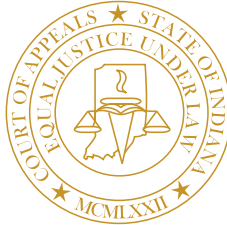


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



IN THE Court of Appeals of Indiana

Lisa Georgia Damico,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff



September 23, 2024

Court of Appeals Case No.
24A-CR-509

Appeal from the Lake Superior Court
The Honorable Salvador Vasquez, Judge
Trial Court Cause No.
45G01-2203-F5-143

Memorandum Decision by Judge Crone
Judges Bradford and Tavitas concur.

Crone, Judge.

Case Summary

- [1] Lisa Georgia Damico appeals the five-year executed sentence imposed by the trial court following her conviction of reckless homicide, a level 5 felony. We affirm.

Facts and Procedural History

- [2] On January 30, 2022, at around 8:50 a.m., Damico drove her Volvo southbound on U.S. 41 in Highland toward the intersection of Ramblewood Drive. The “busy,” “complex” intersection consists of five lanes: two left turn lanes, two through lanes, and one right turn lane. Tr. Vol. 4 at 190, 149. The speed limit on southbound U.S. 41 is thirty-five miles per hour, and there is a hill just prior to the intersection with Ramblewood Drive. *Id.* at 150. As Damico crested the hill, the southbound traffic on U.S. 41 was stopped at a red light at the intersection, and cars were turning left from Ramblewood Drive onto northbound U.S. 41. A Hyundai driven by Socorro Keresztes was the third car to navigate the turn. However, before Keresztes’s car made it through the intersection, Damico failed to stop at the red light, “whipp[ed] around”¹ the stopped southbound vehicles, entered the intersection at ninety-one miles per

¹ One witness described Damico’s vehicle making a “move that you see on the highways if somebody’s going around that traffic to come cut back into the lane to drive.” Tr. Vol. 4 at 118.

hour, never applied the brakes, and “T-boned” Keresztes’s Hyundai. *Id.* at 93-94, 110, 117-19, 152, 155.

[3] Keresztes’s Hyundai spun from the middle of the intersection and came to a stop on the curb on southbound U.S. 41. The impact collapsed the driver’s side of Keresztes’s car. Keresztes died within minutes due to injuries sustained during the crash. Meanwhile, Damico’s Volvo, which had continued southbound, careened to the left into the traffic lanes of northbound U.S. 41, veered down an embankment, and came to rest in a parking lot. A responding officer who approached Damico at the scene noted that she “appeared disoriented” and gave “contradicting” statements. *Id.* at 140. Damico was taken via ambulance to a hospital, where she tested negative for the presence of alcohol or other intoxicating substances.

[4] In March 2022, the State charged Damico with reckless homicide² and driving while suspended, both level 5 felonies. The latter charge was dismissed. After a December 2023 trial, the jury found Damico guilty of reckless homicide. Thereafter, a presentence investigation report was completed, and Damico filed a sentencing memorandum. In the memorandum, Damico highlighted as proposed mitigating facts her lack of prior criminal history, the unlikelihood of

² Indiana Code Section 35-42-1-5 provides that a “person who recklessly kills another human being commits reckless homicide, a Level 5 felony.” A person acts recklessly “if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct.” Ind. Code § 35-41-2-2(c).

the crime recurring, her positive character, a medical condition that might excuse her conduct, and that restitution³ would be made.

[5] At a February 2024 sentencing hearing, Detective Jason Hildenbrand testified that Damico’s driving record included a May 6, 2021 crash in which “unsafe speed” was noted as a “contributing factor” when she “slid on some ice” and struck a Dunkin’ Donuts sign. Tr. Vol. 5 at 87. In addition, on August 18, 2021, Damico was driving her car when it crashed, killing pedestrian Tyler Scheidt. *Id.* at 87, 95. Detective Hildenbrand was the investigator on both the Scheidt matter and the instant case. Damico was charged with level 5 felony reckless homicide in Scheidt’s death; a jury acquitted her in July 2023. Detective Hildenbrand also stated that on October 15, 2021, Damico drove her vehicle the wrong way on I-94 in Porter County, collided “with a semi-truck[,]” and flipped and rolled her own vehicle into a ditch. *Id.* at 88; Ex. Vol. 2 at 42-45. The semi-truck was forced across multiple lanes of traffic and caught fire. Outside of the Scheidt acquittal and the instant case, Damico’s criminal history consists of one entry: a ticket paid for following too closely in 2010. Appellant’s App. Vol. 2 at 209. The probation department gave no recommendation for sentencing. *Id.* at 214.

