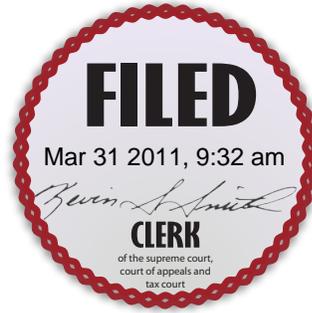


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JERRY W. CLARK,)

Appellant-Defendant,)

vs.)

No. 87A05-1008-CR-572

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE WARRICK SUPERIOR COURT
The Honorable Keith A. Meier, Judge
Cause No. 87D01-1003-FD-43

March 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Jerry Clark claims his sentence for Class D felony dissemination of matter harmful to a minor¹ is inappropriate in light of his character and offense. We affirm.

FACTS AND PROCEDURAL HISTORY

Clark knowingly or intentionally sent a photograph of his erect penis from his cell phone to the cell phone of a fourteen-year-old-girl. Clark agreed to plead guilty to Class D felony dissemination of matter harmful to a minor and to leave sentencing to the discretion of the trial court. The court pronounced a thirty-five month sentence and ordered it all served executed.

DISCUSSION AND DECISION

Clark asserts his sentence is inappropriate.² We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. *Williams v. State*, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008) (citing Ind. Appellate Rule 7(B)). We consider not only the aggravators and mitigators found by the trial court, but also any other

¹ Ind. Code § 35-49-3-3.

² Clark frames his issue as, and offers our standard of review for, whether his sentence is inappropriate. (*See* Appellant's Br. at 1, 12-14.) However, he does not at any point discuss his character or the nature of his offense -- the two factors that determine inappropriateness. *See* Ind. Appellate Rule 7(B). Rather, he provides sub-arguments on specific issues, some of which address aggravators or mitigators, that he asserts demonstrate his sentence is too long. (*See* Appellant's Br. at 14-19.)

The State frames Clark's argument as alleging abuse of discretion under the standard announced in *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g* 875 N.E.2d 218 (Ind 2007), (*see* Br. of Appellee at 1, 4), and explains why no such error occurred. The State asserts Clark made no inappropriateness argument, so that allegation of error is waived. (*See id.* at 6.)

We agree with the State that Clark did not argue the inappropriateness of his sentence, and it is waived for appeal. However, the State, after asserting waiver, offers no argument why Clark's sentence is appropriate. Thus, the State did not address the only issue Clark raised. That could permit us to reverse on a finding of *prima facie* error. *See, e.g., Campbell v. State*, 732 N.E.2d 197, 208 n.7 (Ind. Ct. App. 2000) (failure to address argument "is akin to a failure to file a brief" and permits reversal for *prima facie* error). We remind counsel for both parties that an appellate attorney "has an obligation, both to his client and this court to see that the issues raised are suitably argued." *Dortch v. Lugar*, 255 Ind. 545, 588, 266 N.E.2d 25, 50 (1971), *abrogated on other grounds by Collins v. Day*, 644 N.E.2d 72 (Ind. 1994).

factors appearing in the record. *Roney v. State*, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), *trans. denied*. The appellant bears the burden of demonstrating his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

When considering the nature of the offense, the advisory sentence is the starting point to determine the appropriateness of a sentence. *Anglemeyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh'g* 878 N.E.2d 218 (Ind. 2007). The advisory sentence for a Class D felony is eighteen months, with a sentencing range of six to thirty-six months. Ind. Code § 35-50-2-7. This trial court imposed a thirty-five month sentence. When a court deviates from the advisory sentence, we consider whether there is anything more or less egregious about the offense that makes it different from the “typical” offense accounted for by the legislature when it set the advisory sentence. *Rich v. State*, 890 N.E.2d 44, 54 (Ind. Ct. App. 2008), *trans. denied*.

Clark’s list of reasons why his sentence is too long includes three assertions related to his offense: (1) he was sentenced as if he committed the “Worst Crime,” when there are no facts in the record to support such a distinction, (Appellant’s Br. at 15); (2) “He Was Sentenced As If He Had Hurt the Child,” when he claims he did not, (*id.* at 17-18); and (3) “The Crime Did Not Cause Harm Nor Was It Contemplated that It Would.” (*Id.* at 19.)

