequacy of individual care or claims of medical malpractice are not of constitutional dimension." Id. at 161. "Yet where reasonable care is denied deliberately, and such denial results in the infliction of unnecessary pain, suffering or disability both the Eighth Amendment of the Constitution of the United States and Article 1, Section 16 of the Indiana Constitution are implicated."

Id.

¹ Fording also claims the sentence is grossly disproportionate to the acts which form the basis of the charge but makes no separate argument to support his claim and does not provide any citation to authority. Therefore, the issue is waived. See Ind. Appellate Rule 46(A)(8)(a).

Fording argues that he needs a kidney transplant and “[b]y virtue of the incarceration in the Department of Correction, Fording will be deliberately denied a kidney transplant.” Appellant’s Br. at 9. At the sentencing hearing, Fording submitted a letter from a nurse at Fresenius Medical Care where he had been a patient since February 5, 2009. The letter notes that Fording’s attempt to be placed on the kidney transplant list failed because he was “non-compliant with treatments between 2/12/09 and 7/22/09.” Ex. Vol., Defendant’s Ex. A. After observing that Fording was compliant with treatments from July 2009 to February 2010, the nurse states, “With Mr. Fording being incarcerated I have much concern that a transplant will be out of the question. He is young and should have many years ahead of him to live. If [Fording] continues with dialysis instead of receiving a donor kidney, it could be detrimental to his life.” Id. The letter concludes, “I obviously have no way of telling when Mr. Fording is going to die, but I do know beyond a shadow of a doubt that he will live significantly less time than he would if he received a kidney transplant.” Id.

Although Fording will need a kidney transplant at some point in the future, Fording has not alleged that the Department of Correction has denied him reasonable medical care or cannot adequately provide the medical care needed. Further, Fording only presented evidence that he might not be able to receive a kidney transplant if incarcerated. Fording also has not alleged that the Department of Correction has denied him the dialysis treatments he requires three times per week. Moreover, Fording’s current concern for the state of his health is belied by his past non-compliance with treatment and his continuous drug and cigarette use, which he admits is not “good for

[his] kidneys[.]” Id. at 12. Because Fording has not established that he has been denied reasonable medical care, we conclude that Fording’s claim is not of constitutional dimension. See Naked City, 460 N.E.2d at 161.

For all of these reasons, we affirm Fording’s fourteen-year sentence.

Affirmed.

FRIEDLANDER, J., and MAY, J., concur.