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IN THE
COURT OF APPEALS OF INDIANA

PHILLIP J. JESSUP,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 03A01-0806-CR-299
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BARTHOLOMEW CIRCUIT COURT
The Honorable Stephen R. Heimann, Judge
Cause Nos. 03C01-0112-CF-1692
03C01-0112-DF-1693

APRIL 27, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Defendant-Appellant Phillip J. Jessup appeals the sentence he received following his plea of guilty to child molesting, a Class C felony, Ind. Code § 35-42-4-3; sexual misconduct with a minor, a Class C felony, Ind. Code § 35-42-4-9; failure to register as a sex offender, a Class D felony, Ind. Code § 5-2-12-9[1]; and being a repeat sexual offender, Ind. Code § 35-50-2-14.

We affirm.

Jessup presents one issue for our review which we restate as two:

I. Whether the trial court abused its discretion in sentencing Jessup.

II. Whether Jessup's sentence is inappropriate.

In February 2000, Jessup was charged with child molesting as a Class C felony, sexual battery as a Class D felony, and sexual misconduct with a minor as a Class C felony. Subsequently, in April 2000, he was charged with the additional offenses of child molesting as a Class C felony, failure to register as a sex offender as a Class D felony, and being a repeat sexual offender. Finally, in May 2001, Jessup was charged with child molesting as a Class A felony. In 2002, Jessup pleaded guilty to one count of child molesting as a Class C felony, sexual misconduct with a minor, failure to register as a sexual offender, and to being a repeat sexual offender. The trial court sentenced him to eight years on the child molesting conviction, eight years on the conviction of sexual misconduct with a minor, and three years for his failure to register as a sexual offender,

[1] This statute has been repealed and is now recodified at Ind. Code § 11-8-8-17.

with the terms to run consecutively. The trial court enhanced Jessup's sentence by four years due to his status as a repeat sexual offender. Several years later, in 2008, Jessup filed a petition for permission to file a belated notice of appeal, which the trial court granted. Jessup then filed his belated notice of appeal on June 23, 2008.[2]

We first note that on April 25, 2005, statutory amendments took effect whereby the state legislature amended the sentencing scheme to provide for "advisory" sentences rather than "presumptive" sentences. These amendments constitute a substantive change in a penal statute and, therefore, may not be applied retroactively. *See Combs v. State*, 851 N.E.2d 1053, 1066 n.8 (Ind. Ct. App. 2006), *trans. denied*. Jessup committed these offenses in 2000, and then pleaded guilty and was sentenced in 2002, all prior to the effective date of the legislature's amendments to our statutory scheme for felony sentencing. We are required to apply the statutes that were in effect at the time of commission of these offenses. Thus, in the present case, we are required to apply the "presumptive" sentencing scheme and the applicable case law.

We turn now to Jessup's argument regarding the discretion of the trial court. He first contends that the trial court abused its discretion when it sentenced him to an aggregate sentence of twenty-three (23) years. Particularly, Jessup contends that the trial

[2] A footnote in the trial court's order granting Jessup permission to file a belated appeal stated that Jessup was to be released from prison on August 28, 2008. Based upon the trial court's footnote and other information available to the Court at that time, the Court issued an order to show cause on February 20, 2009, why this appeal should not be dismissed because it appeared to be moot. Although Jessup failed to respond to the order to show cause, the Court discharged the order on March 25, 2009, because we gained information that now leads us to believe that Jessup is not due to be released from the IDOC until October 2009. This being the case, Jessup's appeal would not be moot.

court did not properly consider the letter he wrote expressing his remorse, his cooperation with the probation department, and his medical history. In addition, Jessup asserts that the trial court used an improper aggravator, specifically the aggravator of position of trust.

Sentencing is a determination within the sound discretion of the trial court, and we will not reverse the trial court's decision absent an abuse of discretion. *Allen v. State*, 722 N.E.2d 1246, 1250 (Ind. Ct. App. 2000). An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances of the case. *Groves v. State*, 823 N.E.2d 1229, 1231 (Ind. Ct. App. 2005). The broad discretion of the trial court includes whether to increase the presumptive sentence, to impose consecutive sentences, or both. *Jones v. State*, 807 N.E.2d 58, 68-69 (Ind. Ct. App. 2004), *trans. denied*.