[6] The trial court heard additional testimony and argument and noted the sentencing range and three-year advisory sentence. The trial court recognized

³ The restitution came in the form of a \$100,000 insurance payout to Keresztes’s adult daughter.

that Damico had no criminal record whatsoever, which was a “significant mitigating factor” not to be ignored. Tr. Vol. 5 at 132-33. The trial court then explained why a greater-than-advisory sentence was warranted:

I think it would be absolutely improper to ignore Ms. Damico’s other behavior leading up to this date -- our date being in January -- January 30, I think it was, of 2022.

And a -- a relevant factor, an appropriate factor to a -- and to consider would be Ms. Damico’s character and how she has found herself in other instances -- accidents, if you will -- or her behavior while driving a vehicle leading up to the date of January 30 of 2022. One is the report submitted by the State this morning that -- and then the other one being, of course, the case involving Mr. Scheidt August 18 of 2021.

August 18, of course, is a -- is a substantially similar event as ours that brings us to today, high speed, vehicle movement, resulting in the death of another person.

And although Ms. -- Ms. Damico was found not guilty by jury, I think that the -- the behavior exhibited by ... Ms. Damico on this date is a relevant consideration. It almost -- well, I believe that that event in and of itself should have been sufficient to indicate to anyone -- let alone Ms. Damico -- that there may be something wrong with your mindset. There m[a]y be something wrong with your medications. There may be something wrong with your behavior. There may be something wrong with the method in which she drives -- something that should have sent a message to someone like Ms. Damico I shouldn’t be driving, there’s something wrong. I killed someone.

And there’s no question at all that as a result of this event that occurred on August 18 of ’21 someone died. Let’s change behavior. But that’s not what occurred. What occurred, from what I gather today -- and we all learned -- certainly me for the

first time -- is that on -- on August 15 of 2021, less than 60 days after this death of this person, she was involved in another incident on one of our expressways d[r]iving the wrong way. The report indicates that by going the wrong way she almost [sic] ran into -- or she -- she came close to impacting a semi[-]trailer. Her -- her car flipped, according to the report, and she landed in a ditch. Something's wrong. Something's wrong with my driving. I almost got killed this time and I better curve [sic] my behavior.

But then we're into January 30 of 2022 and now we're talking about a death -- a death five months later after the first death. And once again Ms. Damico finds herself behind -- behind the wheel of a vehicle, going high speed, crash, impact, someone dies.

So this pattern is one that cannot be ignored. This is character information. This is reckless, irresponsibility, character that must be considered, as I see it, and -- and certainly cannot be ignored when determining an appropriate sentence because Ms. Damico should have learned from past mistakes. And one of the things that I -- I -- I try to see or look for -- particularly in sentencing -- is what is a person's pattern of behavior leading up to a particular event? Are they horribly violent? Have they killed before? Are they a person that has been in and out of a jail system? Is this a person that has brandished weapons to other people and commits a series of robberies leading up to a fatal robbery? Is this a person that has a lot of burglaries in -- in their history? Is this a person that [h]as a domestic violence situation has a series of convictions of beating people up, leading up to the point of committing a significant injury in a domestic battery situation. These are -- these are patterns of conduct. These are -- this is character information. And this is character information that puts Ms. Damico in a bad position. Because, as I see it, on at least two prior occasions leading up to January 30 this was predictable.

What occurred on January 30 could have been foretold based on her erratic driving, based on her reckless abandonment of-- of her -- of her responsibility to drive properly, accurately, responsibly. And if I can't do so, then I shouldn't be driving at all.

