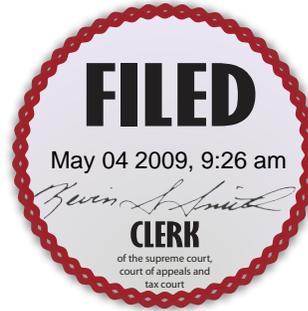


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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GARY D. WILSON, )  
 )  
 Appellant-Defendant, )  
 )  
 vs. ) No. 79A05-0807-CR-429  
 )  
 STATE OF INDIANA, )  
 )  
 Appellee-Plaintiff. )

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APPEAL FROM THE TIPPECANOE CIRCUIT COURT  
The Honorable Donald L. Daniel, Judge  
Cause No. 79C01-0507-FB-17

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**May 4, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

## Case Summary and Issues

Following a jury trial, Gary Wilson was convicted of three counts of incest, Class B felonies, three counts of sexual misconduct with a minor, Class B felonies, and two counts of sexual misconduct with a minor, Class C felonies. He was sentenced to an aggregate term of sixty years with five years suspended. On appeal, Wilson raises two issues: 1) whether the trial court erred in denying his motion to dismiss for the State's alleged violation of Indiana Criminal Rule 4(C); and 2) whether his sentence is inappropriate in light of his character and the nature of his offenses. Concluding that the trial court did not err in denying Wilson's motion to dismiss and that his sentence is not inappropriate, we affirm.

## Facts and Procedural History

On July 6, 2005, Wilson had sexual contact with D.W., his daughter. Wilson touched D.W. on her breasts and vagina above and under her clothing. Wilson also kissed her legs and vagina with his lips and tongue. He admitted to kissing D.W.'s legs and vagina with his lips and tongue on two additional days in the week and a half before the July 6 incident. D.W. was fourteen years old at the time.

Because it is pertinent to our Criminal Rule 4 analysis, the case chronology is set forth in detail below.

On July 13, 2005,<sup>1</sup> the State filed a thirteen-count information against Wilson. On July 14, 2005, an initial hearing was held. Jury trial was set for October 26, 2005.

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<sup>1</sup> Most of the motions and entries detailed here were not included in the appendix. Therefore, we rely primarily on the Chronological Case Summary ("CCS"). Where the order date and the CCS entry date differ, we have used the order date.

On October 2, 2005, the trial court reset the jury trial for February 1, 2006. No reason for the rescheduled trial date is apparent from the record.

On January 13, 2006, Wilson filed a motion to continue the trial. The trial court reset the jury trial for March 7, 2006.

On January 27, 2006, by agreement of the parties, the jury trial date was vacated and the case was set for a guilty plea hearing on March 10, 2006. The plea agreement apparently fell through, and on February 24, 2006, the trial court reset the case for jury trial on June 13, 2006.

On June 2, 2006, the State requested a continuance, which was granted over Wilson's objection. The case was reset for jury trial on August 2, 2006.

On July 28, 2006, the trial court continued the August 2 jury trial due to court congestion. The case was reset for jury trial on October 3, 2006.

On September 20, 2006, the State moved for a continuance. The case was reset for jury trial on December 5, 2006.

On November 3, 2006, the State moved for a continuance. The case was reset for jury trial on December 12, 2006.

On December 1, 2006, the trial court continued the December 12 jury trial due to court congestion. The case was reset for jury trial on February 6, 2007.

On February 1, 2007, Wilson filed a notice of intent to interpose the defense of insanity. The trial court reset the case for jury trial on March 27, 2007. The CCS entry resetting the case states, "The Court notes that the defendant's motion shows that the defendant understands that said trial date would have to be set aside by virtue of the

granting of [his motion to appoint psychiatrists to examine defendant and report to court].” Appellant’s Appendix at 10.

On March 20, 2007, the State moved to continue the March 27 jury trial because of the unavailability of an essential witness and because the reports from the examining psychiatrists were unavailable. The trial court reset the case for jury trial on May 2, 2007, without objection by Wilson.

On April 23, 2007, Wilson filed a motion to dismiss pursuant to Criminal Rule 4(C). The trial court apparently never ruled on the motion.

Jury trial began on March 11, 2008. Wilson was found guilty but mentally ill of three counts of incest, Class B felonies, three counts of sexual misconduct with a minor, Class B felonies, and two counts of sexual misconduct with a minor, Class C felonies. The three incest convictions were merged into the three Class B felony sexual misconduct convictions. Wilson was sentenced to sixteen years for each Class B felony sexual misconduct conviction and six years for each Class C felony sexual misconduct conviction, with all sentences to be served consecutively for an aggregate sentence of sixty years. Fifty-five years of the sentence was to be executed with five years suspended to probation. Wilson now appeals.

