



Alan Wickliff entered a plea of guilty to operating a vehicle while intoxicated resulting in death with a prior offense within five years ("OWI"), a Class B felony, and possession of marijuana in excess of thirty grams and possession of marijuana with a prior conviction, both Class D felonies. Pursuant to the "open sentencing" provision of the plea agreement, the trial court sentenced Wickliff to an enhanced term of twenty years for the Class B felony OWI and enhanced terms of three years for each of the Class D felony possession counts. The Class D felony sentences were to be concurrent with each other, but consecutive to the Class B felony sentence, for an aggregate sentence of twenty-three years. Wickliff appeals his sentence. We affirm.

#### Issue

Wickliff raises a single issue for our review: whether his twenty-three year sentence is inappropriate.

#### Facts and Procedural History

On the evening of April 24, 2003, Wickliff consumed alcohol, marijuana, and Zanax. While subsequently operating his vehicle, he was involved in a collision which resulted in the death of William Stine. Wickliff was ultimately charged with operating a vehicle while intoxicated causing death in two parts, as a Class C felony and also as a Class B felony for a prior conviction within five years; operating a vehicle with blood alcohol content of at least .08 causing death in two parts, as a Class C felony and also as a Class B felony for a prior conviction; possession of marijuana in excess of thirty grams, a Class D felony; operating a vehicle while intoxicated with a controlled substance in his body in two parts, as a Class C felony and also as a Class B felony for a prior conviction;

and possession of marijuana with a prior conviction as a Class D felony. It was also alleged that Wickliff was an habitual substance offender.

Wickliff entered into a plea agreement with the State whereby he would plead guilty to operating a vehicle while intoxicated causing death with a prior conviction, a Class B felony, and possession of marijuana in excess of thirty grams and possession of marijuana with a prior conviction, both Class D felonies. Sentencing was to be "open" and at the trial court's discretion. Following a sentencing hearing, the trial court made the following statement:

. . . I am finding that there are three aggravating circumstances that are applicable here. And one non-statutory aggravating circumstance. The first aggravating circumstance that I'm finding, I am not placing a great deal of weight on, but it is that the defendant has previously violated conditions of probation. And the reason I'm not placing a great deal of weight on that aggravator, but I am finding it certainly applicable, is we're dealing with a juvenile probation violation and in '94 and '96. . . . The second aggravator, which I am placing a significant amount of weight on is that Mr. Wickliff has a significant history of contact with the criminal justice system. There are two juvenile adjudications, and if they had been committed by an adult, they would have been felony offenses. That they're serious juvenile matters. And in addition to that, I counted five prior convictions that occurred prior to this offense, and he was out on bond for two different offenses when this offense occurred. There's a short period of time between the convictions. . . . And there were other offenses that, that did not result in convictions, and the Court can consider those arrests, I'm not placing a lot of weight really on those arrest[s], I'm placing a significant amount of weight, however, on his history of criminal behavior prior to this, this offense. I'm also finding another statutory aggravating circumstance applies, and that is that Alan Wickliff is in desperate need of correctional rehabilitative and substance abuse treatment that can best be provided by the Department of Corrections [sic]. . . . [G]enerally someone who has come into contact with the criminal justice system that much as juvenile and an adult, has recognized the seriousness of the issues. Substance abuse issues, violation of the law. But unfortunately that didn't occur in this case. And it's evident to me that there needs to be a sentence that addresses a very serious substance abuse issue, both prescription drug