With respect to mitigating factors, it is within a trial court's discretion to determine both the existence and the weight of a significant mitigating circumstance. *Allen*, 722 N.E.2d at 1251. Given this discretion, only when there is substantial evidence in the record of significant mitigating circumstances will we conclude that the sentencing court has abused its discretion by overlooking a mitigating circumstance. *Id*. Although the court must consider evidence of mitigating factors presented by a defendant, it is neither required to find that any mitigating circumstances actually exist, nor is it obligated to explain why it has found that certain circumstances are not sufficiently

mitigating. *Id*. at 1252. Additionally, the court is not compelled to credit mitigating factors in the same manner as would the defendant. *Id*.

Jessup alleges that the court erroneously rejected as a mitigating factor the letter he wrote expressing his remorse. On appeal, a trial court's determination of a defendant's remorse is similar to its determination of credibility: without evidence of some impermissible consideration by the trial court, we accept its determination. *Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002). The trial court, having the ability to observe the defendant and listen to the tenor of his voice, is in the best position to judge the sincerity of a defendant's remorseful statements. *Corralez v. State*, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004).

At Jessup's sentencing hearing, defense counsel introduced a letter Jessup wrote that expressed remorse for his actions. At the time the letter was offered as an exhibit, the trial court explained to Jessup that he had a right to testify and that, although the court would take the letter into account, it would be difficult for the court to ascertain the level of Jessup's sincerity from merely reading words on a page. (Transcript of Sentencing Hearing, pp. 46-47). Jessup declined to testify. Subsequently, in pronouncing sentence, the trial court explained to Jessup that it could not find his remorse as a mitigating factor. The court stated, "As I pointed out to you, paper is very compliant. People can write on it whatever they want. It's difficult to judge your credibility or sincerity as a result of some document." (Tr. of Sentencing Hearing, pp. 58-59). As the trial court succinctly stated, it was not able to detect the sincerity of Jessup's expressed remorse from a piece

of paper upon which can be written anything, whether truly felt by the author or not. Therefore, absent impermissible considerations by the trial court, we find no error.

Another proffered mitigator that Jessup claims the trial court overlooked is his cooperation with the probation department in the preparation of his presentence report. Although we agree that defendants should cooperate with the preparation of their presentence report, we are not convinced that this factor should carry any significant mitigating weight. Further, Jessup directs us to no case law and provides no argument to support his assertion. An allegation that the trial court failed to identify or find a mitigating circumstance requires the defendant on appeal to establish that the mitigating evidence is both significant *and* clearly supported by the record. *Powell v. State*, 751 N.E.2d 311, 315 (Ind. Ct. App. 2001) (emphasis added). Jessup has failed to do this, and, thus, his argument on this issue fails.

Jessup also avers that the trial court did not properly consider his medical history, which contains assertions that he was a victim of abuse. In response to this proffered mitigator, the court concluded:

> You are 39 years old and you blame the fact that you have been molesting children for the last 19 years on the fact that you assert at this point that you were molested as a child yourself. But you're 39 years old. You've had the opportunity to deal with this for a long period of time and you failed to take that opportunity. So I do not find it a mitigator at this point in your life…whether you were or were not molested as a child, I do not find that to be a mitigator at this point in your life.

(Tr. of Sentencing Hearing, p. 58). Obviously, the court considered Jessup's alleged history but did not find it significantly mitigating. A sentencing court need not agree

with the defendant as to the weight or value to be given to proffered mitigating facts. *Bostick v. State*, 804 N.E.2d 218, 225 (Ind. Ct. App. 2004). Indeed, a sentencing court is under no obligation to find mitigating factors at all. *Id*. We find no abuse of discretion.

In addition, Jessup claims that the aggravator of position of trust with his victims is improper. In using this aggravator, the trial court stated Jessup was in a position of trust with some of the children because he was "an adult with some authority over them" merely because he was residing in the home where these children were being babysat. (Tr. of Sentencing Hearing, p. 55). Although being in a position of trust with the victim has been considered a valid aggravating circumstance, the cases using this aggravator indicate that the relationship between the perpetrator and the victim have usually been closer and more involved than that between Jessup and his victims in this case. *See Marshall v. State*, 643 N.E.2d 957 (Ind. Ct. App. 1994) (defendant was deputy town marshal who, while counseling teenage girl for drug and alcohol problem, sexually molested her); *see also Martin v. State*, 535 N.E.2d 493 (Ind. 1989) (defendant was live-in boyfriend who beat girlfriend's son to death while babysitting).