### Discussion and Decision

#### I. Indiana Criminal Rule 4(C)

Wilson argues that he was entitled to discharge pursuant to Criminal Rule 4(C) because the State failed to bring him to trial within one year from his arrest. Criminal Rule 4(C) states, in pertinent part:

No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar . . . . Any defendant so held shall, on motion, be discharged.

The rule places an affirmative duty on the State to bring a defendant to trial within one year. Cook v. State, 810 N.E.2d 1064, 1065 (Ind. 2004). However, that time is extended by any delay attributable to the defendant. Id. at 1065-66. The rule also provides for the time to be extended when congestion of the court's calendar so requires. Alter v. State, 860 N.E.2d 874, 877 (Ind. Ct. App. 2007). Our review of a trial court's ruling on a Criminal Rule 4(C) motion is de novo. Kirby v. State, 774 N.E.2d 523, 530 (Ind. Ct. App. 2002), trans. denied.

Wilson calculates that at the time of his motion to dismiss, 429 days not attributable to him or to court congestion had passed. Therefore, based on Criminal Rule 4(C), he argues his motion to dismiss should have been granted. Our calculation leads us to disagree.

The 183 days from July 14, 2005,<sup>2</sup> when Wilson's initial hearing was held, to January 13, 2006, is attributable to the State.<sup>3</sup>

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<sup>2</sup> The information was filed on July 13, 2005. It is not clear from the record when Wilson was arrested, but it is clear that he was in custody at the initial hearing on July 14, 2005. The one-year time period of Criminal Rule 4(C) begins to run on the later of the date the information was filed or the date the defendant was arrested, see Brown v. State, 725 N.E.2d 823, 825 (Ind. 2000). We therefore use the July 14, 2005, date as the date on which the one-year period began to run.

<sup>3</sup> Although trial was originally set for October 26, 2005, and was reset to February 1, 2006, no reason for resetting the trial is apparent from the record. When the record is silent as to the reason, the delay is not attributable to the defendant. Havvard v. State, 703 N.E.2d 1118, 1121 (Ind. Ct. App. 1999).

On January 13, 2006, Wilson filed a motion to continue and the case was reset for March 7, 2006. The delay attributable to the defendant runs from the time a motion for continuance is filed through the date upon which the new trial is rescheduled. Henderson v. State, 647 N.E.2d 7, 13 (Ind. Ct. App. 1995), trans. denied.

Before the March 7, 2006, trial date occurred, a guilty plea hearing was set. The guilty plea apparently fell through, and the trial was reset for June 13, 2006. The time between March 7, 2006, and June 13, 2006, is also attributable to Wilson. See Miller v. State, 650 N.E.2d 326, 329 (Ind. Ct. App. 1995) (where defendant informed trial court that the parties had reached and entered into a plea agreement, defendant's action caused a delay in scheduling his trial and the delay is attributable to defendant), trans. denied.

On June 2, 2006, the State requested a continuance and trial was reset to August 2, 2006. The fifty days between the previous June 13, 2006, trial date and the new August 2, 2006, trial date are attributable to the State, for a total of 233 days of the 365 allowed.

Trial was reset due to court congestion from August 2, 2006, to October 3, 2006. A finding of court congestion tolls the running of the Criminal Rule 4(C) clock. Logan v. State, 836 N.E.2d 467, 475 (Ind. Ct. App. 2005), trans. denied. Wilson makes no argument that the trial court's finding of court congestion was incorrect. See Alter, 860 N.E.2d at 877 (trial court's finding of congestion is presumed valid and need not be contemporaneously explained or documented by the court).

The State then moved for two separate continuances and the trial was ultimately reset for December 12, 2006. The seventy days between the October 3, 2006, trial date

and the December 12, 2006, trial date are attributable to the State, for a total of 303 days toward the 365 days allowed by Criminal Rule 4(C).

The December 12, 2006, trial date was continued to February 6, 2007, due to court congestion, tolling the time period. On February 1, 2007, Wilson filed a notice of intent to interpose an insanity defense, and the jury trial was reset for March 27, 2007. Due to the need to conduct psychological examinations to support the insanity defense, the time from February 1, 2007, to March 27, 2007, is attributable to Wilson. See Ferguson v. State, 594 N.E.2d 790, 792 (Ind. 1992) (“Any delay occasioned by a request for psychiatric examination is . . . chargeable to a defendant.”).