abuse, illegal drug abuse, and alcohol abuse. And I think that that sentence can best be served through the Department of Corrections [sic], because that would be an intense program that would be supervised and a very rigid program in regard to addressing these issues. When I reviewed the presentence I was very concerned with the references to the substance abuse in Mr. Wickliff's past. . . . And through your own admissions in the presentence, and also today, you've indicated that you started using marijuana at age twelve. And throughout the presentence investigation there are references to continue, continuous abuses of substances from marijuana to prescription drugs, to drinking. So there's a seventeen year history of abusing alcohol, prescription drugs, and drugs. I counted four actual convictions for substance abuse offenses. . . . Lastly, I do want to address a non-statutory aggravating factor. . . . [T]he depreciate the seriousness of the offense aggravator, really can be used in two different variations. And I, I want to emphasis [sic] that I'm not using it as an imposition today for weighing out whether a reduced sentence would be appropriate as opposed to an aggravated sentence. And I do recognize that that would be an inappropriate use of that aggravator. However, there is an alternate form of the statutory depreciate seriousness aggravator. It's non-statutory and that is that a sentence less than the enhanced sentence would depreciate the seriousness of the crime. And Mr. Wickliff, that aggravator, I am placing a great deal of weight on. . . . Coming into the sentencing hearing today I was under the impression, based on the probable cause statement, and the other information that was available through the presentence that perhaps you had been at a bar and had been drinking for a number of hours and you took off from that bar and you were driving to Franklin. . . . And you had zero, absolutely zero concern for the laws of the State of Indiana when you did that, zero concern for the safety of anyone, including yourself, and zero concern for the consequences of, of your actions. But what caused me even more concern today is that I wasn't aware, until I heard the testimony today, of the level of abuse in regard to the prescription drugs, and the level of abuse in regard to the marijuana. Those issues do cause me grave concern, in addition to the issues that I had coming into court about your substance abuse of, of alcohol. I am finding that as a sta . . ., or non-statutory aggravating circumstance that should be given a great deal of weight. I also find that there is a mitigating circumstance that should be given weight. . . . [I]f Mr. Wickliff had not entered a plea of guilty, this would be a lengthy trial. The trauma that the family members go through in regard to those trials is just immeasurable. . . . I do want to recognize as a mitigator that he is remorseful for what occurred, and he is saving the family that trauma of the trial. However, I am placing a small amount of weight on that as a mitigating circumstance for a couple of reasons. This is a solid case. Had the State been required to

go to trial, they would have been able to prove the charges. Secondly, the Court is required to place a significant amount of weight on that as a mitigator if the Court finds that the State received a significant benefit from that. I really don't find that to be the case here. And in addition to that, there was an habitual substance offender charge that was dropped as a result of the plea negotiations here. And from my review of your record, that was a pretty solid charge. And so instead of the State really receiving the significant benefit, I believe that you've received a significant benefit from the plea negotiations that have occurred here today. But I'm going to give you some credit for that. . . . It is so uncommon for someone to want to take responsibility for their actions as quickly as you did. To want to even plead without an attorney present, to maintain that position, and to show the recognition for the seriousness and the remorse that you've shown today. I know it doesn't seem like a lot of credit that I'm giving for it, but, but that is because I've placed so much weight on the aggravating circumstances that it would be inappropriate to give it much more weight [than] I am giving it in light of the gravity and the severity of what's occurred here. . . . And I am finding based upon the aggravators outweighing the mitigators that a twenty year sentence is appropriate on the class B felony. It is a sentence at the Indiana Department of Corrections [sic] and it is ordered executed. I do not find Mr. Wickliff to be a good candidate for probation, and I referenced that earlier in regard to probation violations. That sentence is consecutive to count four, which is a D felony conviction. And I am ordering a three year sentence on that offense. It is also consecutive to the sentence on count six, which is a three year sentence on a class D felony, however, I'm ordering counts four and six concurrent to each other, and that is the, I suppose the benefit of the mitigator that the Court's recognizing today. As Mr. Cooper pointed out, if the Court had ordered all the sentences consecutive it would be a twenty six year sentence. And in ordering counts four and six concurrent it becomes a twenty three year sentence. . . . I will make a specific recommendation in my sentencing order abstract that he receive any vocational educational and substance abuse treatment that's available at the Department of Corrections [sic], because I recognize, as everyone does in this courtroom, that there will come a day when Mr. Wickliff is released and any benefit that he receives while at the Department of Corrections [sic] will certainly be a benefit not only to him but to the public at large.

Tr. of Sentencing Hearing at 51-60 (emphasis added). Wickliff now appeals his sentence.

#### Discussion and Decision

Wickliff contends that the twenty-three year sentence imposed by the trial court is inappropriate.

### I. Standard of Review

Under Article VII, section 6 of the Indiana Constitution, we have the authority to review and revise sentences. However, we will not revise a sentence authorized by statute unless it is "inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B); Rodriguez v. State, 785 N.E.2d 1169, 1179 (Ind. Ct. App. 2003), trans. denied.

When considering the appropriateness of the sentence, courts should initially focus on the presumptive sentence. Rodriguez, 785 N.E.2d at 1179. Courts may then consider deviation from the presumptive sentence based upon a balancing of the factors which must be considered pursuant to Indiana Code section 35-38-1-7.1(a) together with any discretionary aggravating and mitigating factors. Id. In considering a sentence revision, we must re-examine all valid aggravating and mitigating circumstances. Cruz Angeles v. State, 751 N.E.2d 790, 799-00 (Ind. Ct. App. 2001), trans. denied.