This never should have occurred. Ever should have occurred.

Now, I'm looking at this timeline. And the -- and the case involving Mr. Scheidt wasn't even filed yet. Our event is January -- from what I can tell, if I read this correctly, our event is January 30 of 2022. Scheidt's case wasn't filed until the following day.

So as a court process, what could we have done differently? Well, the answer is probably nothing at all because we can't -- we don't have crystal balls. We don't -- we can't foretell what's going to happen with a particular defendant. She wasn't even charged yet.

From what I could tell and from just reading in between the lines, the investigation was still ongoing. It kind of came to a head January 30 of 2022.

Given these factors, which I believe to be significant aggravating factors and notwithstanding anything in mitigation, I think a sentence of five years is appropriate, remand to the Department of Correction [DOC] as an aggravated sentence.

I believe anything less would be inappropriate. I reject the notice of alternative sentencing. I don't think community corrections would be appropriate. I do not believe probation would be appropriate. This reckless act has to have a consequence.

Id. at 133-38 (emphases added).

[7] In the resulting order, the trial court summarized its reasoning for the five-year sentence as follows:

SENTENCING CONSIDERATIONS: The Court considers the nature and circumstance of the crime committed and the character of the defendant. The defendant was involved in vehicle crash resulting in the impact death of the victim. The defendant was traveling approximately 90 mile[s] per hour. The reasons stated on the record.

MITIGATING CIRCUMSTANCES: The Court considers the following factors as mitigating circumstances or as favoring suspending the sentence and imposing probation: The defendant has no history of delinquency or criminal activity. The defendant has led a law abiding life of a substantial time before the commission of the crime.

The defendant is likely to respond affirmatively to probation or short term imprisonment because lack of criminal record.

AGGRAVATING CIRCUMSTANCES: The Court considers the following factors as aggravating circumstances or as favoring imposing consecutive terms of imprisonment: *The character of the defendant is reckless, with a selfish disregard for the safety of others. The defendant has pattern of reckless and irresponsible behavior. As presented during the sentencing hearing, the defendant was involved in two significant incidents prior to the current incident on January 30, 2022.*

Other aggravating Circumstances: The defendant was involved in a similar incident on August 18, 2021: the defendant was driving her vehicle when she lost control and hit a pedestrian. Said pedestrian died from the impact. The defendant was involved in another vehicle crash October 15, 2021. This incident is reflected in State's Exhibit 1, admitted during the sentencing hearing.

The court finds that the aggravating factors outweigh the mitigating factors.

The Court finds that given the nature of the offense and the character of the defendant, the sentence imposed is appropriate and proper. Any less[er] sentence or suspension of sentence, will depreciate the seriousness of the crime committed.

Appealed Order at 2-3 (emphasis added). The trial court also suspended Damico's driver's operator's license for five years, gave her credit for time served, ordered her to receive good time credit, and assessed costs.

[8] Damico appeals her sentence.

Discussion and Decision

Section 1 – Damico has not demonstrated that the trial court abused its discretion by considering the basic facts of a prior crash.

[9] Indiana Code Section 35-50-2-6(b) provides that a “person who commits a Level 5 felony ... shall be imprisoned for a fixed term of between one (1) and six (6) years, with the advisory sentence being three (3) years.” Damico was sentenced to an enhanced term of five years executed in the DOC for her conviction of reckless homicide. On appeal, Damico contends that the trial court abused its discretion by considering her acquittal in the Scheidt case as an aggravating circumstance. Specifically, she asserts that the trial court “openly reject[ed] the previous not guilty verdict by holding out the prior accident as evidence of reckless behavior[.]” Appellant's Br. at 8. She faults the trial court

for basing a finding of a “pattern of reckless and irresponsible behavior” on just two prior traffic accidents, one of which led to a ticket that she paid and the other being the acquittal. Appealed Order at 2-3.

