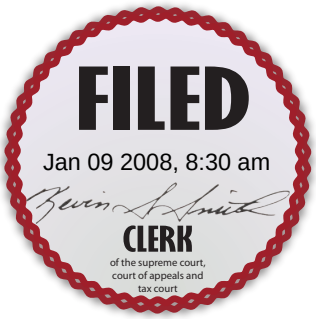

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IN THE
COURT OF APPEALS OF INDIANA

JUSTIN N. TRACY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A04-0707-CR-414
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman Jr., Judge
Cause Nos. 48D03-0607-FD-337, 48D03-0607-FB-333

January 9, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Justin N. Tracy appeals from the trial court's imposition of two consecutive thirty-six month sentences following his guilty pleas under Cause Numbers 48D03-0607-FD-337 ("Cause 337") and 48D03-0607-FB-333 ("Cause 333"). Under Cause 337, Tracy pled guilty to Battery Resulting in Bodily Injury, a Class A misdemeanor[1] and Residential Entry, a Class D felony.[2] Under Cause 333, Tracy pled guilty to Stalking, as a Class D felony,[3] Residential Entry, a Class D felony, Invasion of Privacy, a Class A misdemeanor,[4] Battery Resulting in Bodily Injury, a Class A misdemeanor, and Interference with the Reporting of a Crime, a Class A misdemeanor.[5] On appeal, Tracy claims that he received ineffective assistance of trial counsel at sentencing and that his sentence is inappropriate. We affirm.

FACTS AND PROCEDURAL HISTORY

On May 23, 2006, Tracy was arrested following an altercation with his girlfriend Neetra Dickey. On June 7, 2006, under Cause 337, Tracy was charged with battery resulting in bodily injury and residential entry. As a condition of his release from custody, the trial court ordered Tracy to have no contact with Dickey. At some point thereafter, Tracy had contact with Dickey. On July 24, 2006, under Cause 333, Tracy

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[1] Ind. Code § 35-42-2-1(a)(1)(A) (2006).

[2] Ind. Code § 35-43-2-1.5 (2006).

[3] Ind. Code § 35-45-10-5(a) (2006).

[4] Ind. Code § 35-46-1-15.1 (2006).

[5] Ind. Code § 35-45-2-5(1) (2006).

was charged with stalking, burglary, invasion of privacy, battery resulting in bodily injury, and interference with the reporting of a crime.

On August 21, 2006, Tracy entered guilty pleas under both Cause 337 and Cause 333. Tracy pled guilty to battery resulting in bodily injury and residential entry under Cause 337 and stalking, residential entry, invasion of privacy, battery resulting in bodily injury, and interference with the reporting of a crime under Cause 333. At sentencing, the trial court imposed a thirty-six-month sentence under Cause 337, all thirty-six months suspended to probation with one year served on in-home detention, to be served consecutively with a thirty-six month-sentence under Cause 333, all thirty-six months suspended to probation with one year served on in-home detention. Furthermore, as a condition of Tracy's probation, the court ordered him to have absolutely no contact with Dickey.

On November 9, 2006, Tracy's probation officer filed a notice of violation with the trial court. On November 20, 2006, the court conducted a hearing where Tracy admitted that he had violated his probation by having contact with Dickey. As a result of Tracy's probation violation, the trial court ordered that Tracy's previously suspended sentence be executed. This appeal follows.

DISCUSSION AND DECISION

I. Ineffective Assistance of Counsel

The right to effective counsel is rooted in the Sixth Amendment to the United States Constitution. *Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so

undermined the proper function of the adversarial process that the trial court cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

A successful claim for ineffective assistance of counsel must satisfy two components. *Reed v. State*, 866 N.E.2d 767, 769 (Ind. 2007). Under the first prong, the petitioner must establish that counsel's performance was deficient by demonstrating that counsel's representation "fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment." *Id*. We recognize that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or most effective way to represent a client and therefore under this prong, we will assume that counsel performed adequately, and will defer to counsel's strategic and tactical decisions. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. *Id*. Under the second prong, the petitioner must show that the deficient performance resulted in prejudice. *Reed*, 866 N.E.2d at 769. A petitioner may show prejudice by demonstrating that there is "a reasonable probability (*i.e*. a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different." *Id*. A petitioner's failure to satisfy either prong will cause the ineffective assistance of counsel claim to fail. *See Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999). Therefore, if we can resolve a claim of ineffective assistance of counsel based on

lack of prejudice, we need not address the adequacy of counsel's performance. *See Wentz v. State*, 766 N.E.2d 351, 360 (Ind. 2002).

Tracy contends that his counsel was ineffective at sentencing because he failed to raise numerous mitigating factors, which Tracy believes would have led to the imposition of a shorter sentence. In support, Tracy relies on this court's opinion in *McCarty v. State*, 802 N.E.2d 959 (Ind. Ct. App. 2004), *trans. denied*. In *McCarty*, we concluded that trial counsel was ineffective because he failed to raise four significant mitigating factors which we found to be adequately supported by the record, and, as a result of counsel's failure to raise said mitigators, McCarty suffered prejudice at sentencing. *Id*. at 963, 967. In coming to this conclusion, we articulated that "the dispositive question in determining whether a defendant is prejudiced by counsel's failure at sentencing to present mitigating evidence is what effect the totality of the omitted mitigation evidence would have had on the sentence." *Id*. at 967. Here, Tracy has failed to convince us that he suffered any prejudice as a result of counsel's alleged failure to present mitigating factors at sentencing because we question whether Tracy's proffered mitigating factors would have had any impact on the sentence imposed by the trial court.

