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IN THE
COURT OF APPEALS OF INDIANA

DANNY L. HARTLEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 90A02-0810-CR-873
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WELLS CIRCUIT COURT
The Honorable David L. Hanselman, Sr., Judge
Cause No. 90C01-0703-FA-1

May 21, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Danny Hartley appeals his ten-year sentence for Class B felony child molesting. We affirm.

Issues

Hartley raises two issues, which we restate as:

I. whether the trial court abused its discretion in sentencing him; and

II. whether his ten-year sentence is appropriate in light of the nature of the offense and his character.

Facts

On March 7, 2007, the State charged Hartley with Class A felony child molesting. Hartley put the eleven-year-old victim's penis in his mouth.[1] While that charge was pending, the State charged Hartley with Class C felony sexual misconduct with a minor, involving a different victim, and Class B misdemeanor voyeurism in two separate cause numbers. Hartley initially pled not guilty to the child molesting charge. On December 13, 2007, he withdrew his plea of not guilty. The State moved to amend the charging information and reduced the charge to a Class B felony. Hartley then pled guilty to Class B felony child molesting. It seems the probation officer who prepared the pre-sentence investigation report ("PSI") believed that the State informally agreed to dismiss the other pending charges of sexual misconduct with a minor and voyeurism when Hartley pled

[1] According to the police report, it seems the victim may have been only nine and a half or ten when this happened, but was eleven by the time he reported the abuse.

guilty to the child molesting charge.[2] No written plea agreement was completed.[3] During the guilty plea hearing, the prosecutor stated "Right, there are no conditions attached to it. It's not a plea agreement." Guilty Plea Hearing Tr. p. 19.

During the plea hearing, Hartley admitted to deviate sexual conduct with a victim, who was under the age of fourteen, by inserting the victim's penis into his mouth. The trial court held a sentencing hearing on July 8, 2008. Hartley argued that his guilty plea and relatively minor criminal record served as mitigating circumstances and that he was a good candidate for probation. The State argued that statutory aggravators included the victim's age of less than twelve and the significant harm to the victim. The trial court sentenced Hartley to the presumptive term of ten years. This appeal followed.

Analysis

I. Abuse of Discretion

Hartley argues that the trial court abused its discretion by failing to credit his guilty plea and minor criminal history as mitigating factors and using the victim's age as an aggravating factor. The offense occurred between May and August of 2004, prior to the Indiana legislature's change from "presumptive" to "advisory" sentencing terms. Accordingly, we review a trial court's sentencing decision for an abuse of discretion, which occurs when the sentencing decision is clearly against the logic and effect of the

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[2] The PSI notes alongside the sexual misconduct with a minor and voyeurism charges that "case to be dismissed as part of cause 90C01-0703-FA-00001 plea agreement." App. p. 99.

[3] Hartley states on appeal that without a written plea agreement, the record cannot support any suggestion that the reduction of the charge and dismissal of other charges was given in exchange for his plea of guilty. See Ind. Code § 35-35-3-3 (requiring plea agreements to be in writing). During his PSI interview, however, Hartley told the officer that he "pled guilty to get his A felony reduced to a B felony." App. p. 108.

facts and circumstances before the trial court, or the reasonable, probable, and actual deductions to be drawn therefrom. McElroy v. State, 865 N.E.2d 584, 588 (Ind. 2007). Prior to the revisions, when a trial court enhanced a presumptive sentence, it was required to state its reasons for doing so, identifying all significant aggravating and mitigating factors; stating the facts and reasons that led the court to find the existence of each such circumstance; and demonstrating that the trial court evaluated and balanced the aggravating and mitigating factors in determining the sentence. Id. This sentencing statement guards against arbitrary sentences and provides an adequate basis for appellate review. Id. If we find an irregularity in a trial court's sentencing determination, we may remand to the trial court for clarification or new sentencing determination, affirm the sentence if the error is harmless, or reweigh the proper aggravating and mitigating circumstances independently at the appellate level. Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005).

Because the trial court did not enhance the presumptive sentence, it had no obligation to issue a sentencing statement identifying and balancing aggravating and mitigating circumstances. See McElroy, 865 N.E.2d at 588. The trial court, however, did issue a verbal statement, which Hartley argues contains several errors:

> [T]he court is going to make a finding that there are no applicable mitigating circumstances with the exception of perhaps a period of time where there was no history of delinquent or criminal activity that doesn't have some age on it. However, I think that's offset by the fact that after these charges were filed there were additional charges filed of a similar nature, that being voyeurism and sexual misconduct with a minor. And so I think those balance out one another. I do find one aggravating circumstance, a statutory aggravating

> circumstance and that being that the victim was less than 12 years of age, the other one that [the prosecutor] mentioned is number 1 in the aggravating circumstances. I am not going to make a finding on that because it states the harm, injury, loss or damage suffered by the victim of the offense was significant and I think it was significant however, it also says greater than the elements necessary to prove the commission of the offense and I don't think that's true. Another potential part of the sentencing decision is that this matter was an A felony reduced to the benefit of the Defendant to a D [sic] felony and taking those matters all into effect and all into consideration the Court finds that the presumptive term of imprisonment in this matter is appropriate.