[10] Sentencing decisions rest within the sound discretion of the trial court. *Anglemeyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218. As long as a defendant’s sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Id.* An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions drawn therefrom. *Id.* A trial court may abuse its discretion by failing to enter a sentencing statement, identifying aggravators and mitigators that are unsupported by the record, omitting reasons from the sentencing statement that are clearly supported by the record, or entering reasons in the sentencing statement that are improper as a matter of law. *Id.* at 490-91.

[11] When it comes to aggravating and mitigating factors,

[a] single aggravating circumstance may be sufficient to enhance a sentence. When a trial court improperly applies an aggravator but other valid aggravating circumstances exist, a sentence enhancement may still be upheld. The question we must decide is whether we are confident the trial court would have imposed the same sentence even if it had not found the improper aggravator.

Baumholser v. State, 62 N.E.3d 411, 417 (Ind. Ct. App. 2016) (internal quotation omitted), *trans. denied* (2017).

[12] Five decades ago, our supreme court addressed the propriety of a trial court considering an acquittal as part of a criminal history when enhancing a sentence. *McNew v. State*, 391 N.E.2d 607 (Ind. 1979). In concluding that the trial court improperly considered the acquittal for armed robbery, the *McNew* court clarified that prior criminal history “refers to specific activity of the defendant, not his overall history.” *Id.* at 612. Our supreme court further explained:

A not guilty judgment is more than a presumption of innocence; it is a finding of innocence. And the courts of this state, including this Court, must give exonerative effect to a not guilty verdict if anyone is to respect and honor the judgments coming out of our criminal justice system.

Id. Although the *McNew* court found that consideration of the acquittal within the sentencing calculus was improper, the majority could not say that revision of McNew’s sentence was required under the prior “manifestly unreasonable” analysis. *Id.*

[13] The prohibition on the consideration of acquittals in sentencing decisions has been noted several times since then. *See, e.g., Chastain v. State*, 165 N.E.3d 589, 599 (Ind. Ct. App. 2021) (citing *McNew* and reiterating prior holding that jury found Chastain not guilty of molestation allegations involving L.B., and therefore those allegations may not be considered in sentencing him for molestation of B.L.), *trans. denied*; *see also Watson v. State*, 784 N.E.2d 515, 522 (Ind. Ct. App. 2003) (agreeing with defendant’s contention that because he was acquitted of battery charge for burning victim, trial court should not have

considered this charge as aggravating circumstance in sentencing defendant for subsequent battery of victim); *Clark v. State*, 436 N.E.2d 779, 783 (Ind. 1982) (noting that *McNew* “held that a sentencing judge may not consider a previous acquittal as an aggravating circumstance”).

[14] More recently, the panel in *Walden v. State*, 216 N.E.3d 1165 (Ind. Ct. App. 2023), *trans. denied*, applied *McNew*. The defendant in *Walden* was convicted of three counts of level 1 felony child molesting and two counts of level 4 felony child molesting. In an oral sentencing statement justifying Walden’s 102-year aggregate sentence, the trial court “expressed amazement that Walden had been twice acquitted of child molesting but that, shortly after his second acquittal, had begun molesting [the victim].” *Id.* at 1171. The trial court also noted “way too many similarities” between the instant case and the prior acquittal. *Id.* Disputing an assessment that labeled Walden a low risk to reoffend, the trial court found him to be a high risk to reoffend “based on his character and that this is the third time he has been charged with similar offenses.” *Id.* at 1172. On review, the *Walden* panel explained that it was

clear to us that the trial court considered Walden’s two prior acquittals as part of a pattern of like behavior that culminated in his instant convictions. It is equally clear that the trial court’s consideration of Walden’s charges in two prior child molesting cases that resulted in acquittals as bearing on his likelihood of re-offense could only be relevant if the trial court failed to give exonerative effect to those acquittals. Therefore, we conclude that the trial court’s findings regarding Walden’s risk of re-offense are improper as a matter of law.

Id. at 1177. The *Walden* majority stated that in light of the “prominence of Walden’s prior acquittals in the trial court’s oral and written sentencing statements, [the majority] was not convinced that [the trial court] would have ordered Walden to serve all his individual sentences consecutively if it had not considered this [aggravating] factor.” *Id.* at 1178. Accordingly, and notwithstanding five other proper aggravating circumstances, Walden’s case was remanded for resentencing.