"Appellate courts are—and should be—reluctant to second-guess the decisions that the trial counsel must make in representing clients, as well as the decisions that trial courts must make in sentencing criminal defendants." *Id*. at 968. "This reluctance is perhaps even greater in the case of a guilty plea, with its emphasis on finality and expediency, provided that the defendant has knowingly, voluntarily, and intelligently waived his rights." *Id*. We note that at sentencing, Tracy's counsel presented numerous

witnesses, including the victim, who all requested the trial court's leniency in sentencing Tracy. Following counsel's argument, the trial court exercised its discretion in imposing two consecutive thirty-six-month sentences in Causes 337 and 333, both of which it fully suspended. As a condition of the fully suspended sentence, Tracy was again ordered to have no contact with Dickey. Yet Tracy subsequently violated the court's order. It was only after Tracy violated the court's order by once again having contact with Dickey that Tracy face an executed sentence.

"Given the subjectivity inherent in the sentencing process, a reviewing court is hard pressed to conclude there is a reasonable probability that the trial court would have imposed a lesser sentence had it been presented with additional mitigating evidence that trial counsel should have brought to light." *Id*. Here, considering the seriousness of the charges filed against Tracy, we are unable to see how the inclusion of Tracy's proffered mitigating evidence could have reasonably resulted in a sentence more favorable to Tracy than the fully suspended sentence imposed by the trial court. While Tracy now faces an executed total aggregate sentence of seventy-two months, this appears to be wholly attributable to his poor decision to violate the court's no-contact order rather than to any alleged deficiency of his counsel at sentencing. Indeed, following counsel's representation, Traced faced no prison time. The sentence he now faces is a direct result of his conduct, not counsel's. We conclude that because Tracy has shown no prejudice on behalf of his trial counsel, his claim of ineffective assistance of counsel fails.

II. Sentencing [6]

Additionally, Tracy argues that his sentence is inappropriate in light of his character and the nature of his offenses. Sentencing decisions are entrusted to the sound discretion of the trial court and will be reversed only upon a showing of manifest abuse of that discretion. *Beck v. State*, 790 N.E.2d 520, 522 (Ind. Ct. App. 2003) (citing *Elisea v. State*, 777 N.E.2d 46, 50-51 (Ind. Ct. App. 2002)). "This court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we] find[] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B); *see also Beck*, 790 N.E.2d at 522. The burden lies with the defendant to persuade this court that his or her sentence is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007) (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

With regard to his character, Tracy claims that his sentence is inappropriate because he "is a victim of addiction," "is immature and easily manipulated," and "does not respond well to rejection." Br. of Appellant at 15. We disagree and refuse to accept Tracy's contention that his immaturity or failure to respond well to rejection can be seen as a character trait that may appropriately support a conclusion that his sentence, which results from crimes associated with domestic violence, is inappropriate.

With regard to the nature of his offenses, Tracy claims that the situation is simply one of "Romeo and Juliet run amok." Br. of Appellant at 13. Again, we disagree and are

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[6] Tracy's challenge to his sentence is properly before this court after the trial court granted his motion for belated appeal pursuant to Post-Conviction Rule 2(1).

unpersuaded that Tracy's sentence is inappropriate in light of the nature of his offenses. Tracy was charged under two separate cause numbers with various crimes associated with domestic violence stemming from a series of incidents involving his then girlfriend, Dickey. Tracy subsequently entered into two separate plea agreements in connection with these charges. Under Cause 337, Tracy pled guilty to Class A misdemeanor battery resulting in physical injury and Class D felony residential entry. He was sentenced to the maximum twelve-month sentence associated with the Class A misdemeanor and the maximum thirty-six-month sentence associated with the Class D felony, with the sentences to be served concurrently, all suspended. Under Cause 333, Tracy pled guilty to Class D felony stalking, Class D felony residential entry, Class A misdemeanor invasion of privacy, Class A misdemeanor battery resulting in physical injury, and Class A misdemeanor interfering with the reporting of a crime. He was sentenced to the maximum thirty-six-month sentence for each of the Class D felonies and the maximum twelve-month sentence for each of the Class A misdemeanors, with the sentences to be served concurrently, all suspended. The trial court ordered that the thirty-six-month suspended sentence for Cause 333 be served consecutively to the thirty-six-month suspended sentence for Cause 337. In light of the sheer volume of Tracy's convictions, the fact that each of the convictions is associated with domestic violence, and Tracy's inability to refrain from contacting the victim, we are unable to conclude that Tracy's sentence is inappropriate in light of his offenses.

Tracy has failed to persuade us that his sentence was inappropriate in light of his character or the serious nature of the crimes of which he was convicted. Furthermore, we

conclude that the sentence was well within the trial court's discretion because Tracy did not receive the maximum punishment, as his entire sentence was suspended. *See Beck*, 790 N.E.2d at 522 (stating that the trial court was well within its discretion when sentencing Beck because while Beck was sentenced to the maximum sentence of 365 days for a Class A misdemeanor, she did not receive the maximum punishment of an executed sentence).[7]

The judgment of the trial court is affirmed.

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

[7] We recognize that other panels of this court have previously concluded that there is no distinction between a maximum sentence and maximum punishment. Regardless of whether or not one recognizes such a distinction, we conclude that Tracy's sentence is not inappropriate in light of the nature of his offenses or his character.