



## Case Summary

Benjamin Wash appeals the forty-year executed sentence imposed after he pleaded guilty to 1) three counts of neglect of a dependent as Class D felonies; 2) two counts of dissemination of matter harmful to minors as Class D felonies; 3) one count of attempted sexual misconduct with a minor as a Class B felony; 4) one count of child solicitation as a Class D felony; 5) three counts of sexual misconduct with a minor as Class C felonies; 6) four counts of sexual misconduct with a minor as Class B felonies; 7) one count of vicarious sexual gratification as a Class D felony; 8) three counts of theft as Class D felonies; 9) one count of possession of a controlled substance as a Class D felony; and 10) one count of nonsupport of a dependent as a Class D felony. We affirm.

### Issue

The sole issue for our review is whether Wash's sentence is appropriate.<sup>1</sup>

### Facts

In April 2006, Wash pleaded guilty to 1) three counts of neglect of a dependent as Class D felonies; 2) two counts of dissemination of matter harmful to minors as Class D felonies; 3) one count of attempted sexual misconduct with a minor as a Class B felony; 4) one count of child solicitation as a Class D felony; 5) three counts of sexual misconduct with a minor as Class C felonies; 6) four counts of sexual misconduct with a minor as Class B felonies; 7) one count of vicarious sexual gratification as a Class D

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<sup>1</sup> Wash also argues that several of his convictions violate double jeopardy and that his sentence should be modified because of the violations. However, Wash waived his right to raise a double jeopardy challenge when he pleaded guilty. See Mapp v. State, 770 N.E.2d 332, 334 (Ind. 2002). He raises no Blakely issue.

felony; 8) three counts of theft as Class D felonies; 9) one count of possession of a controlled substance as a Class D felony; and 10) one count of nonsupport of a dependent as a Class D felony. Pursuant to the terms of the plea agreement, Wash was to receive a sixty-year sentence. However, the executed sentence was to have a cap of forty years and could be argued to the trial court.

At the guilty plea hearing, Wash admitted that between April 2003 and December 2004, he was involved in sexual relationships with his fourteen-year-old daughter, B.W., and two of her friends, E.M. and M.Z., who were also under sixteen years of age. Specifically, Wash testified that the sexual relationship with his daughter began when she bragged to him that she was good at giving oral sex, and Wash challenged her to perform oral sex on him. B.W. performed oral sex on her father several times over the following year and one-half. Wash also engaged in vaginal and anal intercourse with his daughter.

In addition, Wash gave drugs and alcohol to B.W. and her friends, and engaged in sexual activities, including threesomes, with the young girls. Wash also e-mailed E.M. a photograph of his penis and showed M.Z. a videotape of him and his wife in a sexual encounter with another couple.

At the hearing, Wash further admitted that he took prescription medication from three patients at Rolling Hills Rehabilitation Center while he was employed there as a Qualified Medicine Administrator. One of the prescriptions was for a controlled substance. Wash also admitted that he failed to pay child support to B.W.'s mother in 2005 when he had the means to do so.

At a sentencing hearing the following month, M.Z.'s custodial grandmother testified that her "happy loving child . . . was turned into someone who hated herself." Tr. p. 50. M.Z.'s grandmother further explained that M.Z. became addicted to the drugs Wash gave her and spent nine months in the Anderson Center. In subsequent therapy sessions, the former honor student told her grandmother that Wash "had made her something that she couldn't even stand to think about." Tr. p. 50. Lastly M.Z.'s grandmother testified that Wash used to tell her what a wonderful girl her granddaughter was and what a wonderful friend she was to B.W. Wash also thanked the grandmother for letting M.Z. come to his house.

At the sentencing hearing, the trial court noted Wash's prior criminal history, including a prior Class D felony conviction for non-support of a dependent child and battery as a Class A misdemeanor as well as Wash's violation of trust. The court also acknowledged that Wash's guilty plea had saved the State a long trial. The trial court concluded that Wash had engaged in "predatory depraved conduct . . . outside the norms of what happens in civilized society," and sentenced him to forty years executed, the maximum executed sentence allowed under the terms of the plea agreement. Wash appeals.

### **Analysis**

Wash contends that his forty-year executed sentence is inappropriate because he is not one of the worst offenders and his are not in the class of the worst offenses. This court has the constitutional authority to revise a sentence if, after consideration of the trial court's decision, we conclude that the sentence is inappropriate in light of the nature of

the offense and the character of the offender. Gornick v. State, 832 N.E.2d 1031, 1035 (Ind. Ct. App. 2005), trans. denied. This court has previously explained as following regarding the worst offender and worst offense principle:

There is a danger in applying [this principle because] [i]f we were to take this language literally, we would reserve the maximum punishment for only the single most heinous offense. In order to determine whether an offense fits that description, we would be required to compare the facts of the case before us with either those of other cases that have been previously decided, - or more problematically – with hypothetical facts calculated to provide a “worst-case scenario” template against which the instant facts can be measured. If the latter were done, one could always envision a way in which the instant facts could be worse. In such case, the worst manifestation of any offense would be hypothetical and not real, and the maximum sentence would never be justified.

This leads us to conclude the following with respect to deciding whether a case is among the very worst offenses and a defendant among the very worst offenders, thus justifying the maximum sentence: We should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant’s character.

Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), trans. denied.

Here, with regard to the character of the offender, Wash failed to support the fourteen-year-old daughter with whom he was engaging in a sexual relationship and stole three different drugs from his employer, one of which was a controlled substance. With regard to the nature of the offenses, Wash engaged in sexual relationships with his daughter and two of her friends, all of whom were under the age of sixteen. Wash gave the girls drugs and alcohol and showed them sexually explicit photos and videos. He stole prescriptions from the rehab center where he worked and failed to support the daughter that he was molesting. We find it difficult to imagine how this offender and these

offenses would not warrant the maximum possible punishment. See Newsome v. State, 797 N.E.2d 293 (Ind. Ct. App. 2003), trans. denied, (stating that the nature of the offenses was vile and the character of the offender was particularly despicable making maximum possible sentence appropriate where defendant molested his own daughters to whom he was in a significant position of trust). Wash's forty-year executed sentence is not inappropriate.<sup>2</sup>

### **Conclusion**

The trial court did not err in sentencing Wash. We affirm.

Affirmed.

BAILEY, J., and VAIDIK, J., concur.

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<sup>2</sup> We note that this is not the maximum sentence permitted by statute. Rather, it was the maximum executed sentence permitted by the plea agreement. Regardless, based upon our analysis of the nature of the offenses and the character of the offender, we believe that this case falls into the category of worst offenses and worst offender.