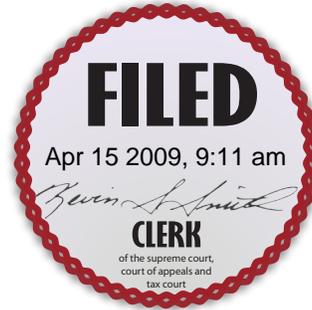


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT WATERS,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 72A01-0809-CR-460

APPEAL FROM THE SCOTT CIRCUIT COURT
The Honorable Roger L. Duvall, Judge
Cause No. 72C01-0707-FA-9

April 15, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Robert Waters appeals his sentence following a plea of guilty to two counts of class C felony child molesting.¹

We affirm.

ISSUES

1. Whether Waters waived his right to appeal his sentence.
2. Whether the trial court erred in sentencing Waters.

FACTS

In July of 2007, the Scott County Department of Child Services (“DCS”) received information that Waters had been molesting his son, C.W. Waters admitted to DCS investigators that he had molested two of his son’s friends multiple times. The molestations took place while D.A. and C.S. were visiting Waters’ home and occurred over a period of time from May of 2007 to July 24, 2007. He also admitted to having molested his other son, a nephew, and a “neighbor kid” approximately twenty years ago. (App. 29).

On July 26, 2007, the State charged Waters with one count of class A felony child molesting and two counts of class C felony child molesting. As to Count 1, the State alleged that Waters had placed ten-year old D.A.’s penis in his mouth. As to Count 2, the State alleged that Waters had touched D.A.’s penis. As to Count 3, the State alleged that Waters had touched ten-year old C.S.’s penis.

¹ Ind. Code § 35-42-4-3.

On February 25, 2008, Waters entered into a blind plea, whereby he agreed to plead guilty to Counts 2 and 3, and the State agreed to dismiss Count 1. As to each count, the plea agreement provided:

The Defendant shall be sentenced by the Court after a hearing at which both the State and the Defendant may present evidence and argument of any aggravating or mitigating circumstances, and at which the State may make a recommendation to the court, but which recommendation shall not be binding on the Court, and the final sentence shall be determined by the Court. (“Blind” Plea).

The parties acknowledge that the sentencing range available to the Court . . . is from TWO (2) to EIGHT (8) YEARS.

(App. 17-18). The plea agreement further provided that “sentencing in this matter shall be CONSECUTIVE, due to the fact that each count relates to a separate victim, for a sentencing range of from FOUR (4) to SIXTEEN (16) YEARS.” (App. 18).

Also on February 25, 2008, Waters filed a motion to withdraw his not guilty plea and enter a plea of guilty. “With respect to a ‘Blind’ or ‘Open’ plea, in which the final sentence shall be determined by the Court,” Waters affirmed as follows:

a. The sentence shall be imposed by the Court, pursuant to any terms or restrictions that may be contained in the “MEMORANDUM OF PLEA AGREEMENT”;

....

d. I have agreed that the Court may sentence me up to the maximum sentence as set forth in the MEMORANDUM OF PLEA AGREEMENT. I hereby knowingly, intelligently, and voluntarily waive any right to appeal the reasonableness of the sentence of the Court or the finding and/or balancing of any aggravating or mitigating circumstances by the Court. I knowingly, intelligently, and voluntarily waive my right to challenge the sentence on the basis that it is erroneous.

(App. 15).

On May 15, 2008, the trial court appointed a psychiatrist and a psychologist to evaluate Waters pursuant to Indiana Code section 35-38-1-7.5 in order to determine whether he is a sexually violent predator. On August 5, 2008, the trial court held a sentencing hearing, during which Waters presented evidence that he had been sexually molested as a child. The trial court also considered the reports of Dr. Daniel Howerton and Dr. Heather Henderson-Galligan.