Dealing first with Clark’s assertion that he did not harm his victim, we remind Clark that he pled guilty to disseminating matter “harmful to minors.” The statute defining that crime, Ind. Code § 35-49-3-3, does not require a showing the minor was harmed. Rather, our legislature has decided a matter or performance is “harmful” to minors if:

- (1) it describes or represents, in any form, nudity, sexual conduct, sexual excitement, or sado-masochistic abuse;
- (2) considered as a whole, it appeals to the prurient interest of sex of minors;
- (3) it is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable matter for or performance before minors; and
- (4) considered as a whole, it lacks serious literary, artistic, political, or scientific value for minors.

Ind. Code § 35-49-2-2. Clark's picture of his erect penis is within that definition and, thus, was matter "harmful" to minors. As the statute does not require actual harm to a specific child, Clark's argument fails.

The record does not reflect Clark's crime was worse than a "typical" dissemination of material harmful to minors, for which the legislature set the advisory sentence at eighteen months. However, in light of Clark's character, we cannot say his thirty-five month sentence is inappropriate.

When considering the character of the offender, one relevant fact is the defendant's criminal history. *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007). The significance of a criminal history in assessing a defendant's character varies based on the gravity, nature, and number of prior offenses in relation to the current offense. *Id.* Clark asserts he should have received a shorter sentence because "the prior record was not similar in nature to the present charge," (Appellant's Br. at 14), and none of the prior charges were related to children.³

³ Clark notes he spent ninety-five days in jail prior to the sentencing, which according to Clark "was enough." (Appellant's Br. at 17.) Although ninety-five days in jail, with day-for-day good time credit, would have given Clark credit for serving a one-hundred-eighty-day advisory sentence, the court explicitly stated at sentencing,

The trial court addressed Clark’s criminal history in detail, explicitly explaining why it led the court to believe Clark should receive a long and executed sentence. Despite nine convictions, time on probation, at least three rounds of mental health treatment, and numerous other charges that had been dismissed, Clark continues to commit crimes, “[s]o the bottom line, what that tells me, Mr. Clark, is that treatment without significant monitoring has not deterred you from committing offenses . . . [and] probation has not been effective.” (Tr. at 97-98.) The court acknowledged the dismissed charges were not convictions, but determined they were reflective of Clark’s “overall character.” (*Id.* at 94.) That Clark was on probation when he committed this offense also reflects poorly on his character. *See Rich*, 890 N.E.2d at 54 (committing “offenses while on probation is a substantial consideration in our assessment of his character”), *trans. denied*. Addressing other charges pending at the time of sentencing and the variety of charges against Clark over the past fifteen years, the court noted Clark’s “criminal versatility.” (Tr. at 96.)

Clark asserts he was remorseful, but the trial court doubted his sincerity:

I’m not sure about your remorsefulness on this. It’s difficult to tell. I’m not saying that you aren’t. I’m sure you’re sorry about the predicament you’re in. But in reading Dr. Samuels’ report and listening to you testify, there’s still been some air of denial there or minimization. And to characterize what went on as a game, I think is a very naïve approach to what occurred. And that causes me some concern.

“to send you home and tell you to get treatment, no, that’s not indicated.” (Tr. at 100.) As this factor is not pertinent to either Clark’s crime or his character, we decline to address it further.

Clark also asserts he was entitled to a shorter sentence because he pled guilty and because he needed to support his family by working. As Clark does not explain why those facts are necessarily related to his offense or character, we are unable to address them.

(*Id.* at 93-94.) The court also noted the psychological evaluation conducted prior to sentencing indicated Clark lacked remorse, was prone to pathological lying, lacked empathy, failed to accept responsibility for his actions, and was callous. (*See id.* at 99.) Thus we decline to find the remorse alleged by Clark suggests his character is such that his sentence is inappropriate.

Even if Clark's crime was not "the worst of the worst," (Appellant's Br. at 15), the evidence regarding Clark's character leads us to conclude Clark's thirty-five-month sentence for Class D felony dissemination of material harmful to a minor is not inappropriate. Accordingly, we affirm.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.