[15] In the instant case, unlike in *McNew*, the trial court did not utilize the Scheidt reckless homicide acquittal as a criminal history aggravating circumstance. In fact, the trial court went out of its way to point out that Damico “presents without any criminal record—none whatsoever[.]” Tr. Vol. 5 at 132. Rather than rejecting the Scheidt verdict, the trial court stressed that Damico “was found not guilty by jury[.]” *Id.* at 134. Moreover, unlike in *Walden*, the trial court did not use the acquittal to support a likely-to-reoffend aggravating circumstance. In fact, the trial court did not use the acquittal as an aggravating circumstance per se.

[16] The trial court did note the basic facts of the Scheidt matter, that Damico was driving a vehicle that hit a pedestrian who died. However, the trial court did not imply that the Scheidt jury somehow got it wrong. Rather, the trial court discussed the Scheidt event in the context of how it should have been an indicator to Damico that something might be wrong with her mindset, medications, and/or driving methods. *Id.* The trial court then focused on the fact that less than sixty days after the Scheidt crash, Damico was traveling the

wrong way on an expressway, hit a semitrailer, flipped her car, and landed in a ditch. The trial court opined that, likewise, this incident should have caused Damico to further reflect that something might be wrong with her or her driving. These two serious driving mishaps, plus the third incident wherein Damico slid into a sign, all occurred within less than five months. From the trial court's perspective, "Damico should have learned from past mistakes." *Id.* at 136. The trial court viewed Damico's failure to change her behavior despite her pattern of serious driving mishaps as irresponsible and reckless, hence reflecting poorly on her character.

- [17] Under the unique circumstances of this case, where multiple driving mishaps occurred within a shockingly short time span, we find no abuse of discretion in the trial court's consideration of the basic undisputed facts that Damico had been the driver of a vehicle that was involved in the death of another person. The Scheidt incident was just one piece of the puzzle that led the trial court to conclude that Damico exhibited a selfish disregard for the safety of others when she continued driving after having abandoned the duty "to drive properly, accurately, [and] responsibly." *Id.* at 136-37. As such, we do not disagree with the trial court's use of Damico's negative character as an aggravating circumstance. We also point out that the trial court stated that any lesser sentence would "depreciate the seriousness of the crime committed." *Appealed Order* at 3; *see Mathews v. State*, 849 N.E.2d 578, 590 (Ind. 2006) ("[I]t is not error to enhance a sentence based upon the aggravating circumstance that a sentence less than the enhanced term would depreciate the seriousness of the

crime committed.”). Damico did not challenge the conclusion that a lesser sentence would depreciate the seriousness of her crime. We cannot say that the trial court’s determination of aggravating circumstances was an abuse of discretion.

Section 2 – Damico has not shown that her sentence was inappropriate in light of the nature of her offense and her character.

[18] Damico also asks us to revise her sentence pursuant to Indiana Appellate Rule 7(B), which 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.” We apply a “holistic approach” to our 7(B) review. *Lane v. State*, 232 N.E.3d 119, 127 (Ind. 2024) (quoting *Connor v. State*, 58 N.E.3d 215, 219 (Ind. Ct. App. 2016)). In determining whether a sentence is inappropriate, we “‘must consider’ both factors, but the defendant need not ‘necessarily prove’ that the sentence is inappropriate on both counts.” *Id.* at 126 (quoting *Connor*, 58 N.E.3d at 219). When reviewing a sentence, our principal role is to leaven the outliers rather than necessarily achieve what is perceived as the correct result in each case. *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). Damico bears the burden to show that her sentence is inappropriate. *Anglemyer*, 868 N.E.2d at 490.

[19] “[S]entencing is principally a discretionary function in which the trial court’s judgment should receive considerable deference.” *Cardwell*, 895 N.E.2d at 1222.

