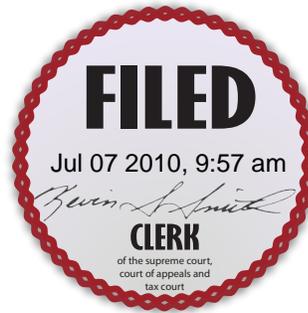


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DENISE L. BLACK,)
)
Appellant-Defendant,)
)
vs.) No. 45A03-0912-CR-572
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-0512-FB-108

July 7, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Denise L. Black appeals her eight-year executed sentence imposed following her guilty plea to class C felony reckless homicide,¹ arguing that it is inappropriate in light of the nature of the offense and her character.² We vacate her sentence and remand with instructions to impose a six-year executed sentence.

According to the “Stipulated Factual Basis” submitted to the trial court with Black’s plea agreement, on or about October 14, 2004, Dustin Oglesby was at Black’s home in Hobart. Appellant’s App. at 43. Black extracted the Fentanyl from her prescription Fentanyl patch with a syringe. *Id.* She “then gave the Fentanyl to Oglesby in exchange for money.” *Id.* That night, “Oglesby stopped breathing as a result of the Fentanyl injection combined with other drugs and alcohol and died.” *Id.* Black had a valid prescription for the Fentanyl patch. However, “she was informed by the pharmacy that she was not to alter said medication or give it to anyone else[, and] she knew she was not supposed to alter the medication or give it to anyone else.” *Id.*

On December 29, 2005, a grand jury returned bills of indictment against Black, charging Black with class B felony dealing in a schedule II controlled substance and class C felony reckless homicide. The reckless homicide indictment alleged that Black “did recklessly kill Dustin Oglesby by injecting him with a controlled substance classified in

¹ See Ind. Code § 35-42-1-5 (“A person who recklessly kills another human being commits reckless homicide, a Class C felony.”). “A person acts recklessly for purposes of reckless homicide if he engages in conduct in plain, conscious, and unjustifiable disregard of harm that might result and such conduct involves substantial deviation from acceptable standards of conduct.” *Gibbs v. State*, 677 N.E.2d 1106, 1108 (Ind. Ct. App. 1997) (quoting *McClaskey v. State*, 540 N.E.2d 41, 45 (Ind. 1989)), *transfer denied*.

² Because of our resolution of this issue, we need not address Black’s argument that in sentencing her, the trial court abused its discretion in finding and weighing the aggravating and mitigating circumstances.

Schedule II, to wit: Fentanyl[.]” *Id.* at 11. On July 17, 2009, Black pled guilty to class C felony reckless homicide pursuant to a written plea agreement, and the State agreed to dismiss the dealing charge. Following a hearing, on November 10, 2009, the trial court issued its sentencing order, which provides in relevant part as follows:

Aggravating Circumstances:

1. [Black] has a history of misdemeanor and felony convictions. The Court finds [Black]’s criminal history to be a moderate aggravating factor.
2. The Court finds that the nature and circumstances of the crime to be a significant aggravating factor in that [Black] not only delivered Fentanyl to the victim but actually injected him with it causing his death. [Black] knew that she was not to alter this medicine or give it to anyone else but nevertheless, sold the Fentanyl to the victim for profit. Also, the victim was [Black]’s cousin and there obviously existed a certain level of trust between the two.

Mitigating Circumstances:

1. [Black] admitted her guilt by way of plea agreement, thus saving the Court and the tax payers of this county the time and expense of a trial. The Court does not consider this a significant mitigating factor in that [Black] received a substantial benefit from the agreement because her plea is a lower class felony than originally charged.

After presentation of evidence and hearing argument, the court finds that the aggravating factors outweigh the mitigating factors.

Id. at 46-48. The trial court then sentenced Black to the Department of Correction for a period of eight years, executed.

Black appeals her sentence, contending that it is inappropriate. Article 7, Section 6 of the Indiana Constitution authorizes this Court to independently review and revise a sentence imposed by the trial court. *Smith v. State*, 839 N.E.2d 780, 787 (Ind. Ct. App. 2005). Indiana

Appellate Rule 7(B) states, “The Court may revise a sentence authorized by statute 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.” “Although appellate review of sentences must give due consideration to the trial court’s sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied.” *Purvis v. State*, 829 N.E.2d 572, 588 (Ind. Ct. App. 2005) (internal citation and quotation marks omitted), *trans. denied*. The defendant bears the burden of persuading the appellate court that the sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

Turning first to the nature of Black’s offense, we observe that the “presumptive sentence for the class of crimes to which the offense belongs is meant to be the starting point for the court’s consideration of what sentence is appropriate for the crime committed.” *Smith*, 839 N.E.2d at 787. At the time of Black’s offense, the presumptive sentence for a class C felony was four years, with the maximum sentence being eight years and the minimum sentence being two years. Ind. Code § 35-50-2-6. Black received the maximum sentence. With regard to the imposition of the maximum possible sentence, our supreme court has stated,

[T]he maximum possible sentences are generally most appropriate for the worst offenders. This is not, however, an invitation to determine whether a worse offender could be imagined. Despite the nature of any particular offense and offender, it will always be possible to identify or hypothesize a significantly more despicable scenario. Although maximum sentences are ordinarily appropriate for the worst offenders, we refer generally to the class of

offenses and offenders that warrant the maximum punishment. But such class encompasses a considerable variety of offenses and offenders.

Buchanan v. State, 767 N.E.2d 967, 973 (Ind. 2002) (citations and quotation marks omitted).

