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IN THE
COURT OF APPEALS OF INDIANA

DEAN F. BIGELOW,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 03A01-0810-CR-489
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause No. 03D01-0703-FA-0454

June 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Dean Bigelow appeals the five-year sentence that was imposed following his guilty plea to Child Molesting,[1] a class C felony. Specifically, Bigelow argues that the trial court abused its discretion when it sentenced him. In addition, Bigelow contends that his sentence is inappropriate in light of the nature of the offense and his character pursuant to Indiana Appellate Rule 7(B). Finding that the trial court did not abuse its discretion by sentencing Bigelow to five years imprisonment and that his sentence is not inappropriate, we affirm.

FACTS

According to the probable cause affidavit, on March 6, 2007, Officer Jeremy Coomes of the Columbus Police Department was dispatched to ten-year-old S.R.'s elementary school. The school's principal informed Officer Coomes that S.R. had just reported that she had been molested by Bigelow, who was her mother's boyfriend.

Later that day, Detective Mark Kruchten of the Columbus Police Department interviewed S.R. and she stated that Bigelow "would sometimes place his hands down her pants and touch her 'pee spot'" and that one evening, he had placed his finger in her anus. Appellant's App. p. 12-13, 44. She also informed Detective Kruchten that this had occurred for four years, and the family had moved to Indiana from Florida in the spring of 2006. S.R. mentioned that Bigelow had touched her in a sexual manner in early February and March of 2007.

On March 13, 2007, Bigelow was charged with two counts of child molesting, both as C felonies. On October 26, 2007, Bigelow was charged with an additional count

[1] Ind. Code § 35-42-4-3(b).

of child molesting as a class A felony and criminal deviate conduct, a class B felony. On November 27, 2007, Bigelow pleaded guilty to one count of child molesting, a class C felony. In exchange for Bigelow's guilty plea, the State dismissed the remaining charges.

At Bigelow's October 1, 2008, sentencing hearing, the trial court sentenced Bigelow to five years imprisonment. Bigelow now appeals.

DISCUSSION AND DECISION

I. Sentencing—Abuse of Discretion

Bigelow argues that the trial court considered improper aggravating factors when it sentenced him. We initially observe that sentencing decisions rest within the trial court's sound discretion and are reviewed on appeal only for an abuse of that discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (2007). Trial courts are required to enter sentencing statements whenever imposing a sentence for a felony offense. 868 N.E.2d at 490. The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. Id. If the recitation includes the finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating factors and explain why each circumstance has been determined to be mitigating or aggravating. Id. A trial court may abuse its discretion by entering a sentencing statement that includes reasons for imposing a sentence not supported by the record, omits reasons clearly supported by the record, or includes reasons that are improper as a matter of law. Id. at 490-91.

A. The LSI-R

Bigelow argues that the trial court abused its discretion by considering his Level of Service Inventory ("LSI-R") score as an aggravating factor. The LSI-R "is a standardized actuarial instrument that contains 54 items and produces a summary risk score that can be categorized into five risk levels. . . . Higher risk levels reflect an increase in the propensity to commit future criminal acts." Rhodes v. State, 896 N.E.2d 1193, 1195 (Ind. Ct. App. 2008) (citations omitted).

Indiana's sentencing scheme includes a nonexhaustive list of aggravating and mitigating circumstances that a trial court "may consider" when imposing a sentence. Ind. Code § 35-38-1-7.1. In addition, a trial court "may impose any sentence that is . . . authorized by statute; and . . . permissible under the Constitution of the State of Indiana; regardless of the presence or absence of aggravating or mitigating circumstances." Id. at -7.1(d).

Bigelow directs us to Rhodes v. State, in support of his argument that the trial court's consideration of his LSI-R score was improper. In Rhodes, a panel of this court determined that a trial court's use of a LSI-R score as an aggravating factor is improper as a matter of law. 896 N.E.2d at 1195. The court reasoned that the "use of a standardized scoring model, such as the LSI-R, undercuts the trial court's responsibility to craft an appropriate, individualized sentence." Id. However, because the trial court had found other proper aggravating and mitigating circumstances, this court affirmed, concluding that the trial court would have imposed the advisory sentence even if it had not considered the LSI-R score. Id. at 1196.

