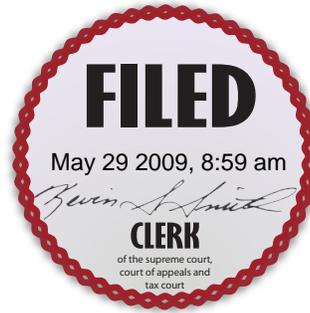


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ALBERT L. MARSHALL,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 90A02-0902-CR-160

APPEAL FROM THE WELLS CIRCUIT COURT
The Honorable David L. Hanselman, Sr., Judge
Cause No. 90C01-0409-FA-0005

May 29, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Albert Marshall appeals his sentences for sexual misconduct with a minor as a class C felony¹ and child seduction as a class D felony.² Marshall raises several issues, which we restate as:

- I. Whether the trial court was biased in sentencing Marshall;
- II. Whether the trial court abused its discretion in sentencing Marshall;
and
- III. Whether the sentences are inappropriate in light of the nature of the offenses and the character of the offender.

We affirm.

In June of 1999, when M.S., Marshall's stepdaughter, was at least fourteen years of age but less than sixteen years of age, Marshall performed or submitted to the fondling or touching of either M.S. or Marshall with the intent to arouse or satisfy the sexual desires of either M.S. or himself. In November 2000, Marshall engaged in sexual intercourse with M.S. At that time, M.S. was at least sixteen years of age but less than eighteen years of age. Marshall continued to engage in sexual activity with M.S. over a period of a year, and as a result, Marshall fathered a child with M.S. In 2005, M.S. died in an automobile accident.

In September 2004, the State charged Marshall with: Count I, child seduction as a class D felony with respect to M.S.; Count II, sexual misconduct with a minor as a class

¹ Ind. Code § 35-42-4-9 (2004) (subsequently amended by Pub. L. No. 216-2007, § 45 (eff. July 1, 2007)).

² Ind. Code § 35-42-4-7 (2004) (subsequently amended by Pub. L. No. 1-2005, § 228 (eff. July 1, 2005)).

B felony with respect to M.S.; Count III, child molesting as a class A felony with respect to C.S., the younger sister of M.S.; and Count IV, sexual misconduct with a minor as a class B felony with respect to C.S. On March 15, 2007, the trial court held a guilty plea hearing. At the hearing, the State reduced the count of sexual misconduct with a minor with respect to M.S. from a class B felony to a class C felony, and Marshall pled guilty to the reduced count of sexual misconduct with a minor as a class C felony and to the count of child seduction as a class D felony, each of which were related to M.S. The State dismissed the counts of child molesting as a class A felony and sexual misconduct with a minor as a class B felony, each of which were related to C.S.

At sentencing, the trial court found the following aggravating factors: (1) Marshall had three prior felony convictions and three prior misdemeanor convictions; (2) the severity of the offenses committed by Marshall; (3) Marshall was in a position of trust and caregiver; and (4) the events took place over a long period of time.³ The trial court sentenced Marshall to eight years for the sexual misconduct with a minor conviction and three years for the child seduction conviction, and ordered that the sentences be served concurrently.

I.

The first issue is whether the trial court judge was biased in sentencing Marshall.

The law presumes that a judge is unbiased and unprejudiced. James v. State, 716 N.E.2d

³ Marshall failed to include a copy of the presentence investigation report in the appellate record. Thus, the information before us comes solely from the trial court's statements and the materials provided in the Appellant's Appendix submitted by Marshall. See Waldon v. State, 829 N.E.2d 168, 181 n.12 (Ind. Ct. App. 2005) (Court relied on statements of counsel where defendant failed to include a copy of his presentence investigation report in his appellant's appendix), reh'g denied, trans. denied.

935, 940 (Ind. 1999). When a judge’s impartiality might reasonably be questioned because of personal bias against a defendant or counsel, a judge shall disqualify himself or herself from a proceeding. Id.; Ind. Judicial Conduct Canon 2.11(A). The test for determining whether a judge should recuse himself or herself is “whether an objective person, knowledgeable of all the circumstances, would have a reasonable basis for doubting the judge’s impartiality.” James, 716 N.E.2d at 940. The record must show actual bias and prejudice against the defendant before a conviction will be reversed on the ground that the trial judge should have been disqualified. Flowers v. State, 738 N.E.2d 1051, 1061 (Ind. 2000), reh’g denied. Furthermore, a “defendant must show that the trial judge’s action and demeanor crossed the barrier of impartiality and prejudiced the defendant’s case.” Id. An adverse ruling alone is insufficient to show bias or prejudice. Id. at 1060 n.4.

