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**IN THE
COURT OF APPEALS OF INDIANA**

BRUCE JOHNSON,)

Appellant-Defendant,)

vs.)

No. 09A02-0605-CR-424

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE CASS SUPERIOR COURT
The Honorable Rick Maughmer, Judge
Cause No. 09D02-0304-FB-20

January 10, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Bruce Johnson appeals his conviction for Rape,¹ a class B felony. Specifically, Johnson contends that the trial court abused its discretion when it failed to consider certain mitigating factors that he offered at sentencing and, instead, imposed an enhanced sentence based on Johnson's criminal history. Finding no error, we affirm the judgment of the trial court.

FACTS

On the night of April 16, 2003, Johnson visited the home of Pamela Putnam in Logansport. Johnson had known Putnam since childhood and regularly visited Putnam at her home. Putnam's children, eighteen-year-old A.P. and twenty-one-year-old Shaun, also lived at the residence. When Johnson arrived at Putnam's home, Putnam was in her bedroom and A.P. was watching television in the living room. Johnson sat next to A.P. on the couch and A.P. noticed that Johnson smelled of alcohol and that his speech was slurred. Shaun arrived home a short time later, and Johnson and Shaun decided to walk to Johnson's home to obtain alcohol, approximately three blocks away. After they left, A.P. went to her bedroom to sleep. Johnson and Shaun returned to Putnam's home with a few beers and a bottle of whiskey, consumed some of the alcohol, and fell asleep watching television.

During the night, A.P. awoke to discover Johnson sitting on the edge of her bed. A.P. asked Johnson why he was in her room and then told him to leave. Johnson left A.P.'s bedroom, closing the door behind him. A.P. fell asleep but was subsequently awakened by a man she recognized as Johnson lying behind her and applying pressure to her neck and hips.

¹ Ind. Code § 35-42-4-1.

A.P. realized that the shorts she was wearing had been pulled down and that Johnson was touching her neck, lower back, and vagina while holding her wrists together in front of her. A.P. felt Johnson put his penis into her vagina and move slowly. A.P. began to struggle, freed her left arm, pushed Johnson, and told him “no” and “to stop.” Tr. p. 25. Johnson began to move faster as A.P. struggled. Johnson eventually stopped, stood up, told A.P. not to tell anyone, and left her bedroom.

The next morning, Putnam found Johnson on the couch and he told her that he had done “something that he was ashamed of” Id. at 60. A.P. remained in her bedroom until Putnam and Johnson left the house. A.P. answered the phone when it rang and Johnson asked her “if [she] was okay” and reiterated that this was “between me and you.” Id. at 28. A.P. hung up the phone, called Putnam at work, and asked that she come home.

When Putnam returned home, A.P. told her mother that Johnson had raped her. While Putnam was talking with A.P., Johnson called the house again. Putnam answered the phone and told Johnson that she knew what he had done and that she was going to call the police and take A.P. to the hospital. After she hung up the phone, Putnam called the police and brought A.P. to the emergency room in a Logansport hospital. At the hospital, a nurse performed a sexual assault examination on A.P.. A.P. complained of a sore vaginal area and lower back pain. The nurse noticed an abrasion on A.P.’s neck.

On April 23, 2003, the State charged Johnson with class B felony rape. On June 4, 2004, the State filed an additional count of class B felony rape. A bench trial was held on March 23, 2006, and Johnson moved for a directed verdict after the State presented its

evidence. The trial court granted Johnson’s motion as to Count II but denied the motion as to Count I. After the remainder of the bench trial, the trial court found Johnson guilty of rape. Following sentencing hearings on April 17, 2006, and May 1, 2006, the trial court sentenced Johnson to twenty years imprisonment. Johnson now appeals.

DISCUSSION AND DECISION

Johnson argues that the trial court abused its discretion when it imposed a twenty-year sentence. Specifically, Johnson argues that the trial court erred when it did not consider his proffered mitigating circumstances and, instead, imposed the maximum enhanced sentence after relying solely on his criminal history.

The amended sentencing statute² provides that for a class B felony, a person “shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years.” Ind. Code § 35-50-2-5. Our court has the constitutional

² Indiana’s sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences and comply with the holdings in Blakely v. Washington, 542 U.S. 296 (2004), and Smylie v. State, 823 N.E.2d 679 (Ind. 2005). See Ind. Code §§ 35-38-1-7.1, 35-50-2-1.3. Johnson committed his criminal offense before this statute took effect but was sentenced after the effective date. Under these circumstances, there is a split on this court as to whether the advisory or presumptive sentencing scheme applies. Compare Walsman v. State, 855 N.E.2d 645, 649-52 (Ind. Ct. App. 2006) (sentencing statute in effect at the time of the offense, rather than at the time of the conviction or sentencing, controls) with Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (concluding that change from presumptive sentences to advisory sentences is procedural rather than substantive and, therefore, application of the advisory sentencing scheme is proper when defendant is sentenced after effective date of amendment even though he committed the crime prior to the amendment date).