This panel does not need to express its agreement or disagreement with the principle announced in Rhodes. Here, the trial court sentenced Bigelow to five years imprisonment, which is within the range authorized by statute. See Ind. Code § 35-50-2-6 (stating that "[a] person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years"). In addition, the trial court noted several other aggravating factors, including Bigelow's failure to successfully complete probation, his pattern of physical abuse toward women, his history of substance abuse, evidence of multiple instances of molestation toward the victim, and his violation of a position of trust.[2] Therefore, even assuming solely for the sake of argument that the trial court should not have considered Bigelow's LSI-R score, the trial court did not abuse its discretion by sentencing Bigelow to five years imprisonment, which is only slightly above the advisory sentence. Consequently, this argument fails.

B. Criminal History

Bigelow asserts that the trial court abused its discretion by considering his criminal record as "somewhat" aggravating. Tr. p. 110. Bigelow points out that his

[2] In his reply brief, Bigelow seems to imply that for the violation of a position of trust to be an aggravating factor, it must be coupled with the nature and circumstances of the molestation. We cannot agree. In Singer v. State, this court held that "[a]busing a 'position of trust' is, by itself, a valid aggravator which supports the maximum enhancement of a sentence for child molesting." 674 N.E.2d 11, 14 (Ind. Ct. App. 1996). Although Singer was decided before the General Assembly changed Indiana's sentencing scheme from a presumptive scheme to an advisory scheme in 2005, a defendant's violation of a position of trust, in and of itself, remains a valid aggravating factor. See Ind. Code § 35-38-1-7.1(a)(8) (stating that in determining what sentence to impose, the trial court may consider that "[t]he person was in a position having care, custody, or control of the victim of the offense" as an aggravating factor).

record is minimal and unrelated to the present offense and is, therefore, unsupported by the record.

Indiana Code section 35-38-1-7.1 provides that "[i]n determining what sentence to impose for a crime, the court may consider the following aggravating circumstances . . . [t]he person has a history of criminal or delinquent behavior." Our Supreme Court has held that the significance of past criminal conduct "'varies based on the gravity, nature and number of prior offenses as they relate to the current offense.'" Cotto v. State, 829 N.E.2d 520, 526 (Ind. 2005) (quoting Wooley v. State, 716 N.E.2d 919, 929 n.4 (Ind. 1999)).

Here, the record indicates that while living in Florida, Bigelow was convicted of check fraud and driving under the influence, both as misdemeanors. In its oral sentencing statement, the trial court observed that "[y]our criminal record is a long way from the worst I have ever seen. So while it is aggravating and not mitigating, it is not a terribly aggravated record, but is somewhat." Tr. p. 110. This shows that the trial court recognized the limited significance of Bigelow's criminal history. Therefore, this argument is unavailing.

II. Inappropriate Sentence

Finally, Bigelow argues that his five-year sentence is inappropriate in light of the nature of the offense and his character pursuant to Indiana Appellate Rule 7(B). When reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to

persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

As for the nature of the offense, the record indicates that Bigelow had been molesting S.R. for four years and that the abuse spanned two states. The presentence investigation report reveals that Bigelow admitted to molesting S.R. twenty times since they had moved to Indiana. In addition, Bigelow was in a position of trust, inasmuch as S.R. was his girlfriend's daughter and both of them resided with Bigelow.

With respect to Bigelow's character, the record indicates that he has a history of alcohol and drug abuse and a history of abusing women. In addition to his two misdemeanor convictions, Bigelow was arrested for possession of marijuana and felony aggravated battery. Although a record of arrests cannot be used to establish criminal history, it is relevant to show that "a defendant has not been deterred even after having been subject to the police authority of the State." Cotto, 829 N.E.2d at 526. Similarly, Bigelow was placed on probation twice and violated the terms of his probation both times. This further indicates that Bigelow has not been deterred by State intervention. Therefore, in light of the nature of the offense and his character, Bigelow has failed to persuade us that his five-year sentence is inappropriate.

The judgment of the trial court is affirmed.