We observe that the trial court found the nature and circumstances of Black's crime to be a significant aggravating factor because she "actually injected" Oglesby with the Fentanyl. Appellant's App. at 46. The parties vehemently disagree as to whether the record supports a finding that Black actually injected Oglesby with the Fentanyl. We note that whereas the charging indictment alleges that Black "injected" Oglesby, the "Stipulated Factual Basis" states only that she "gave" Oglesby the Fentanyl in exchange for money. *Id.* at 43, 11. At the sentencing hearing, the trial court asked the parties whether Black actually injected Oglesby or gave it to him and he injected it himself. Tr. at 37. The parties answered as follows:

[DEFENSE]: No, it's my client's version that she gave it to him and he injected himself, that's why we had to add that specifically. We know that was kind of a point of contention that we were actually negotiating in the stipulated factual basis. You know, I did speak with the State regarding it. I specifically, after speaking with my client, negotiated as far as what she would ultimately sign. That's what my client's version is going to be, that she gave him the Fentanyl for money, but not that she actually injected him.

[STATE]: And obviously, Judge, the State has a different view of that. I think when we were here at the submission [hearing], because it was such an old case and going on forever, she contested that word. So we changed the word from injected to gave. But when the Magistrate did read it to her, she admitted to injecting him. So as it's read, it can be interpreted either way, but I [k]now the last time we were here we did take out – we originally had it as injected, and she would not sign it because it said injected.

Tr. at 38. The trial court noted that although it could consider, in addition to the factual basis statement, any admission made by Black, it did not have a transcript of the plea hearing, and

therefore, it could not accept the State's version of what was discussed at the plea hearing and was limited to the content of the factual basis statement. *Id.* at 38-40. In light of the trial court's statements, it is unclear why it cited the disputed allegation as an aggravating factor in the sentencing order.

On appeal, the State argues,

Although being surplus language in the indictment, [Black] was specifically indicted with reckless homicide for injecting Oglesby with the Fentanyl. That is the charge that [Black] pled guilty to, and she indicated her understanding of the indictment at the guilty plea hearing. The fact that she contested that fact at sentencing and only wanted to admit that she "gave" the Fentanyl to the victim did not eradicate her admission to the language in the indictment.

Appellee's Br. at 7 (citations omitted). We are unpersuaded by the State's argument because it ignores the significance of the stipulated factual basis. This document is the basis for Black's guilty plea; it establishes only the fact that she gave Oglesby the Fentanyl in exchange for money. Accordingly, we decline to rely on this allegation in assessing the nature of the offense.

What the record supports regarding the nature of Black's crime is that she had a prescription Fentanyl patch, which she knew she was not supposed to alter or give to anyone else.³ She extracted the Fentanyl with a syringe and sold it to Oglesby, her cousin, who was fourteen years her junior. Later that night, Oglesby stopped breathing as a result of the Fentanyl combined with other drugs and alcohol. Although we find Black's ruinous actions

³ That Black knew she was not supposed to alter the medication or give it to anyone else is arguably a component of the mens rea element of her offense.

appalling and are struck with the tragic nature of her offense, we do not think the maximum possible sentence is warranted.

As to Black's character, we are troubled by the choices she has made in recent years. Her criminal history consists of one felony conviction for forgery and two misdemeanor convictions for theft and possession of paraphernalia. Although the theft conviction occurred in 1993, the forgery and possession of paraphernalia convictions both occurred within four years of the current offense. In fact, Black was on probation for both convictions when she committed the current offense. Also, in the presentence investigation report, she admits to consuming crack cocaine between 2001 and 2004.

The State asserts that Black "cannot recall the last time she was employed" and that she "receives social security disability and consumes approximately seventeen different prescription medications." Appellee's Br. at 13. Although, generally, failure to maintain gainful employment would reflect poorly on one's character, the fact that Black has a disability for which she receives social security benefits would appear to be, at the very least, a reason, if perhaps not the sole reason, for her lack of employment. Our review of the seventeen different prescription medications includes many medicines for diabetes, asthma, and high cholesterol. Appellant's App. at 60. We fail to see how the need for such medicines is relevant to assessing Black's character.

The State also baldly asserts that Black lost custody of her children in 1999. Appellee's Br. at 13. One might surmise that she lost her children due to neglect or abuse.

However, a review of the record shows that the incident was related to a bout with depression, for which she was treated in 2000. Appellant's App. at 61.

In addition, the State argues that although Black is now forty-three years old, she "continues to use childhood tragedy and her abusive marriage as excuses for her extremely poor, and in this case criminal, behavior." Appellee's Br. at 13. The record shows that Black was sexually abused by a step-father for two years in her childhood and was physically abused by her husband of fourteen years. Appellant's App. at 58. The difficulty in dealing with such traumas should not be underestimated. At any rate, Black pled guilty, *see Lopez v. State*, 869 N.E.2d 1254, 1259 (Ind. Ct. App. 2007) (observing that defendant's guilty plea reflects positively on character), *trans.* denied, and the record shows that Black did express remorse for her actions. At the sentencing hearing, she stated,

I would just like to say that I'm very truly sorry about what happened. Not only – he was also related to me, he was my cousin. And I know what I did was wrong and I regret that. If I could turn back the days, I would do it and everything would be different. But, of course, I can't do that. And I'm sorry for, you know, the family's hurt, the hurt that I put on the family and everything.

Tr. at 50.

Based on the nature of the offense and her character, we conclude that although a sentence above the presumptive is justified, the maximum sentence is inappropriate. We therefore vacate Black's sentence and remand with instructions to impose a six-year executed sentence.

Vacated and remanded.

BAKER, C.J., and DARDEN, J., concur.