While our Supreme Court has not explicitly ruled which sentencing scheme applies in these situations, a recent decision seems to indicate the date of sentencing to be critical. Prickett v. State, 856 N.E.2d 1203 (Ind. 2006). The defendant in Prickett committed the crimes and was sentenced before the amendment date. In a footnote, our Supreme Court stated that “[w]e apply the version of the statute in effect at the time of Prickett’s sentence and thus refer to his ‘presumptive’ sentence, rather than an ‘advisory’ sentence.” Id. at *3 n.3 (emphasis added). Therefore, since Johnson was sentenced on May 1, 2006—one month after the effective date of the amended statute—we will apply the amended statute and refer to Johnson’s “advisory” sentence.

authority to revise a sentence 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). However, sentence review under Appellate Rule 7(B) is very deferential to the trial court's decision, Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003), and we refrain from merely substituting our judgment for that of the trial court, Foster v. State, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

The trial court sentenced Johnson to the statutory maximum of twenty years imprisonment and provided:

Based upon twelve prior convictions in three counties over the last, looks like about twenty years, seven of those appear to be felonies, uh and there were several attempts at rehabilitation which have failed, which resulted in probation violations being filed against you. For whatever it's worth[,] the fact finder in this did find that based upon the evidence both presented by the Defense and the State that the Defendant was in a position of trust as it related to the victim in this cause of action.

Sent. Tr. 11.³

Johnson argues that his proffered mitigators were clearly supported on the face of the record and that the trial court erred by not discussing them at sentencing. At the hearing, Johnson testified that he took a theology course and received his ministry certification from the Universal Life Church on November 21, 2003. Sent. Tr. p. 4; Appellant's App. p. 32.

³ On appeal, Johnson only argues that the trial court did not consider his proffered mitigators and that it improperly enhanced his sentence based on his criminal history; he does not appeal the trial court's findings that attempts at rehabilitation had failed or that he was in a position of trust with the victim.

Johnson also argues that the presentence investigation report raised his child support obligation, evidence that long-term imprisonment would impose an undue hardship on his son—as a second mitigating circumstance.

The finding of mitigating circumstances is not mandatory and rests within the trial court’s discretion. Moyer v. State, 796 N.E.2d 309, 313 (Ind. Ct. App. 2003). The trial court has the discretion to determine the existence of and the weight to be given a mitigating circumstance. Davies v. State, 758 N.E.2d 981, 987 (Ind. Ct. App. 2001). The trial court is not required to accord the same weight to a mitigating circumstance as would the defendant. Id. Additionally, the trial court need not consider a mitigating circumstance that is highly disputable in nature, weight, or significance. Id. When the trial court fails to find a significant mitigating circumstance that is clearly supported by the record there is a reasonable belief that it was improperly overlooked. Johnson v. State, 725 N.E.2d 864, 868 (Ind. 2000).

Johnson directs us to Elmore v. State, which provides that a reviewing court will “only assume a trial court failed to weigh a mitigator when that mitigator is clearly supported on the face of the record and the trial court did not discuss it.” 657 N.E.2d 1216, 1220 (Ind. 1995). Johnson seems to be basing his claim for relief on the mere fact that the trial court did not discuss his proposed mitigating factors when it sentenced him to twenty years of imprisonment. However, “an allegation that the trial court failed to identify a particular mitigating factor requires the defendant to establish that the mitigating evidence is both

significant and clearly supported by the record.” Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied.

Johnson completed his theology course while he was incarcerated. Our Supreme Court has rejected the notion that the trial court must find a defendant’s good conduct while in jail awaiting trial to be a mitigating circumstance. Page v. State, 689 N.E.2d 707, 712 (Ind. 1997). At sentencing and on appeal, Johnson fails to establish how his recent education is a significant mitigating factor; therefore, the trial court did not abuse its discretion by failing to find it to be a mitigating circumstance.

As for the undue hardship on Johnson’s son, we initially note that Johnson has waived appellate review of this issue because he did not advance this mitigating circumstance at sentencing; therefore, we must presume that the mitigating circumstance is not significant. Wells, 836 N.E.2d at 479. Waiver notwithstanding, we have previously held that a defendant failed to show undue hardship to his child where the record revealed that the child’s mother was the custodial parent and primary caregiver of the child. Anglin v. State, 787 N.E.2d 1012, 1018 (Ind. Ct. App. 2003). Here, the only evidence of potential hardship on Johnson’s son was the minimal child support obligation noted in Johnson’s presentence investigation report. Johnson did not present additional evidence that long-term incarceration would cause undue hardship on his son; therefore, the trial court did not abuse its discretion by failing to find this a mitigating circumstance.

Johnson also argues that his criminal history does not warrant an enhanced sentence. However, the trial court noted at sentencing that Johnson has “twelve prior convictions in

three counties over the last, looks like about twenty years, seven of those appear to be felonies.” Sent. Tr. 11. A criminal record, in and of itself, is sufficient to support an enhanced sentence. Bradley v. State, 765 N.E.2d 204, 209 (Ind. Ct. App. 2002). The significance of the defendant’s criminal history varies based on the gravity, nature, and number of prior offenses as they relate to the current offense. Cotto v. State, 829 N.E.2d 520, 526 (Ind. 2005). Only one valid aggravating circumstance is required to enhance a sentence. Bradley, 765 N.E.2d at 209.

Johnson’s extensive criminal history shows his continued disregard for the law over the past two decades. Johnson has been convicted of theft five times, operating while intoxicated, sale of cocaine, maintaining a common nuisance, disorderly conduct, conversion, false reporting, and domestic battery. While some of these crimes are property offenses that Johnson argues are unrelated to his current rape conviction, his previous offenses, particularly the domestic battery conviction, show Johnson’s continued disregard for the welfare of others. As a result, we cannot conclude that Johnson’s sentence was inappropriate.

The judgment of the trial court is affirmed.

DARDEN, J., and ROBB, J., concur.