Tr. pp. 11-12.

First, Hartley contends the trial court abused its discretion by relying on the victim's age as an aggravator. When the age of the victim constitutes a material element of the crime, then the victim's age may not also constitute an aggravating circumstance to support an enhanced sentence. Kien v. State, 782 N.E.2d 398, 414 (Ind. Ct. App. 2003), trans. denied. A court may consider the particularized factual circumstances of the case to be an aggravating factor and some cases have held that a very young age may constitute such a circumstance. See id. Certain molestation cases have held that for an exceptionally young victim of "tender years" age may be used as an aggravator and element of the crime, but those victims have been much younger than twelve. Buchanan v. State, 767 N.E.2d 967, 971 (Ind. 2002) (approving the use of the age of a five-year-old victim as an aggravator); see also Stewart v. State, 531 N.E.2d 1146, 1151 (Ind. 1988) (finding that use of the three-year-old victim's age as an aggravator was proper); Kien, 782 N.E.2d at 414 (finding that the trial court did not err in considering the five-year-old victim's age an aggravator); Brown v. State, 760 N.E.2d 243, 246 (Ind. Ct. App. 2002)

(recognizing the seven-year-old victim's age as a particularized circumstance in the nature of the crime), trans. denied.

The victim here was at least nine, but younger than twelve years old. The fact that the victim was under fourteen years old was a material element of the offense. See Ind. Code § 35-42-4-3. The victim was not of the "tender years" contemplated by other decisions, nor did the trial court specify that his age represented a particularized circumstance. Therefore, it was improper for the trial court to consider the victim's age as an aggravator. Notably, however, the trial court did not use this improper aggravator to enhance Hartley's sentence.

Even without this aggravator, it is likely the trial court would have imposed the presumptive sentence because it did not put much weight, if any, on Hartley's proffered mitigators. Hartley argues that without a written plea agreement, he received no leniency by pleading guilty and the trial court failed to recognize this mitigator. He also argues that the trial court failed to afford sufficient weight to his lack of criminal history.

Hartley's criminal history only included an arrest for distribution of marijuana. The trial court clearly contemplated Hartley's lack of criminal history, but did not find that mitigator sufficiently strong considering the subsequent charges of voyeurism and Class C felony sexual misconduct with a minor. These charges were apparently dismissed at some point, but the details of the dismissal are not part of the record on appeal, nor is it clear they had been dismissed at the time of sentencing.[4] Hartley argues

[4] The alleged victim in the Class C felony sexual misconduct with a minor charge appeared and read a statement during Hartley's sentencing in the instant offense.

that the trial court's consideration of these alleged subsequent offenses was in error. Hartley concedes that as subsequent arrests, these charges could have been considered in the context of whether he was as risk to commit another offense. See Miller v. State, 709 N.E.2d 48, 49 (Ind. Ct. App. 1999) (explaining that an arrest record is not evidence of criminal history, but it is relevant to the court's assessment of the defendant's character and risk he will commit another crime). Regardless of the trial court's treatment of Hartley's criminal history, it did not use this circumstance as an aggravator to enhance his sentence. The State concedes that it is unclear whether the trial court refused to find Hartley's criminal history as a mitigator, or found it as a mitigator and offset its weight with the subsequent charges. A lack of clarity regarding how the trial court arrived at the low weight of this mitigator does not render the sentencing statement reversible, considering that the trial court only ordered a presumptive sentence.

The trial court did not recognize or give mitigating weight to Hartley's guilty plea and he argues it deserves significant mitigating weight. Although the trial court's statement does not explicitly mention Hartley's guilty plea, the trial court does note that "the matter was an A felony reduced to the benefit of Defendant." Tr. p. 12. Hartley argues that without a written plea agreement, this observation by the trial court is improper. He argues that his guilty plea deserves substantial mitigating weight for saving the State the time and expense of trial. Despite his expression of responsibility and remorse at the sentencing hearing, Hartley's comments in the PSI indicate his original motivation for pleading guilty related to receiving a lesser charge. As pointed out by the trial court at his guilty plea hearing, all that would have been necessary for the State to

convict Hartley of a Class A felony instead of a Class B would be to prove he was at least twenty-one years old at the time of the offense, and he was thirty-five. Still, the trial court should have recognized Hartley's guilty plea as a mitigator. See Cotto, 829 N.E.2d at 526.