Marshall argues that the trial judge was biased based upon his questioning of one of the witnesses—Marshall’s mother-in-law—at the sentencing hearing. After Marshall’s mother-in-law testified that Marshall was “a very kind, nice person, very caring,” the trial judge asked her: “How do you reconcile being a kind, nice person with [the] criminal acts [] Mr. Albert Marshall committed?” Sentencing Transcript at 6. Before the witness could fully respond, the sentencing judge again asked: “How do you reconcile those two things?” Id. Marshall’s mother-in-law replied: “Well I though [sic], you know I forgave him. I have prayed for it and I forgave him. You know I have to go on with my life. You know what he did was wrong, but I have forgiven him. I’ll never forget, but I’ll

forgive.” Id. Marshall argues that this exchange shows that his sentence was enhanced because of the sentencing judge’s emotions and personal feelings. We disagree. While the judge interrupted the witness, the record does not indicate that his actions or demeanor crossed the barrier of impartiality. Marshall has not established that the trial court judge enhanced Marshall’s sentence for inappropriate reasons. See, e.g., Timberlake v. State, 690 N.E.2d 243, 256-257 (Ind. 1997) (declining to find trial judge demonstrated partiality even where trial court’s remarks displayed a degree of impatience), cert. denied 525 U.S. 1073, 119 S. Ct. 808 (1999).

II.

The next issue is whether the trial court abused its discretion in sentencing Marshall. Marshall’s offenses were committed prior to the April 25, 2005 revisions to the sentencing statutes. The Indiana Supreme Court has held that we apply the sentencing scheme in effect at the time of the defendant’s offense. See Robertson v. State, 871 N.E.2d 280, 286 (Ind. 2007) (“Although Robertson was sentenced after the amendments to Indiana’s sentencing scheme, his offense occurred before the amendments were effective so the pre-Blakely sentencing scheme applies to Robertson’s sentence.”); Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007). Consequently, the pre-April 25, 2005 presumptive sentencing scheme applies to Marshall’s two sentences.

Under the pre-April 25, 2005 sentencing statutes, sentencing decisions rest within the discretion of the trial court and are reviewed on appeal only for an abuse of discretion. Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002). An abuse of discretion

occurs if “the decision is clearly against the logic and effect of the facts and circumstances” before the court. Pierce v. State, 705 N.E.2d 173, 175 (Ind. 1998) (citation omitted). In order for a trial court to impose an enhanced sentence, it must: (1) identify the significant aggravating factors and mitigating factors; (2) relate the specific facts and reasons that the court found to those aggravators and mitigators; and (3) demonstrate that the court has balanced the aggravators with the mitigators. Veal v. State, 784 N.E.2d 490, 494 (Ind. 2003).

Marshall argues that the trial court failed to consider certain proposed mitigators.⁴ Specifically, Marshall argues that the trial court overlooked: (1) his guilty plea; (2) the undue hardship on his family caused by his incarceration; (3) the fact that he was gainfully employed; and (4) the fact that he was deemed a low risk to reoffend by a sex offense therapist.

“The finding of mitigating factors is not mandatory and rests within the discretion of the trial court.” Ellis v. State, 736 N.E.2d 731, 736 (Ind. 2000). The trial court is not obligated to accept the defendant’s arguments as to what constitutes a mitigating factor. Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002), trans. denied. “Nor is the court required to give the same weight to proffered mitigating factors as the defendant does.” Id. Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Sherwood v. State, 749 N.E.2d 36, 38 (Ind. 2001). However,

⁴ Marshall also seems to argue that the trial court enhanced his sentence based solely upon a prior conviction. However, the trial court recognized four aggravators. Also, as the trial court noted, Marshall had three prior felony convictions and three prior misdemeanor convictions.

the trial court may “not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them.” Id. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999).

With respect to the trial court’s consideration of Marshall’s guilty plea, the Indiana Supreme Court has held that “a defendant who pleads guilty deserves ‘some’ mitigating weight be given to the plea in return.” Anglemyer v. State, 875 N.E.2d 218, 220 (Ind. 2007) (quoting McElroy v. State, 865 N.E.2d 584, 591 (Ind. 2007)). However, “an allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is not only supported by the record but also that the mitigating evidence is significant.” Id. at 220-221. The significance of a guilty plea as a mitigating factor varies from case to case. Id. at 221. “For example, a guilty plea may not be significantly mitigating when it does not demonstrate the defendant’s acceptance of responsibility, . . . or when the defendant receives a substantial benefit in return for the plea.” Id. (citing Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999)).

Here, Marshall pled guilty to one count of sexual misconduct with a minor and one count of child seduction, and in exchange the State dismissed one count of sexual misconduct with a minor and one count of child molesting. The State also reduced the

count of sexual misconduct with a minor to which Marshall pled guilty from a class B felony to a class C felony. The trial court acknowledged at the sentencing hearing that Marshall pled guilty to two criminal acts. However, the trial court also noted that Marshall received a “great deal of leniency from the State” because the State reduced one of its charges and dismissed two others. Sentencing Transcript at 17-18. Indeed, if the State had not reduced the charge for sexual misconduct with a minor to which Marshall pled guilty from a class B felony to a class C felony, the trial court could have imposed a maximum sentence of twenty years for the class B felony. Also, if Marshall did not accept the State’s plea agreement and was found guilty of the four initial charges against him, the trial court could have imposed maximum sentences of fifty years for the class A felony, twenty years for each of the class B felonies, and three years for the class D felony. Given the significant benefit Marshall received as a result of the plea agreement, we conclude that the trial court did not abuse its discretion. See, e.g., Sensback, 720 N.E.2d at 1165 (holding that the defendant received “benefits for her plea adequate to permit the trial court to conclude that her plea did not constitute a significant mitigating factor”).

