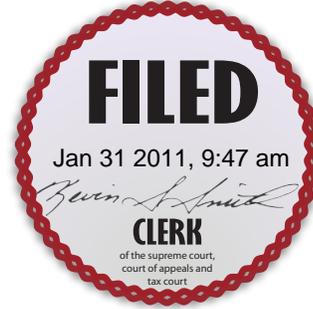


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ROY A. SELBY,

Appellant- Defendant,

vs.

STATE OF INDIANA,

Appellee- Plaintiff,

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No. 63A01-1005-CR-235

APPEAL FROM THE PIKE CIRCUIT COURT

The Honorable Jeffrey L. Biesterveld, Judge

Cause No. 63C01-0903-FA-173

January 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issues

Roy Selby was convicted following a jury trial of one count of child molesting as a Class A felony and one count of child molesting as a Class C felony. The trial court imposed an aggregate fifty-year sentence. Selby appeals, raising three issues for our review which we consolidate to the following two: 1) whether the trial court abused its discretion in considering additional pending child molesting charges to be an aggravating factor; and 2) whether the fifty-year sentence is inappropriate in light of the nature of his offenses and his character. Concluding the trial court did not commit reversible error in sentencing Selby and that his fifty-year sentence is not inappropriate, we affirm.

Facts and Procedural History

Selby was found guilty by a jury of two incidents of molesting S.L. when she was approximately twelve years old. S.L. was best friends with Selby's twin daughters from the time they met in kindergarten and lived across the street from the Selby family for a time. S.L. spent a great deal of time with Selby and his family. The charges stemmed from Selby fondling S.L. by picking her up and touching her genital area and from Selby approaching her as she lay on the family room floor during a sleepover, moving her underwear aside, and licking her genital area.

Prior to the jury trial, Selby filed a motion in limine regarding several matters, including prior bad acts, which the trial court granted. Four additional child molesting cases were pending against Selby at the time of trial. Two of the alleged victims testified at trial but the motion in limine prevented them from testifying about anything other than their observations of the interaction between Selby and S.L. They were not allowed to

testify at trial regarding their own encounters with Selby or their observations of the interaction between Selby and the other alleged victims. These same two alleged victims testified at the sentencing hearing, however, and were allowed to testify over Selby's objection to facts surrounding Selby's alleged molestation of each of them.

In sentencing Selby, the trial court found the following aggravating and mitigating factors:

In sentencing [Selby], the Court has considered:

- (1) The harm suffered by the victim of said offense was significant.
- (2) [Selby] was in a position of having care, custody, or control of the victim of the offense.
- (3) [Selby's] character is such that probable cause has been found in four (4) other cases for child molesting as a Class "C" felony.
- (4) [Selby's] conduct poses a risk to this community.
- (5) That imposition of a reduced sentence or suspension of sentence would depreciate the seriousness of the offenses.
- (6) [Selby] lacks remorse as evidenced by his prior testimony and conduct.

The Court finds the following mitigating factors:

- (1) [Selby] has a limited history of charged delinquency or criminal activity or the person has led a law-abiding life for a substantial period before commission of the crime.

Appellant's Brief at 10-11. The trial court found the aggravating factors outweighed the mitigating factor and sentenced Selby to fifty years for the Class A felony conviction, to be served concurrently with a seven-year sentence for the Class C felony conviction. Selby now appeals his sentence.

Discussion and Decision

I. Abuse of Discretion

Selby first contends the trial court erred in allowing two other alleged victims of molestation to testify to the specifics of their own molestations at the sentencing hearing

and abused its discretion in considering the pending charges related to those victims to be an aggravating factor. In Smylie v. State, 823 N.E.2d 679 (Ind. 2005), cert. denied, 546 U.S. 976 (2005), our supreme court held that Indiana’s then-existing fixed-term presumptive sentencing scheme was unconstitutional based upon a United States Supreme Court decision that any factor which increased a sentence beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Id. at 683 (citing Blakely v. Washington, 542 U.S. 296, 301 (2004)). In response to Smylie, the legislature amended the sentencing scheme, effective April 25, 2005, to eliminate the problematic presumptive sentence from which the sentence could be increased or decreased and created sentencing ranges with non-binding “advisory sentences” instead. Under this new sentencing scheme, the statutory maximum is the upper limit of the statutory range, and a sentence can no longer be increased beyond the statutory maximum. Anglemyer v. State, 868 N.E.2d 482, 489 (Ind. 2007), clarified on reh’g, 875 N.E.2d 218 (2007). The advisory sentencing scheme, therefore, does not run afoul of Blakely even with judicial findings of aggravating circumstances. Id.