Hartley argues that with an improper aggravator and a failure to recognize the guilty plea and give substantial weight to both mitigators, his sentence must be reversed and a lesser sentence imposed. We will not reverse Hartley sentence merely because he contends the mitigating factors deserve more weight than the trial court afforded them. See id. ("It is true that a trial court is not obligated to weigh or credit the mitigating factors in the manner a defendant suggests they should be weighed or credited."). When we cannot say with confidence that the trial court would have imposed the same sentence if it had considered the proper aggravating and mitigating circumstances, we will remand for resentencing. See McCann v. State, 749 N.E.2d 1116, 1121 (Ind. 2001). That is not the case here. We are confident that the trial court's improper consideration of the age of the victim as an aggravator did not affect the sentence it imposed. Nor does the trial court's failure to expressly mention the guilty plea mean it entirely failed to be cognizant of this mitigator.

When reviewing a sentence under the presumptive sentencing scheme, it is within our province to reweigh the proper aggravators and mitigators independently. See Cotto, 829 N.E.2d at 525. Eliminating the victim's age as aggravator and accepting Hartley's lack of criminal history and guilty plea as proper mitigators, we still find that there is not

sufficient weight to warrant a reduction to the presumptive sentence. We conclude the trial court did not abuse its discretion in ordering the presumptive sentence.

II. Appropriateness

Hartley argues that the ten-year sentence is inappropriate considering the nature of the offense and his character. See Ind. Appellate Rule 7(B). Although Indiana Appellate Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id.

As to the nature of the offense, Hartley contends that no evidence was presented that his victim suffered an "unusual impact other than what is expected from an offense of this type." Appellant's Br. p. 12. Ironically, Hartley claims his own molestation at a young age still affects his life, causing him to live a life of drug abuse and become a perpetrator himself. It seems unfair that Hartley can somehow discount the harm brought to his own victim, while at the same time, claim molestation still affects his adult life in so many negative ways. Though the nature of this offense may not be extraordinary, nothing about it merits a reduction to the presumptive ten-year term.

During his sentencing hearing, Hartley explained that "I know it's not right what I done, but it wasn't right what was done to me either, so—That's about all I can say you know, I just apologize and I truly do, I know it was wrong." Tr. p. 6. Blaming his own

bad acts on his past does not boost our assessment of Hartley's character. On appeal, he contends that his efforts at drug abuse and sex offender rehabilitation should account for a reduction to this sentence. Although we commend his efforts to overcome his addictions and deviate behavior by taking advantage of programs offered while incarcerated, these efforts do not amount to a viable reason to reduce his sentence. Hartley has not convinced us that his character and the nature of this offense warrant a reconsideration of his sentence. The ten-year sentence is appropriate.

Conclusion

Even though the trial court improperly considered the victim's age as an aggravator and did not explicitly acknowledge the guilty plea as a mitigator, upon reweighing the proper aggravators and mitigators we conclude that the trial court did not abuse its discretion in ordering the presumptive sentence. The presumptive ten-year sentence is appropriate in light of the nature of the offense and the defendant's character. We affirm.

Affirmed.

MAY, J., concurs.

BAKER, C.J., dissents with opinion.

IN THE
COURT OF APPEALS OF INDIANA

DANNY L. HARTLEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 90A02-0810-CR-873
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

BAKER, Chief Judge, dissenting.

I respectfully dissent. I agree with the majority that the trial court abused its discretion by considering the victim's age to be an aggravator and failing to consider Hartley's guilty plea without the benefit of a plea agreement to be a mitigator. Turning to Rule 7(B), I observe that while Hartley's offense was certainly heinous and worthy of punishment, nothing in the record leads me to conclude that the nature of his offense was worse than that contemplated by the legislature in setting forth the penalties for this crime. See Anglemyer v. State, 868 N.E.2d 482, 494 (Ind. 2007) (holding that "regarding the nature of the offense, the advisory sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed").

Turning to Hartley's character, he pleaded guilty without the benefit of a plea agreement. In other words, he reaped little or no benefit from this plea, and he saved the State the time and expense of a trial, getting nothing in return.[5] Moreover, he has no prior convictions. He has been arrested for distribution of marijuana, but was evidently not convicted of that offense. Subsequent to his arrest for the offense at issue herein, he was charged with voyeurism and class C felony sexual misconduct with a minor—but those charges appear to have been dismissed. At the least, the record does not show that he was convicted of those crimes. Under these circumstances, I can only conclude that the advisory ten-year sentence imposed by the trial court is inappropriate in light of the nature of the offense and Hartley's character. Therefore, I would reverse and remand with instructions to revise Hartley's sentence to seven years imprisonment.

[5] The trial court opined, and the majority states, that the State reduced the charge from a class A felony to a class B felony in exchange for Hartley's guilty plea. Inasmuch as there was no plea agreement, however, I do not believe it proper to reach this conclusion. Even if the parties had reached an informal agreement, nothing bound the State to keep its bargain and nothing in the nature of a contract was executed. Therefore, I believe the only proper conclusion to reach is that Hartley reaped no benefit from his guilty plea.