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IN THE
COURT OF APPEALS OF INDIANA

LEONARD OLDEN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A04-0812-CR-732
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Marianne Vorhees, Judge
Cause No. 18C01-0806-FC-30

June 15, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Leonard Olden appeals the six-year executed sentence imposed after he pled guilty to one count of sexual misconduct with a minor, a Class C felony. For our review, Olden raises a single issue, which we expand and restate as two issues: 1) whether the trial court properly sentenced him; and 2) whether his sentence is inappropriate in light of the nature of his offense and his character. Concluding the trial court properly sentenced Olden and his sentence is not inappropriate, we affirm.

Facts and Procedural History

In March of 2008, Olden moved in with his half-sister, N.J.B. N.B., N.J.B.'s fourteen-year-old granddaughter, lived in the home as well. On June 10, 2008, Olden tried to kiss N.B. N.B. tried to pull away, but Olden grabbed her arms and put his hands down the front and back of her panties, touching her genitals. N.B. got away from Olden, but he followed her into the bathroom, where he put his mouth on her breasts and made her touch his penis. N.B. finally got away from Olden and told her grandmother what happened.

The State charged Olden with two counts of sexual misconduct with a minor, both Class C felonies. Olden pled guilty to one count pursuant to a plea agreement, and, in return, the State agreed to dismiss the second count. The plea agreement left sentencing to the discretion of the trial court. On November 17, 2008, the trial court held a sentencing hearing at which Olden and N.J.B. testified. In its sentencing statement, the trial court found the following aggravating circumstances: 1) Olden violated a position of trust; 2) N.B. was more vulnerable than a typical fourteen-year-old due to mental and

emotional conditions,[1] and Olden knew and took advantage of her vulnerability; and 3) Olden was not truthful with the trial court in his testimony. The trial court also found the following mitigating circumstances: 1) Olden showed remorse for his actions; 2) Olden entered a guilty plea; and 3) Olden has a minimal criminal history. The trial court determined that the aggravating circumstances outweighed the mitigating circumstances and sentenced Olden to six years executed with the Indiana Department of Correction. Olden now appeals.

Discussion and Decision

I. Standard of Review

We engage in a multi-step process when evaluating a sentence. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (2007). First, the trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravating or mitigating circumstances, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id.

[1] N.J.B. informed the probation officer who completed the pre-sentence investigation ("PSI") report that N.B. suffers from ADHD/ADD and bipolar disorder. In addition, N.J.B. reported that Olden told her "he was actually trying to help the victim because he thought she had low self-esteem, so he thought what he did would help her." Appellant's App. at 29.

II. Propriety of Sentence

A trial court may impose "any sentence that is: (1) authorized by statute … regardless of the presence or absence of aggravating or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). However, a trial court abuses its discretion when it: 1) fails to issue any sentencing statement; 2) enters a sentencing statement that explains reasons for imposing a sentence, but the record does not support the reasons; 3) enters a sentencing statement that omits reasons clearly supported by the record and advanced for consideration; or 4) considers reasons that are improper as a matter of law. Anglemyer, 868 N.E.2d at 490-91.

A. Aggravating Circumstances

Olden admits he violated a position of trust, but argues the record does not support the remaining aggravating circumstances. Specifically, Olden challenges the following aggravating circumstances: that he took advantage of N.B.'s increased vulnerability to molestation and that he was not completely truthful with the trial court. Olden's admission that he violated a position of trust alone is sufficient to warrant an increase from the advisory sentence. See Sullivan v. State, 836 N.E.2d 1031, 1037 (Ind. Ct. App. 2005) (a sentence may be upheld where defendant admits to other aggravating factors supporting an increased sentence). Therefore, we need not address Olden's challenges to the remaining aggravating circumstances. That fact notwithstanding, we proceed to address the merits of Olden's arguments.

With respect to N.B.'s increased vulnerability, Olden argues there is no evidence to support the trial court's conclusion that N.B.'s ADHD/ADD or bipolar disorder made

her more vulnerable to molestation. However, Olden told N.J.B. he knew N.B. had low self-esteem and he thought his actions would help her. This statement by Olden is sufficient to support the trial court's finding that he knew and took advantage of N.B.'s vulnerability. Therefore, the trial court did not abuse its discretion in finding this aggravating circumstance.