The sentencing scheme in effect at the time of a defendant’s crime is the appropriate sentencing scheme to be applied. Robertson v. State, 871 N.E.2d 280, 286 (Ind. 2007). Without specifically arguing so, Selby apparently asserts his crimes were committed prior to April 25, 2005, and his sentence was therefore subject to the dictates of Blakely.¹ The information in this case alleges that “on or about the calendar year

¹ Only if the offenses were committed prior to April 25, 2005, would Blakely play a role in Selby’s sentencing; however, we note that in his abuse of discretion argument, Selby cites the maxim that a trial court may impose any sentence that is authorized by statute and permissible under the constitution regardless of the presence or absence of aggravating or mitigating factors, which is post-Blakely amendment language. See Ind. Code § 35-38-1-7.1(d).

2005,” Selby committed his crimes. Appellant’s Appendix at 1. The only specific testimony at trial regarding when the offenses occurred is S.L.’s testimony that it was “during a warm season.” Transcript at 48. This testimony does not sufficiently narrow the timeline to determine whether the offenses occurred before or after the sentencing amendments. However, we need not decide whether the presumptive sentencing scheme, and therefore the strictures of Blakely, apply to Selby’s case.

We will assume for the sake of the remainder of Selby’s arguments that the trial court erred in allowing and relying on evidence of additional charged crimes in sentencing Selby, and therefore supported the sentence imposed with a reason that was improper as a matter of law. In such a case, “remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.” Anglemyer, 868 N.E.2d at 491.

Selby does not argue that any of the remaining aggravating factors cited by the trial court were invalid, nor does he argue the trial court overlooked any significant mitigating factors clearly supported by the record. It is clear from consideration of the trial court’s oral statement at the sentencing hearing that it was most concerned with the impact Selby’s actions had on S.L. See Tr. at 258-59 (noting S.L.’s life “will forever be changed,” that she “risked very much to come forward” and Selby “caused her to take the stand and be questioned as to her truthfulness . . . called [her] out as [a] liar[] and now makes a statement that what was alleged is in fact true.”). Whether or not Selby had other pending cases, that impact would not change. In addition, Selby was in a position

of trust with S.L., who viewed the Selbys as family. The trial court did acknowledge, as do we, that Selby has no history of juvenile delinquency and two misdemeanor operating while intoxicated convictions more than ten years prior to the current offense, but found the aggravating factors “substantially outweigh” the mitigating factor of lack of criminal history. Tr. at 260. Under these circumstances, we can say with confidence that the trial court would have imposed the same sentence even if it had not considered the additional pending charges. See Trusley v. State, 829 N.E.2d 923, 927 (Ind. 2005) (stating “with confidence,” after balancing the valid aggravating and mitigating factors, the defendant’s sentence enhancement should be affirmed).

II. Inappropriate Sentence

Selby also contends his fifty-year sentence is inappropriate in light of the nature of his offenses and his character. Article 7, sections 4 and 6 of the Indiana Constitution authorizes independent appellate review of the appropriateness of a sentence, an authority implemented through Indiana Appellate Rule 7(B). Childress v. State, 848 N.E.2d 1073, 1079-80 (Ind. 2006). This court may revise a sentence “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.” Ind. Appellate Rule 7(B). In making this determination, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. The defendant bears the burden to persuade this court that his or her sentence is inappropriate. Childress, 848 N.E.2d at 1080.