Marshall next claims that the trial court should have considered the hardship incarceration would impose on his family. “Many persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship.” Dowdell v. State, 720 N.E.2d 1146, 1154 (Ind. 1999). Marshall points to the fact that he was current on his

child support. Also, at the sentencing hearing, Marshall's mother and mother-in-law testified that Marshall performed various tasks for them (e.g., fixed windows, cleaned rugs, assisted with trips to doctors, and remodeled a bathroom) and supported his children by helping them with money and attending their ballgames. When asked during cross-examination if any of the individuals who showed up at the sentencing hearing to support Marshall could help out Marshall's mother if Marshall were incarcerated, Marshall testified that "each and everyone would try to help, but there is [sic] special things that need to be done that some people don't have the experience to do." Sentencing Transcript at 10.

In its oral sentencing statement, the trial court acknowledged the testimony regarding the possible hardship on Marshall's family, but explained that any incarceration would result in some degree of hardship on family members of the incarcerated person. The trial court also acknowledged that Marshall's incarceration would result in the loss of child support, but the trial court was not persuaded that Marshall's sentence should be reduced as a result. It is clear that the trial court considered the testimony of Marshall and his family and friends at the sentencing hearing, but did not consider that testimony to be significant. Marshall has failed to establish that the mitigating evidence is both significant and clearly supported by the record. Accordingly, we cannot say that the trial court abused its discretion in failing to find undue hardship on Marshall's family as a mitigator. See, e.g., Dowdell, 720 N.E.2d at 1154.

Marshall also claims that the trial court should have considered his gainful employment as a significant mitigating circumstance. First, we note that the trial court need not give gainful employment the same significance as Marshall would propose. See Newsome v. State, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003) (“Many people are gainfully employed such that this would not require the trial court to note it as a mitigating factor.”), trans. denied. While the record reveals that Marshall was employed for a little over two years at the time of the sentencing hearing, the trial court was not required to find Marshall’s employment to be a significant mitigating circumstance. Accordingly, the trial court did not abuse its discretion. See, e.g., Newsome, 797 N.E.2d at 301.

Finally, Marshall argues that the trial court did not consider the testimony of his sex offense therapist who testified at the sentencing hearing that he believed Marshall’s risk of reoffending was low. The therapist also indicated that he relied primarily on Marshall’s self-report in arriving at that determination. In its oral sentencing statement, the trial court noted Marshall’s prior felony convictions, observed that Marshall committed crimes since the time he was incarcerated for those prior convictions, and that another charge against Marshall was pending before the trial court. Given Marshall’s failure to be deterred by previous convictions and incarceration, the trial court was not obligated to find there was little risk Marshall would reoffend. We conclude that the trial court did not abuse its discretion in sentencing Marshall.

III.

The next issue is whether Marshall's sentences are inappropriate in light of the nature of the offenses and the character of the offender. Indiana Appellate Rule 7(B) provides that this Court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Our review of the nature of the offense reveals that Marshall performed or submitted to the fondling or touching of either M.S. or Marshall with the intent to arouse or satisfy the sexual desires of either himself or his stepdaughter, who was at least fourteen years of age but less than sixteen years of age. Marshall also engaged in sexual intercourse with M.S. when she was at least sixteen years of age but less than eighteen years of age. Marshall was M.S.'s stepfather, and he was in a position of trust. Marshall's sexual activity with M.S. was not isolated, but continued over a year and resulted in the birth of a child.

Our review of the character of the offender reveals that Marshall pled guilty to one count of sexual misconduct with a minor and to one count of child seduction, but the State reduced the charge of sexual misconduct with a minor from a class B felony to a class C felony and dismissed its charges of sexual activity with a minor and child molesting with respect to Marshall's alleged sexual activity with C.S. Marshall was previously convicted for robbery in 1987 and for burglary in 1983. Marshall was also

convicted for failure to appear and for three misdemeanors, and there was a pending charge against him. Marshall's lengthy criminal history is a negative reflection of Marshall's character. Further review of his character is limited by the fact that Marshall failed to include his presentence investigation report in his Appendix. However, we do note that Marshall continued to engage in sexual activity with his stepdaughter M.S. over a period of a year and fathered a child with M.S. Marshall used cocaine at the time of his actions with M.S. and afterwards until 2001. As noted above, the trial court sentenced Marshall to concurrent sentences for his convictions, resulting in an aggregate sentence of eight years. Given Marshall's criminal history, actions against M.S., and his position of trust with M.S., we cannot say that the sentence imposed by the trial court is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Miller v. State, 884 N.E.2d 922, 928 (Ind. Ct. App. 2008) (concluding that the defendant's sentence was not inappropriate), trans. denied.

For the foregoing reasons, we affirm Marshall's sentence for sexual misconduct with a minor as a class C felony and child seduction as a class D felony.

Affirmed.

CRONE, J. and BRADFORD, J. concur