The trial court found as follows:

[T]he court finds there do exist aggravating factors, the victims of the offense were less than 12 years of age, on this aggravating factor the court is aware that the victim's age is also an element of the offense, therefore, the court gives limited weight to this factor as is warranted since an element of the offense is that the victim is under the age of 14 years of age and that the victims of this case were younger at age 10. The victims were therefore younger than both the threshold age for finding an aggravating factor and the threshold age for the element of the crime. You were also in a position of trust having care, control of the victims at the times of the crime in that the victims of the crime were both young children, friends of your child, the crimes occurred when the victims were entrusted to you, the court finds there was a high level of trust placed with you by the children and their families and the testimony that I received today has only reinforced that finding. I find this to be a significant aggravating factor. Court finds that there exist[s] a mitigating factor for which the court will give limited and qualified consideration in that you do not have a previous conviction for a crime, however, I limit my consideration of this factor because of the record before the court of the history and extent of your inappropriate sexual behavior with minors, the court will not find that you have no history of criminal activity or have lead a law abiding life for a substantial period of time before the commission of a crime under these circumstances. The fact that no convictions result [sic] does not take away the history that has occurred here. I note the mitigating factor . . . about your remorse however I must be honest with you that I find remorse to be somewhat mixed or confusing when you emphasize your own victim-hood, your own experiences and inexplicable logic that you were acting in a loving manner when committing these acts on these children. I find the aggravating factors outweigh the mitigating factors

(Tr. 48-50). It further found Waters to be a sexually violent predator. The trial court then sentenced Waters to eight years on each count, to be served consecutively.

Additional facts will be provided as necessary.

DECISION

1. Waiver

Waters asserts that his waiver of his right to appeal his sentence is unenforceable. A defendant may waive the right to appellate review of his sentence as part of a written plea agreement. *Creech v. State*, 887 N.E.2d 73, 75 (Ind. 2008).

In *Creech*, Creech and the State entered into a plea agreement that left Creech's sentence to the trial court's discretion but capped the executed portion at six years. The plea agreement contained the following provision:

I understand that I have a right to appeal my sentence if there is an open plea. An open plea is an agreement which leaves my sentence to the Judge's discretion. I hereby waive my right to appeal my sentence so long as the Judge sentences me within the terms of my plea agreement.

887 N.E.2d at 74. The trial court accepted the plea agreement; sentenced Creech to an executed sentence of six years; and advised him that he retained the right to appeal. It did not question Creech regarding his understanding of the waiver-provision.

The Indiana Supreme Court held that a defendant, as part of a plea agreement, can waive his right to appeal a discretionary sentencing decision and that the trial court's statements that Creech retained the right to appeal were "not grounds for allowing Creech to circumvent the terms of his plea agreement." *Id.* at 76. It further held that

neither the Indiana Rules of Criminal Procedure nor Indiana Code requires trial courts that accept plea agreements to make express findings regarding

a defendant's intention to waive his appellate rights. Acceptance of the plea agreement containing the waiver provision is sufficient to indicate that, in the trial court's view, the defendant knowingly and voluntarily agreed to the waiver.

Id. at 77; *see also Brattain v. State*, 891 N.E.2d 1055, 1057 (Ind. Ct. App. 2008) (finding that where the defendant entered into a plea agreement, providing that he “further waive[d] the right (under Indiana Appellate Rule 7 and I.C. 35-38-1-15 or otherwise) to review of the sentence imposed,” the defendant waived his right to appeal). *But cf. Ricci v. State*, 894 N.E.2d 1089, 1093-94 (Ind. Ct. App. 2008) (finding no waiver of the right to appeal where, at the plea hearing, the trial court read the plea agreement and stated that, according to its understanding of the plea agreement, Ricci had not surrendered his right to appeal his sentence), *trans. denied*.