We acknowledge Selby received the maximum sentence and that maximum sentences are generally reserved for the worst offenses and offenders. See Buchanan v. State, 699 N.E.2d 655, 657 (Ind. 1998). However, our review focuses not on comparing Selby’s case to others, real or hypothetical, but on what the record reveals about the nature of his offense and his character. See Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), trans. denied. “[W]hether we regard a sentence as appropriate at the end of the day 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 v. State, 895 N.E.2d 1219, 1224 (Ind. 2008).²

As for the nature of the offenses, there was testimony that Selby committed additional acts of molestation against S.L. beyond those charged. S.L. testified that she and Selby engaged in a game wherein he would tickle her, pick her up, and pretend to throw her in a trashcan. When he picked her up, he would touch her genital area. Although this conduct is the basis for the Class C felony child molesting charge, S.L. testified this occurred numerous times, beginning when she was in elementary school. She also testified Selby would “go around in a towel after he took a bath and his genitals would hang out of his towel, when he was sitting on the chair.” Tr. at 33. Finally, she

² We note the State has cited earlier caselaw for the proposition that our review of sentences under Rule 7(B) is “very deferential” to the trial court and that we exercise our review and revise authority “with great restraint.” Brief of Appellee at 12 (citing Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003) and Foster v. State, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003)). We have repeatedly urged the State to discontinue citing cases standing for these propositions as outdated in light of more recent supreme court precedent applying a more vigorous approach to revising sentences. See Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). Most recently, in reviewing a sentence, our supreme court noted that it was “[c]omplying with the requirement [of Rule 7(B)] that the trial court’s decision is given due consideration” Akard v. State, --- N.E.2d ---, 2010 WL 5016975 at * 2 (Ind., Dec. 9, 2010) (emphasis added). “Due consideration” would seem to be a lesser standard than “very deferential.” We again urge the State to alter its language describing our standard of reviewing sentences.

testified there were “peepholes” in the bathrooms at the Selby house and she once saw him spying on her when she was in the bathroom. Id. at 34.

As for his character, Selby took advantage of the friendship S.L. shared with his twin daughters and the affection she felt for him and used the guise of friendly horseplay and hospitality to satisfy his own sexual desires. S.L. was still prepubescent when Selby perpetrated these crimes upon her. At the time of the trial, S.L. was sixteen, and her statement at the sentencing hearing demonstrated the deep and lasting effects the molestations have had on her. Selby apologized at the sentencing hearing, but the trial court, which is in the best position to judge the demeanor of the witnesses, did not believe him to be genuinely remorseful. Although Selby’s criminal history prior to this incident was distant in time and unrelated in nature to these crimes, as related above, the charged incidents were not the sole incidents of molestation of S.L. and we therefore cannot consider him to have been leading an entirely law-abiding life in the years following his prior convictions. In sum, it is Selby’s burden to persuade us his sentence is inappropriate, and we cannot conclude he has done so here. The fifty-year sentence imposed by the trial court is not inappropriate considering the nature of Selby’s offense and his character.

Conclusion

To the extent the trial court abused its discretion in identifying additional pending charges against Selby as an aggravating factor, we are confident the trial court would have imposed the same sentence absent consideration of that factor. Further, Selby’s

fifty-year sentence is not inappropriate in light of the nature of his offenses and his character. His sentence is therefore affirmed.

Affirmed.

RILEY, J., concurs.

BROWN, J., dissents with opinion.

**IN THE
COURT OF APPEALS OF INDIANA**

ROY A. SELBY,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 63A01-1005-CR-235
)	
STATE OF INDIANA)	
)	
Appellee-Plaintiff.)	

Brown, J., dissenting

I respectfully dissent. As to the first issue, I cannot say with confidence that the trial court would have imposed the same sentence if it had not considered the additional pending charges.

As to the second issue, giving due consideration to the trial court’s decision per Akard v. State, ---N.E.2d---, 2010 WL 5016975 (Ind. Dec. 9, 2010), I would find the maximum sentence imposed in this case, which, as the majority notes, is generally reserved for the worst offenses and offenders, to be inappropriate. See Buchanan v. State, 699 N.E.2d 655 (Ind. 1998); Payton v. State, 818 N.E.2d 493 (Ind. Ct. App. 2004), trans. denied. Of course every child molesting case is serious. However, the nature of the offense here as articulated by the majority does not approach and certainly does not parallel the worst of the worst offenses.

As to the character of the offender, as noted by the majority, Selby’s criminal history consisted of two, remote in time and circumstances, misdemeanor convictions.

While there are other pending cases against Selby, if he is convicted in those cases he will face sentencing for those crimes.

I would reverse and remand for resentencing to the advisory term of thirty years on the class A felony to be served concurrently with the seven year sentence for the class C felony.