With respect to Olden's candor before the trial court, it is the responsibility of the trial court, not the appellate court, to assess witness credibility and we will not second-guess the trial court's determinations in that respect absent a strong showing that all of the evidence points toward an opposite determination. Hammer v. State, 545 N.E.2d 1, 4 (Ind. 1989). The record indicates that Olden was not entirely truthful regarding the current status of his marriage or his diligence in pursuing a job. Therefore, the trial court did not abuse its discretion when it found this aggravating circumstance.

Olden next argues the trial court improperly concluded he would not be a good candidate for supervised probation. The decision to order probation as an alternative to an executed sentence is at the sole discretion of the trial court, and is a "matter of grace" and a "conditional liberty that is a favor, not a right." Cox v. State, 706 N.E.2d 547, 549 (Ind. 1999). Olden had a previous probationary sentence terminated as unsatisfied. In addition, Olden could not identify a place where he could live while on probation or house arrest. In addition, the trial court expressed reservations about ordering probation based on Olden's lack of honesty before the trial court. On these bases, we cannot say the trial court abused its discretion when it concluded Olden would not be a good candidate for supervised probation.

Finally, Olden argues the trial court improperly concluded he committed the offense in a planned-out manner. Initially, we note this issue is not one of the aggravating circumstances enumerated by the trial court. Rather, the trial court addresses this fact in the context of the decision to order an executed sentence rather than probation. That said, we agree with Olden that the evidence in the record does not support a finding that he planned out the attack beforehand. However, the remaining aggravating circumstances support an increase in Olden's sentence to six years.

B. Mitigating Circumstances

Olden does not specifically challenge the trial court's findings of mitigating circumstances other than to argue that they should balance out the aggravating circumstances. We will not review the weight assigned by the trial court to the various aggravating and mitigating circumstances. Anglemyer, 868 N.E.2d at 491. The record supports the trial court's determination that the aggravating circumstances outweigh the mitigating circumstances and the resulting six-year sentence. Therefore, the trial court properly sentenced Olden.

III. Appropriateness of Sentence

Olden's six-year sentence for his Class C felony conviction is two years above the advisory sentence. See Ind. Code § 35-50-2-6 (advisory sentence is four years). Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence 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." Id. When making this decision, we may look to any factors appearing in the record. Roney v. State, 872

N.E.2d 192, 196 (Ind. Ct. App. 2007), trans. denied; cf. McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006) ("[I]nappropriateness review should not be limited … to a simple rundown of the aggravating and mitigating circumstances found by the trial court."). However, the defendant bears the burden to "persuade the appellate court that his … sentence has met this inappropriate standard of review." Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

A. Nature of the Offense

N.B. suffers from several mental and emotional difficulties, and Olden admitted he thought she had low self-esteem. Olden took advantage of this in an attempt to gratify his own sexual desires. First, Olden attempted to kiss N.B. When N.B. pulled away from him, Olden grabbed her arms and put his hands down her pants. N.B. escaped from Olden and fled to the bathroom; however, Olden pursued her and continued the attack. Because Olden took advantage of a perceived vulnerability in N.B. and continued to attack her despite her attempts to get away from him, we cannot say that his six-year sentence is inappropriate in light of the nature of the offense.

B. Character of the Offender

Olden had recently lost his job and experienced problems with his marriage. Because of this, he left his home in Illinois and travelled to Indiana to find employment and be near his family. Olden's half-sister, N.J.B., took him into her home and allowed him to stay despite the fact that he was less than diligent at looking for employment. Despite this demonstration of kindness, Olden abused the trust placed in him by sexually abusing N.B. This abuse of trust reflects very negatively on Olden's character.

In addition, Olden was not completely honest with the trial court. Olden withheld information about the status of his marriage and implied that he could stay with family if placed on supervised probation, when this seems to be untrue. In addition, Olden had a previous probation terminated unsuccessfully. These facts also reflect negatively on Olden's Character.

On the other hand, Olden has demonstrated remorse for his crime and pled guilty, saving N.B. the pain of testifying at a trial. Olden also has a minimal criminal history with no relation to his present crime. While these facts weigh in favor of Olden's character, we cannot say that they outweigh the negatives discussed above. Olden bears the burden of demonstrating that his sentence is inappropriate, and he has failed to meet this burden. Therefore, his sentence is not inappropriate in light of the nature of his offense and his character.

Conclusion

The trial court properly sentenced Olden and his sentence is not inappropriate in light of the nature of his offense and his character.

Affirmed.

DARDEN, J., and BAILEY, J., concur.