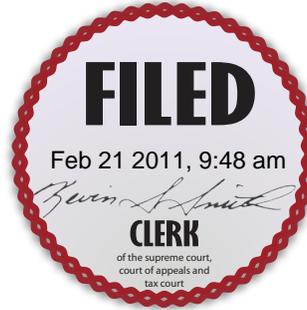


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ERIC WELCH,)
)
 Appellant-Defendant,)
)
 vs.) No. 27A02-1007-CR-893
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE GRANT CIRCUIT COURT
The Honorable Mark E. Spitzer, Judge
Cause No. 27C01-0902-FA-63

February 21, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Following a jury trial, Appellant-Defendant Eric Welch was convicted of four counts of Class A felony Child Molesting,¹ three counts of Class B felony Sexual Misconduct with a Minor,² and Class A misdemeanor Contributing to the Delinquency of a Minor,³ for which he received an aggregate sentence of seventy-one years in the Department of Correction. Upon appeal Welch argues that his sentence is inappropriately harsh and requests that this court reduce it. We affirm.

FACTS AND PROCEDURAL HISTORY

Welch is the biological father of K.W. K.W. was born on June 22, 1993, following a brief relationship between Welch and K.W.'s mother. When K.W. was five or six years old, Welch began exercising regular visitation with her, every other weekend.

In February of 2009, when K.W. was fifteen years old, she reported that Welch had been forcing her to have sexual intercourse with him on a regular basis since she was ten or eleven, which was before the onset of puberty. The first time this happened, Welch laid K.W. on the floor, took her clothes off, ignored her pain, and forced her to have sexual intercourse with him. Welch then told K.W. to check for blood, which K.W. later found.

Thereafter, for the next five years, and at three separate residences, Welch often molested K.W. when he exercised his visitation. According to K.W., Welch molested

¹ Ind. Code § 35-42-4-3(a)(1) (2005).

² Ind. Code § 35-42-4-9 (a)(1) (2007).

³ Ind. Code § 35-46-1-8(a) (2008).

her in the range of twenty times per year. K.W. told Welch that she wanted him to stop molesting her, and Welch told her that he would, but Welch did not stop molesting K.W.

The molestations occurred when Welch's mother, whom he lived with, would leave the home. In order to have "alone time" with K.W., Welch would arrange for his mother to leave the house by giving her money to play bingo. Tr. p. 91. K.W. greatly feared that she would become pregnant. Welch gave K.W. alcohol and took sexually explicit photographs of her.

On February 24, 2009, the State filed an information, and on May 13, 2010, an amended information, charging Welch with four counts of Class A felony child molesting (Counts 1-4),⁴ three counts of Class B felony sexual misconduct with a minor (Counts 5-7),⁵ one count of contributing to the delinquency of a minor (Count 8), and one count of dissemination of matter harmful to minors (Count 9). During a May 17-19, 2010 jury trial, Welch was found guilty of all counts but Count 9, after which the trial court entered judgment of conviction on Counts 1 through 8.

During a June 25, 2010 sentencing hearing, the trial court sentenced Welch to thirty years on each of Counts 1 through 4, ten years on each of Counts 5 through 7, and one year on Count 8, all executed in the Department of Correction. The trial court further ordered that Counts 1 and 2 were to be served concurrent with each other, as

⁴ In Counts 1-4, the State charged Welch with one count for each year, from 2004 through June 21, 2007, during which the sexual intercourse was alleged to have occurred while K.W. was under fourteen years of age.