Here, Jessup was not in a position of trust with these children as that term has been used in previous cases. Jessup was not in charge of the children but was staying in the home of the people who were babysitting the children. Thus, although not a complete stranger to these children, Jessup was not in such a position as would warrant consideration as an aggravating circumstance. *See, e.g.*, *Edgecomb v. State*, 673 N.E.2d 1185, 1198 (Ind. 1996) (finding that trial court erred by using "position of trust" as

aggravating factor where defendant was merely neighbor who occasionally borrowed things and casually conversed with victim).

Nevertheless, when a trial court improperly applies an aggravator but other valid aggravating circumstances exist, a sentence enhancement may still be upheld. *Hatchett v. State*, 740 N.E.2d 920, 929 (Ind. Ct. App. 2000), *trans. denied*. Here, the trial court found six additional aggravating circumstances, none of which Jessup challenges on appeal. Therefore, although we determine this aggravator to have been used in error, there exist other, sufficient aggravators to support the enhancement of Jessup's sentence.

Finally, we address Jessup's contention that his sentence is inappropriate.[3] We have the authority to revise a sentence if, after due consideration of the trial court's decision, we determine that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). A defendant bears the burden of persuading the appellate court that his or her sentence has met the inappropriateness standard of review. *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007).

Under the heading of "nature of the offense," the presumptive sentence is the starting point in our consideration of the appropriate sentence for the crime committed.

[3] At the time of Jessup's sentencing in 2002, Indiana Appellate Rule 7(B) provided that a sentence could be revised upon appellate review if the sentence was "manifestly unreasonable in light of the nature of the offense and the character of the offender." Effective January 1, 2003, Rule 7(B) was amended to provide that a sentence could be revised if the reviewing court finds the sentence to be "inappropriate in light of the nature of the offense and the character of the offender." Because the rule is directed to the reviewing court, the amendment is applicable to review after January 1, 2003, even when the sentence was imposed prior to that date. *See Polk v. State*, 783 N.E.2d 1253, 1260 (Ind. Ct. App. 2003), *trans. denied*.

Hildebrandt v. State, 770 N.E.2d 355, 361 (Ind. Ct. App. 2002), *trans. denied*. Jessup was convicted of two Class C felonies and a Class D felony. At the time he was sentenced, the presumptive term for a Class C felony was four years, with a maximum sentence of eight years and a minimum sentence of two years. *See* Ind. Code § 35-50-2-6. A Class D felony carried a presumptive term of 1 1/2 years, with a maximum sentence of three years and a minimum sentence of six months. *See* Ind. Code § 35-50-2-7. The court imposed eight years for each Class C felony conviction and three years for the Class D felony conviction, to be served consecutively for an aggregate sentence of nineteen years. Also, Jessup was sentenced to four additional years for his adjudication as a repeat sexual offender. *See* Ind. Code § 35-50-2-14.

With regard to Jessup's character, we note, as did the trial court, that Jessup is not a first-time offender. He admitted molesting multiple victims, with molestations dating as far back as 1983. Moreover, after being released from prison where he served time for molestation charges, he was allowed to move in with his brother's family. Jessup admitted that once there, he began molesting his nephew. Appellant's Appendix at 522. The charges to which Jessup pleaded guilty in the present case involve a boy who was 10 and a girl who was 14 and had been diagnosed as "moderately mentally handicapped." Appellant's App. at 524. In addition, Jessup failed to register as a sex offender as required by state law. Thus, the nature of Jessup's character is revealed in his molestation of numerous children for many years and in several counties of this state. He has demonstrated his inability or unwillingness to learn from his prior incarceration for

similar charges and conform his actions to the letter of the law. In light of Jessup's character and the consequences of his actions, we conclude that he has not carried his burden of persuading this Court that his sentence meets the inappropriateness standard of review. *See Anglemyer*, 868 N.E.2d at 494.

Based upon the foregoing discussion and authorities, we conclude that the trial court did not err by finding that Jessup's letter indicating his remorse, his cooperation with the probation department, and his medical history were not mitigating circumstances. In addition, although the trial court improperly found as aggravating the position of trust held by Jessup, the error was harmless because there exist other valid aggravators. Finally, we conclude that, based upon the nature of the offenses and the character of the offender, Jessup's sentence is not inappropriate.

Affirmed.

CRONE, J., and BRADFORD, J., concur.