### II. Appropriateness of Wickliff's Sentence

We note first that Wickliff entered a plea of guilty to a Class B felony and two Class D felonies. The presumptive sentence for a Class B felony is ten years, with not more than ten years added for aggravating circumstances, and not more than four years subtracted for mitigating circumstances. Ind. Code § 35-50-2-5. The presumptive sentence for a Class D felony is one and one-half years, with not more than one and one-half years added for aggravating circumstances and not more than one year subtracted for

mitigating circumstances. Ind. Code § 35-50-2-7(a). Thus, the statutory range within which the trial court could sentence Wickliff pursuant to his plea was six years for fully reduced concurrent sentences to twenty-six years for fully enhanced consecutive sentences. Wickliff was sentenced to enhanced, consecutive terms totaling twenty-three years.

Although information regarding the offense is somewhat limited due to Wickliff's guilty plea, our review of the nature of the offense reveals that Wickliff drank alcohol, consumed marijuana and Zanax and then drove his vehicle at a high rate of speed, causing an accident which resulted in the death of one person and injury to another, as well as to himself. His blood alcohol content was at least .16, twice the legal limit.<sup>1</sup> However, we note that Wickliff entered a plea of guilty to operating a vehicle while intoxicated causing death as a Class B felony, which specifically takes into account that a death occurred as a result of the offense.

As for Wickliff's character, the trial court noted that he had been using marijuana since he was twelve years of age and had an ounce-a-day habit at the time of the collision. He had a large quantity of marijuana on his person at the time of the accident, and had smoked marijuana prior to the collision, in addition to consuming alcohol and ingesting a prescription drug. He acknowledged that he needed substance abuse help but had never voluntarily sought treatment. He has numerous prior arrests and convictions, and had two cases pending at the time of this offense. Prior lenient sentences had done

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<sup>1</sup> As the parties have pointed out, Wickliff agreed with the State when he was asked during the sentencing hearing if his blood tested .163 for alcohol content. Tr. of Sentencing Hearing at 21. However, the probable cause affidavit indicates that Wickliff tested .21. Appellant's Appendix at 23.

little, if anything, to improve his behavior. On the other hand, Wickliff apparently has strong family support, had maintained steady employment prior to this incident, and, as the trial court noted in mitigation, immediately accepted responsibility for his actions and entered a plea of guilty to spare the family the trauma of a trial.

The trial court found four aggravating circumstances, assigning little weight to his previous probation violations because they had occurred several years past and were part of his juvenile record. The trial court assigned great weight to the remainder of the aggravating circumstances, including his extensive criminal history, both arrests and convictions. The trial court specifically noted that imposition of a sentence less than an enhanced sentence would depreciate the seriousness of the offense and that Wickliff's substance abuse history demonstrated that he was in desperate need of treatment and rehabilitation which could best be provided by commitment to a penal facility. Wickliff does not challenge any of these aggravating circumstances. The trial court also found that Wickliff's remorse and acceptance of responsibility as demonstrated by his plea of guilty was a mitigating circumstance, although entitled to little weight because he received a significant benefit from the plea bargain, specifically the dismissal of the habitual substance offender enhancement. The trial court noted that the benefit of that mitigating circumstance was shown in the imposition of an aggregate twenty-three year sentence rather than a possible twenty-six year sentence.

Wickliff notes that "the maximum possible sentences are generally most appropriate for the worse offenders," citing Rodriguez v. State, 785 N.E.2d at 1180, and noting that case's similarity to his own. In Rodriguez, the defendant entered a plea of

guilty to operating a vehicle while intoxicated causing death as a Class C felony in exchange for dismissal of two other counts. The trial court found three aggravating factors and four significant mitigating factors and sentenced the defendant to a maximum enhanced sentence of eight years. On appeal, this court held that two of the three aggravators found by the trial court were improper, and that with the remaining aggravator balanced against the significant mitigators, the eight-year sentence was inappropriate. The court noted that the defendant was not among the worst offenders because he had no prior criminal history, and accordingly reduced his sentence. Id. Here, Wickliff has an extensive criminal history, and the trial court identified and weighed several aggravating circumstances against one mitigating circumstance. Rodriguez does not compel a sentence reduction in this case.

Based upon our review of the record, the nature of Wickliff's offense and the nature of his character, and the trial court's thorough and well-reasoned statements at the sentencing hearing, we hold that the twenty-three year sentence imposed on Wickliff is not inappropriate.

#### Conclusion

Wickliff's twenty-three year sentence is appropriate considering the nature of his offense and the nature of his character. We therefore affirm the sentence.

Affirmed.

SHARPNACK, J. and DARDEN, J. concur.