⁵ In Counts 5-7, the State charged Welch with one count for each year, from June 22, 2007 through January 31, 2009, during which the sexual intercourse was alleged to have occurred while K.W. was between fourteen and sixteen years old.

were Counts 3 and 4 and Counts 5 through 7. The trial court additionally ordered that the aggregate thirty-year sentences for Counts 1 and 2 be served consecutive to the aggregate thirty-year sentence for Counts 3 and 4, the aggregate ten-year sentence for Counts 5 through 7, and the one-year sentence for Count 8, for a total aggregate sentence of seventy-one years in the Department of Correction. In reaching this sentence, the trial court found Welch's lack of a criminal record to be a mitigating circumstance. The trial court found as aggravating circumstances Welch's position of care, custody, or control over K.W. and his position of trust with her. In imposing consecutive sentences, the trial court relied upon the aggravating circumstances and the "frequency of the criminal behavior over the period of time encompassed by the charges." App. p. 97. In the trial court's view, "[T]he imposition of all concurrent sentences would be contrary to the evidence at trial of the Defendant's persistent and frequent molestation of his biological daughter over the course of 5 years." App. p. 97. This appeal follows.

DISCUSSION AND DECISION

Upon appeal, Welch claims that his sentence, comprised of consecutive advisory sentences, is inappropriately harsh in light of the nature of his offenses and his character. Article VII, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007) (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006) (emphasis and internal quotations omitted)). Such appellate authority is implemented through Indiana Appellate Rule 7(B), which provides that 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 exercise deference to a trial court’s sentencing decision, both because Rule 7(B) requires that we give “due consideration” to that decision and because we recognize the unique perspective a trial court has when making sentencing decisions. *Stewart v. State*, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). It is the defendant’s burden to demonstrate that his sentence is inappropriate. *Childress*, 848 N.E.2d at 1080.

Welch was convicted of four Class A felonies, each of which carries a sentencing range of from twenty to fifty years, with the advisory⁶ sentence being thirty years. *See* Ind. Code § 35-50-2-4 (2005). Welch received an advisory thirty-year sentence for each of his Class A felonies, with two of those sentences ordered to run consecutive to one another, totaling sixty years.

Welch was also convicted of three Class B felonies, each of which carries a sentencing range of from six to twenty years, with the advisory sentence being ten years. *See* Ind. Code § 35-50-2-5 (2007). Welch received advisory ten-year concurrent sentences for each of his Class B felonies, and that aggregate ten-year term was ordered to run consecutive to Welch’s Class A felony sentences.

In addition, Welch was convicted of one Class A misdemeanor, which carries a sentencing maximum of one year, which Welch received. *See* Ind. Code § 35-50-3-2

⁶ Welch’s acts were, in large part, committed after April 25, 2005, the effective date for the current advisory sentencing scheme. Accordingly, for purposes of establishing a reference point, we will, like Welch, refer to the “advisory” sentence rather than the “presumptive” sentence. Both the “advisory” and the “presumptive” sentence invoke the same term of years and the difference between the two sentencing schemes is not material for purposes of Rule 7(B) review.

(2008). This additional year was similarly ordered to run consecutive to the Class A felony and B felony sentences.

In challenging the length of his sentence, Welch points to the fact that he has no criminal history; that he has maintained employment; that his crimes were directed against a single victim; and that apart from the molestation, he and K.W. have had a positive relationship. In Welch's view, these factors reflect positively upon his character and demonstrate that the nature of his offenses is not adequately egregious to warrant consecutive sentences.

In support of this argument, Welch cites to *Tyler v. State*, 903 N.E.2d 463, 469 (Ind. 2009) and *Rivers v. State*, 915 N.E.2d 141, 143-44 (2009). In *Tyler*, the defendant, who was convicted of molesting children unrelated to him, was sentenced to 110 years for two convictions of Class A felony child molesting, one conviction of Class D felony vicarious sexual gratification, and for being a habitual offender. 903 N.E.2d at 465. The Supreme Court reduced the defendant's aggregate sentence from 110 years to sixty-seven and one-half years based in part upon the facts that the defendant had not used physical force or caused his victims physical injury, that he was not regularly in a position of trust with the victims, and that he did not actively seek opportunities to be in their presence. 903 N.E.2d at 469. In addition, the defendant in *Tyler* had a low IQ and a brain tumor affecting his ability to control his behavior. *Id.*

In *Rivers*, where the defendant's two consecutive thirty-year terms for two distinct incidents of Class A felony child molesting were modified to run concurrently,

the crimes had not occurred over a long period of time, and there was no indication that the defendant had committed any other sexual misconduct. 915 N.E.2d at 144.

