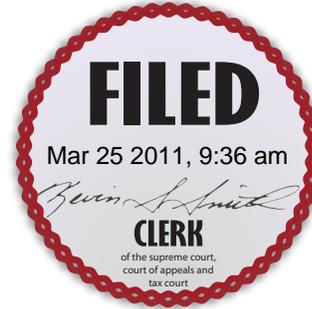


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DOUGLAS (SOMMERS) SUMMERS,)

Appellant-Defendant,)

vs.)

No. 34A02-1007-CR-876

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Stephen M. Jessup, Judge
Cause No. 34D02-0912-FA-233

March 25, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Douglas Summers¹ appeals his three-year-sentence for Class D felony sexual battery. We affirm.

Issues

Summers raises two issues, which we restate as:

- I. whether the trial court abused its discretion when it sentenced him; and
- II. whether his sentence is inappropriate.

Facts

On October 25, 2009, seven-year-old D.D. and his mother visited with his mother's friends in Logansport. D.D. went to sleep in one of the bedrooms. When D.D.'s mother checked on him, she found Summers in bed with D.D. Summers was wearing only his socks and D.D. was naked.² D.D. and his mother left immediately.

On December 9, 2009, the State charged Summers with Class A felony child molesting. On March 22, 2010, the State dismissed the Class A felony charge and filed another charge alleging Summers committed Class D felony sexual battery. The charge alleged that Summers compelled D.D. "to submit to a touching by force or imminent threat of force, to-wit: pressed naked body against [D.D.] with the intent to arouse or satisfy the sexual desires of defendant" App. p. 77.

¹ Summers is also referred to as "Sommers." For purposes of this appeal, we refer to him as Summers.

² The record does not include a transcript of the guilty plea hearing. The chronological case summary indicates the parties stipulated "that the Affidavit for Probable Cause and the attachments thereto are true" as they relate to the sexual battery charge. App. p. 6.

On May 14, 2010, Summers pled guilty to the sexual battery charge. At the sentencing hearing, the trial court stated:

in spite of the fact that there are mitigating factors that I don't doubt that this is basically a good individual based upon the letters, based upon the people who are here, and I agree that the support of family and friends is important. It will be important when you are released. However, I can't ignore the fact that an A felony was dismissed in order for you to plead guilty to this, even though the facts may not have been there, but there's a lot of room between an A and a D, 50 years down to 3 years total, maximum is what we're talking about. And you do have a prior record and the fact that this child is part of the—I can't consider it because it's part of the charge, although it's not part of what you pled guilty to, sexual battery, I think I can take into consideration, this boy was under 12. At any rate, I am sentencing you to 3 years and giving you credit for 223 actual days.

Tr. p. 22. Summers now appeals his sentence.

Analysis

I. Abuse of Discretion

Summers argues that the trial court abused its discretion when it sentenced him. We evaluate a sentence under the current “advisory” sentencing scheme pursuant to Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007), clarified on reh'g by Anglemyer v. State, 875 N.E.2d 218 (Ind. 2007). The trial court must issue a sentencing statement that includes “reasonably detailed reasons or circumstances for imposing a particular sentence.” Anglemyer, 868 N.E.2d at 491. The reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. The weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id.

Summers contends that the trial court failed to give a reasonably detailed explanation of his sentence. Although the trial court's explanation of Summers's sentence could have been more detailed, it is sufficient to facilitate our review of the sentence. The trial court did not abuse its discretion in this regard.

Summers also argues the trial court improperly focused on the dismissal of the Class A felony child molesting charge and should have considered his guilty plea as a mitigator. In sentencing Summers, the trial court acknowledged the State's issues of proof as the reason for the dismissal. To the extent Summers argues that the trial court considered the dismissal as an aggravator,³ we disagree with that characterization.

Regarding whether the trial court should have considered Summers's guilty plea as a mitigator, on rehearing, the Anglemyer court held, "an allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is not only supported by the record but also that the mitigating evidence is significant." Anglemyer, 875 N.E.2d at 220-21. The court explained that a guilty plea may not be significantly mitigating when it does not demonstrate the defendant's acceptance of responsibility. Id. at 221.

Here, although Summers pled guilty and apologized for his actions, it is not clear that he accepted responsibility for the crime. As of the time of the sentencing hearing, Summers had not told his parents "exactly everything that happened" even though they

³ Summers argues, "Here Sommers was originally charged with child molesting. There was insufficient evidence, and Sommers consistently denied, that he had the intent to defraud while possessing the checks." Appellant's Br. p. 6. Possession of checks was not an issue in this case and the reference is likely just an editing error, but it is difficult to address Summers's argument on this point.

testified on his behalf at the sentencing hearing. Tr. p. 14. Furthermore, the presentence investigation report indicates Summers explained to D.D.'s mother that he thought D.D. was a woman. Summers's guilty plea does not demonstrate his acceptance of responsibility. Summers has not established that the trial court abused its discretion by not considering the guilty plea as a significant mitigator.

II. Inappropriateness

Summers also argues his sentence is inappropriate in light of the nature of the offense and the character of the offender. Indiana Appellate Rule 7(B) permits us to revise a sentence authorized by statute 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. When considering whether a sentence is inappropriate, we need not be "extremely" deferential to a trial court's sentencing decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). Still, we must give due consideration to that decision. Id. We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

The principal role of Rule 7(B) review "should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008). We "should focus on the forest—

the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count.” Id.

Regarding the nature of the offense, Summers points out there was no physical injury to D.D. Notwithstanding the lack of physical injury, we cannot ignore the fact that D.D. was seven years old. Unlike child molesting, sexual battery has no age element. Compare Ind. Code § 35-42-4-3 (defining child molesting), with I.C. § 35-42-4-8 (defining sexual battery). D.D.’s tender age is of particular concern in our consideration of the nature of the offense.

As for the character of the offender, although Summers had been employed and had the support of friends and family, his criminal history and substance abuse are troubling. Twenty-eight-year-old Summers has a juvenile adjudication and five misdemeanor convictions. Also, Summers reported consuming alcohol since he was fifteen and using hashish, marijuana, methamphetamine, gasoline, glue or paint, nitrous oxide, codeine, and oxycontin regularly. Summers had also tried many other drugs. Despite rehabilitation efforts associated with past probation, Summers continued to abuse drugs and alcohol. Given the nature of the offense and the character of the offender, we cannot say that the three-year-sentence is inappropriate.

Conclusion

Summers has not established that the trial court abused its discretion in sentencing him or that his sentence is inappropriate. We affirm.

Affirmed.

BAKER, J., and VAIDIK, J., concur.