“Such deference should prevail unless overcome by compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant’s character (such as substantial virtuous traits or persistent examples of good character).” *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015). As we assess the nature of the offense and character of the offender, “we may look to any factors appearing in the record.” *Boling v. State*, 982 N.E.2d 1055, 1060 (Ind. Ct. App. 2013).

Ultimately, whether a sentence should be deemed inappropriate “turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case.”

Cardwell, 895 N.E.2d at 1224. Additionally, when conducting an appropriateness review, the appellate court may consider all penal consequences of the sentence imposed including the manner in which the sentence is ordered served. *Davidson v. State*, 926 N.E.2d 1023, 1025 (Ind. 2010).

[20] The two prongs of 7(B) review are “separate inquiries to ultimately be balanced in determining whether a sentence is inappropriate.” *Lane*, 232 N.E.3d at 126 (quoting *Connor*, 58 N.E.3d at 218). “[T]o the extent the evidence on one prong militates against relief, a claim based on the other prong must be all the stronger to justify relief.” *Id.* at 127.

[21] Turning first to the nature of the offense, we observe that “the advisory sentence is the starting point the Legislature selected as appropriate for the crime committed.” *Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014). We reiterate that the sentencing range for a level 5 felony is between one and six years, with the

advisory being three years. Damico's five-year sentence is below the statutory maximum for reckless homicide.

[22] Damico urges us to reduce her sentence, asserting that the trial court “did not find any sentencing consideration” regarding the nature of the offense prong. Appellant's Br. at 10. She also claims that her conduct was no more egregious than necessary to establish the elements of reckless homicide. *Id.* at 11. We find her first assertion irrelevant, *see Turkette v. State*, 151 N.E.3d 782, 787 n.5 (Ind. Ct. App. 2020), *trans. denied*, and we disagree with her second claim. The trial court explicitly stated that Damico was “traveling approximately 90 miles per hour” and then referenced the “reasons stated in the record.” Appealed Order at 2. Damico was traveling at more than two-and-one-half times the speed limit. The light she ran had been red long enough that two other vehicles already had safely navigated the turn through the busy intersection when Damico barreled down the street at more than ninety miles per hour and never hit the brakes. Instead, she “blew through the red light” and t-boned Keresztes's vehicle. Tr. Vol. 4 at 110. The force of the crash caused Keresztes to die within minutes of impact due to exsanguination and multiple injuries to her head and torso. Damico does not present us with compelling evidence portraying her offense in a positive light. Nothing about the nature of her offense convinces us that her sentence merits a reduction.

[23] We reach a similar conclusion regarding Damico's character. We assess a defendant's character by engaging in a broad consideration of her qualities. *Madden v. State*, 162 N.E.3d 549, 564 (Ind. Ct. App. 2021). An offender's

character is shown by his or her “life and conduct.” *Adams v. State*, 120 N.E.3d 1058, 1065 (Ind. Ct. App. 2019). Damico stresses that she has no criminal history. In addition, she claims to have addressed the medical issues that she asserts “have led to her contacts with the criminal court system.” Appellant’s Br. at 12. Damico’s lack of criminal history is admirable. However, three separate driving mishaps (one of which involved a fatality) within five months should have been wake-up calls. Yet, Damico did not feel that she was “taking a risk” when she drove on January 30, 2022. Appellant’s App. Vol. 2 at 213. Moreover, when Detective Hildenbrand approached her in the hospital after the crash, Damico did not inquire about Keresztes. Instead, Damico asked if Detective Hildenbrand had returned a phone call to Damico’s insurance adjuster about releasing her vehicle from the Scheidt crash. Tr. Vol. 5 at 88-89. This reflects poorly on her character. While seeking a new neurologist after the fourth driving mishap within less than nine months is commendable, it is too little too late to rehabilitate the poor character Damico demonstrated from May 2021 through January 2022, let alone prevent the death of Keresztes. Damico has not met her burden to establish that her five-year sentence for level 5 felony reckless homicide is inappropriate in light of the nature of her offense and her character. Therefore, we affirm.

[24] Affirmed.

Bradford, J., and Tavitas, J., concur.

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