Here, Waters argues that his waiver is unenforceable because only the motion to withdraw his guilty plea contained the waiver provision, and the provision's language was confusing. We look with disfavor upon not including the waiver within the plea agreement itself. However, we cannot say that failure to do so renders the waiver unenforceable. Both Waters and his counsel signed the motion to withdraw his guilty plea; and Waters affirmed that he understood that, by entering into the plea agreement, he “waive[d] any right to appeal the reasonableness of the sentence of the Court . . . and voluntarily waive[d] [his] right to challenge the sentence on the basis that it is erroneous.” (App. 15).

Furthermore, although the language contained in the waiver provision is not as simple as the language used in *Creech* and *Brattain*, it clearly provides that, by entering

into a “blind” plea, Waters agrees to waive his right to appeal his sentence. Thus, we cannot say that the language of the waiver provision is grounds for allowing him to circumvent the waiver. Although we find that Waters has waived his right to appeal his sentence, we nonetheless address whether the trial court erred in sentencing him.

2. Sentence

Waters argues that the trial court failed to consider his guilty plea and troubled childhood as mitigating circumstances. He also argues that his sentence is inappropriate.

a. *Mitigating circumstances*

Waters contends that the trial court abused its discretion in omitting his guilty plea and troubled childhood from consideration in its sentencing statement. We disagree.

A sentence that is within the statutory range is subject to review only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218 (Ind. 2007). One way in which a trial court may abuse its discretion is if the sentencing statement “omits reasons for imposing a sentence that are clearly supported by the record and advanced for consideration” *Id.* at 490-91. Under such circumstances, “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.” *Id.* at 491. However, the relative weight or value assignable to reasons properly found, or to those which should have been found, is not subject to review for abuse of discretion. *Id.*

Waters argues that the trial court abused its discretion in failing to identify his guilty plea as a mitigating circumstance. “Our courts have long held that a defendant

who pleads guilty deserves to have some mitigating weight extended to the guilty plea in return.” *Cotto v. State*, 829 N.E.2d 520, 525 (Ind. 2005). A guilty plea, however, is not necessarily a significant mitigating factor. *Id.*

Here, Waters received a significant benefit from his guilty plea. In exchange for his guilty plea, the State dropped the class A felony charge. Moreover, the substantial evidence against him, including his own statements to DCS investigators, indicates that his guilty plea was pragmatic. Thus, we do not find that the trial court abused its discretion in failing to identify Waters’ guilty plea as a mitigating circumstance as we cannot say that it was significant. *See Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005) (“[A] guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one.”), *trans. denied*.

Waters further contends that the trial court abused its discretion in failing to consider his troubled childhood, namely, the sexual abuse he endured, as a mitigating circumstance. We disagree.

“Evidence of a troubled childhood does not require the trial court to find it to be a mitigating circumstance.” *Page v. State*, 615 N.E.2d 894, 896 (Ind. 1993). This is particularly so where, as here, the defendant has “chose[n] to create more victims by becoming an abuser himself.” *See Hines v. State*, 856 N.E.2d 1275, 1283 (Ind. Ct. App. 2006), *trans. denied*. We therefore find no abuse of discretion in failing to consider Waters’ troubled childhood as a mitigating circumstance.

b. *Inappropriate sentence*

Waters also asserts that his sentence is inappropriate. We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). It is the defendant's burden to "persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." *Anglemyer*, 868 N.E.2d at 494 (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

In determining whether a sentence is inappropriate, the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Childress*, 848 N.E.2d at 1081. The advisory sentence for a class C felony is four years. I.C. § 35-50-2-6. The potential maximum sentence is eight years. *Id.* Here, the trial court sentenced Waters to eight years on each count, to be served consecutively, for a total sentence of sixteen years.

Regarding the nature of Waters' offenses, he molested two ten-year old boys while they were in his care. He admitted that he specifically preyed on "boys with no father who needed 'extra love'" (App. 120). He further admitted to molesting the boys multiple times.

As to Waters' character, he admitted to investigators that he had molested other children, including his own son and nephew. He committed these crimes despite having been a victim himself. Given these facts, we are not persuaded that his sentence is inappropriate.

Affirmed.

BAILEY, J., and ROBB, J., concur.