Here, Welch systematically molested his own daughter, perhaps 100 times, during five particularly formative years in her young life. Welch planned the incidents, forced himself upon K.W., ignored her pain, and refused to stop. And he did this for years. *Tyler* and *Rivers*, which involved comparatively isolated incidents, are easily distinguishable on this ground.⁷ The fact that a defendant lacks a criminal history seems somewhat less redemptive when his instant crime spans half a decade. Further, unlike in *Tyler*, Welch makes no claim to a mental condition affecting his behavior. Indeed, by all accounts, Welch, who has been reliably employed, is fully competent. Welch's seventy-one-year sentence accurately reflects the egregious nature of his offenses and his substantial lack of character in having committed them.

We are aware that the Supreme Court has modified consecutive sentences to concurrent sentences even in cases where, as here, the defendant engaged in multiple molestations of his victim, with whom he had held a position of trust, over a lengthy period of years. *See Harris v. State*, 897 N.E.2d 927, 930 (Ind. 2008) (modifying two consecutive fifty-year terms to two concurrent fifty-year terms for defendant's multi-year, twice-per-week molestation of his girlfriend's eleven-year-old live-in daughter); *Monroe v. State*, 886 N.E.2d 578 (Ind. 2008) (revising 100-year sentence for five counts

⁷ To the extent Welch relies upon this court's reduction of the defendant's sentence in *Laster v. State*, 918 N.E.2d 428 (Ind. Ct. App. 2009), it also involved isolated incidents of molestation and is similarly distinguishable on this ground.

of Class A felony child molesting⁸ to five concurrent fifty-year sentences for defendant's two-year molestation of child for whom he served as surrogate parent). But each of the challenged sentences in *Harris* and *Monroe* was the particularly lengthy term of 100 years, and the victim was not the defendant's own biological child.

Moreover, while the *Harris* and *Monroe* courts determined that consecutive sentences were inappropriate, the underlying sentences at issue in those cases were enhanced maximum sentences, not advisory sentences as we have here. *Harris*, 897 N.E.2d at 930; *Monroe*, 886 N.E.2d at 580. Indeed, the Supreme Court endorsed those maximum sentence enhancements based upon the ongoing nature of the crimes and the defendant's violation of his position of trust, the very factors which the trial court relied upon in the instant case to impose consecutive sentences.⁹ *Harris*, 897 N.E.2d at 930; *Monroe*, 886 N.E.2d at 580. Admittedly, these factors were used to justify multiple consecutive sentences in the instant case but only one enhanced sentence in *Harris* and *Monroe*. Nevertheless, given the biological father-daughter relationship at issue here, we are convinced that the instant sentence lies within the range of the modified sentences in *Harris* and *Monroe*. Welch's seventy-one-year sentence, in light of his character and the nature of his offenses, is appropriate.

⁸ The defendant had five convictions, for which the trial court imposed five twenty-two-year sentences and ordered that they be served consecutively. *Monroe*, 886 N.E.2d at 579. The *Monroe* court determined that the trial court, which had found aggravating circumstances but imposed reduced sentences and failed to explain why the aggravators justified consecutive sentences, had improperly sentenced the defendant. *Id.* at 580.

⁹ Significantly, the Supreme Court considers the ongoing nature of the crimes with respect to the appropriateness of consecutive sentences, not just the appropriateness of enhanced sentences, for purposes of Rule 7(B) review. See *Sanchez v. State*, 938 N.E.2d 720, 722-23 (Ind. 2010) (discussing this factor in context of both consecutive sentences and enhanced sentences).

The judgment of the trial court is affirmed.

KIRSCH, J., and CRONE, J., concur.