Subsequently, on March 21, 2007, the State moved to continue the March 27, 2007, trial because reports from the examining psychiatrists were unavailable. The continuance was granted and the jury was reset for May 2, 2007. The time from March 27, 2007, to May 2, 2007, is attributable to Wilson because it related to his insanity defense.

Before the May 2, 2007, trial date, Wilson filed his motion to dismiss under Criminal Rule 4(C). At that time, the State had only used 303 of the allowable 365 days in which to bring Wilson to trial. Therefore, the trial court properly denied Wilson’s motion to dismiss.

## II. Inappropriate Sentence

An appellate court “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Ind.

Appellate Rule 7(B). When determining whether a sentence is inappropriate, we recognize that the advisory sentence “is the starting point the Legislature has selected as an appropriate sentence for the crime committed.” Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). “[A] defendant must persuade the appellate court that his or her sentence has met this inappropriateness standard of review.” Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

A Class B felony conviction is punishable by a sentence between six and twenty years, with an advisory sentence of ten years. Ind. Code § 35-50-2-5. A Class C felony conviction is punishable by a sentence between two and eight years, with an advisory sentence of four years. Ind. Code § 35-50-2-6. Wilson was given an aggravated sentence for all three of his Class B felony convictions – sixteen years instead of the advisory sentence of ten years – and both of his Class C felony convictions – six years instead of the advisory sentence of four years.

With regard to the nature of the offenses, Wilson committed oral sex upon his daughter on three separate occasions, and fondled or touched his daughter inappropriately on two others. The trial court noted that Wilson’s position of trust with respect to his daughter is an aggravating factor that would justify a sentence greater than the advisory and we agree. Although this factor alone would not justify the imposition of a sentence twenty-two years above the advisory for Wilson’s five convictions, it is a significant aggravating factor.

Looking to Wilson’s character, there are several important factors to consider: 1) Wilson has an extensive criminal history; 2) he has failed to rehabilitate his conduct to be

in accord with the law; 3) he has a long history of drug and alcohol abuse; and 4) on all counts, Wilson was found guilty but mentally ill.

Before the instant case, Wilson had been convicted of six misdemeanors, five felonies, been designated an habitual substance offender three times, and been designated an habitual traffic offender once. All of these crimes involved operating a motor vehicle while intoxicated or operating a motor vehicle when his driving privileges were suspended. His criminal record alone is not, therefore, entitled to significant consideration because it is unrelated in gravity and nature to the instant offenses. See Rutherford v. State, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007). However, the sheer number of Wilson's prior convictions, coupled with his behavior following those convictions reflects negatively on his character. On many occasions, Wilson was given more lenient sentences than incarceration, such as home detention or probation. However, Wilson failed to use these opportunities to rehabilitate himself and conform his conduct to the law, often violating the conditions of his alternate placement. At the time of the instant offenses, Wilson was on bond for another case, and violated the terms of his bond by committing additional crimes. Wilson also has a long history of self-reported drug abuse, including the use of alcohol, marijuana, hashish, cocaine, amphetamines, prescription medication, and other drugs on a regular basis. Wilson's inability or unwillingness to act in accordance with the law, in addition to his long history of multi-drug and alcohol abuse, reflects poorly on his character.

Wilson argues that his aggravated sentences are inappropriate because of the jury's finding that he was guilty but mentally ill. Our supreme court has recognized that

a defendant found guilty but mentally ill “is not automatically entitled to any particular credit or deduction from his otherwise aggravated sentence simply by virtue of being mentally ill.” Weeks v. State, 697 N.E.2d 28, 30 (Ind. 1998) (citation and internal quotations omitted). Indeed, the statute outlining a finding of guilty but mentally ill provides that “the court shall sentence the defendant in the same manner as a defendant found guilty of the offense.” Ind. Code § 35-36-2-5(a). However, a court should carefully consider what mitigating weight, if any, to give evidence of mental illness, even though it is not required to give it the weight a defendant would. Weeks, 697 N.E.2d at 30. There are several factors that bear on the weight, if any, that should be given to mental illness in sentencing: 1) the extent of the defendant’s inability to control his or her behavior due to the disorder or impairment; 2) overall limitations on functioning, 3) the duration of the mental illness, and 4) the extent of any nexus between the disorder or impairment and the commission of the crime. Id.

In this case, the mitigating weight of Wilson’s mental illness is minimal. Wilson correctly points out that Dr. Martin Abbett and Dr. Zeinab Tobaa both found that he has some mental illnesses that were occurring before he was arrested, including dependent personality disorder, depression and/or distemia, and polysubstance disorder. However, at trial, Dr. Abbett testified that Wilson was able to tell right from wrong at the time he committed the crimes. Dr. Abbett further testified that Wilson “could have kept himself from committing the alleged acts at those times.” Appellant’s App. at 218. Dr. Tobaa testified that she believed Wilson was having a manic episode when she interviewed him and that she assumed this manic behavior had been going on for years. Asked about

Wilson’s sanity at the time the crime was committed, she testified that “during the manic episodes the person is . . . very emotional. The body has very impaired judgment and he can do impulsive things that he might regret later.” Id. at 204. To the extent there is any nexus between Wilson’s mental illness and the commission of these crimes, it counsels this court against a finding that the sentence was inappropriate. The fact that Wilson may succumb to impulses without recognizing the consequences of his actions until after they are complete presents a danger to Wilson and to society. In sum, we cannot say that Wilson has shown that his mental illness impaired him to the point that it would merit significant mitigating weight.

In light of Wilson’s character and the nature of his offenses, and after giving due consideration to the trial court’s decision, we cannot say that Wilson’s sentence is inappropriate.<sup>4</sup>

### Conclusion

Wilson was brought to trial in accord with Criminal Rule 4(C), and the trial court did not err in denying his motion to dismiss. Further, in light of Wilson’s character and the nature of his offenses, his sixty-year sentence is not inappropriate.

Affirmed.

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<sup>4</sup> The dissent believes, based on Indiana Supreme Court cases Monroe v. State, 886 N.E.2d 578 (Ind. 2008) and Smith v. State, 889 N.E.2d 261 (Ind. 2008), that the sentence is inappropriate and should be revised to thirty-two years. In Monroe, an initial sentence of 100 years for five counts of deviate sexual conduct was revised to fifty years. 886 N.E.2d at 581. The defendant therein lived in the child victim’s home and was the father of her half-brother. The court noted the defendant’s insubstantial criminal history, but also stated that “crimes against children are particularly contemptible.” Id. at 580. In Smith, an initial sentence of 120 years for four counts of child molesting was revised to sixty years. 889 N.E.2d at 264. The defendant therein was the victim’s step-father. He had mental health issues and was a self-reported substance abuser, and his criminal history included sex offenses but no convictions in the previous fourteen years. The court called the revision to sixty years “consistent with this Court’s general approach to such matters.” Id. Wilson was convicted of multiple sex offenses committed against his daughter, has a lengthy if unrelated criminal history, is a substance abuser, and suffers from mental illness. Comparing the facts and the resulting sentence in this case to those of Monroe and Smith, we believe that Wilson’s sixty-year sentence is consistent with the outcome in those cases.

CRONE, J., concurs.

BROWN, J., concurs in part and dissents in part with opinion.

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**IN THE  
COURT OF APPEALS OF INDIANA**

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GARY D. WILSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A05-0807-CR-429
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	
	)	

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**Brown, Judge concurring in part and dissenting in part**

I concur with the majority’s conclusion that Wilson was not entitled to discharge under Ind. Criminal Rule 4(C). However, with respect to Wilson’s sentence, I respectfully dissent. I conclude that Wilson’s sixty-year sentence is inappropriate in light of the nature of the offense and the character of the offender. My decision is based upon the Indiana Supreme Court’s recent holdings in Monroe v. State, 886 N.E.2d 578 (Ind. 2008), and Smith v. State, 889 N.E.2d 261 (Ind. 2008). In Monroe, 886 N.E.2d at 581, the Court reduced a defendant’s consecutive sentences for five counts of child molesting from 100 years to 50 years where the defendant had repeatedly molested one child. Similarly, in Smith, 889 N.E.2d at 264, the Court reduced a defendant’s consecutive sentences for four counts of child molesting from 120 years to 60 years where the defendant had repeatedly molested one victim. The Court reasoned that Smith’s repeated molestation of the victim together with his violation of his position of trust and his infliction of psychological abuse warranted sentencing on one of the child molesting

counts consecutive to one of the other counts, with the remaining terms concurrent. Here, Wilson repeatedly engaged in sexual misconduct with his daughter and received five consecutive sentences. Given Monroe and Smith, I would impose consecutive sentences of sixteen years on two of the B felony convictions and would impose a concurrent sentence of sixteen years on the remaining felony and six years on each of the C felony convictions, resulting in an aggregate sentence of 32 years.

For these reasons, I respectfully concur in part and dissent in part.