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IN THE
COURT OF APPEALS OF INDIANA

RAYMOND CAIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 22A01-1011-CR-605
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FLOYD CIRCUIT COURT
The Honorable J. Terrence Cody, Judge
Cause No. 22C01-0609-FC-725

June 21, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Raymond Cain appeals his six-year sentence with two years suspended to probation for Class C felony child exploitation. He contends that the trial court abused its discretion in identifying two aggravators and failing to accord sufficient weight to a mitigator. Finding no abuse of discretion, we affirm.

Facts and Procedural History

In the summer of 2006, Cain took pictures of B.C., a six-year-old girl, exposing her genitalia. Cain was friends with B.C.'s older brother and was employed by B.C.'s father. Cain later took the film to Walgreens for developing. When Cain picked up the photographs, the police arrested him and took possession of the photographs.

The State charged Cain with Class C felony child molesting and Class C felony child exploitation. On the same day his trial was scheduled to begin, Cain pled guilty in an open plea to Class C felony child exploitation. A sentencing hearing was then held. The trial court found aggravating that Cain had a history of criminal and delinquent behavior and that B.C. was only six years old. The court found mitigating that Cain pled guilty and that he might respond affirmatively to probation or short-term imprisonment. The court found that the aggravators outweighed the mitigators and sentenced him to six years with two years suspended to probation. In sentencing him to six years with two years suspended instead of eight years, the court conceded that Cain was "not the worst of the worst." Tr. p. 63. Cain now appeals his sentence.

Discussion and Decision

Cain contends that the trial court abused its discretion in sentencing him.[1] Sentencing decisions rest within the sound discretion of the trial court. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). So long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. *Id.* An abuse of discretion will be found where the decision is clearly against the logic and effect of the facts and circumstances before the court or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.*

A trial court may abuse its discretion in a number of ways, including: (1) failing to enter a sentencing statement at all; (2) entering a sentencing statement that includes aggravating and mitigating factors that are unsupported by the record; (3) entering a sentencing statement that omits reasons that are clearly supported by the record; or (4) entering a sentencing statement that includes reasons that are improper as a matter of law. *Id.* at 490-91. Because the trial court no longer has any obligation to weigh aggravating and mitigating factors against each other when imposing a sentence, a trial court cannot now be said to have abused its discretion in failing to properly weigh such factors. *Id.* at 491. If a trial court abuses its discretion, "remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." *Id.*

[1] Although Cain loosely references Indiana Appellate Rule 7, he provides only an analysis for abuse of discretion. Had Cain made a cogent inappropriate sentence argument, we nevertheless would have concluded that his six-year sentence with two years suspended to probation was not inappropriate.

Cain first argues that the trial court abused its discretion in using the victim's age as an aggravator because the victim's age is already an element of child exploitation. *See* Ind. Code § 35-42-4-4 ("child under eighteen (18) years of age"). The State responds that a trial court can use a victim's age as an aggravator even if it is an element of an offense if the youth of the victim is extreme. *See Reyes v. State*, 909 N.E.2d 1124, 1128 (Ind. Ct. App. 2009); *see also Kien v. State*, 782 N.E.2d 398, 414 (Ind. Ct. App. 2003) (noting that it is proper for a trial court to rely upon the age of a child molesting victim when the trial court notes that the victim was of particularly tender years).

In *Reyes*, the defendant was convicted of molesting a nine year old. The upper age limit for a child molesting victim is thirteen years old. *See* Ind. Code § 35-42-4-3(a) ("a child under fourteen (14) years of age"). The trial court found aggravating the child's age. On appeal, we found that although the trial judge "could have been more specific in tying the victim's age to the particular nature and circumstances of the offenses, she did refer to the victim's age in conjunction with the molestation that occurred over a period of years." *Reyes*, 909 N.E.2d at 1128. We did not agree with Reyes "that the trial court abused its discretion in concluding that the molestation of a nine year old [was] extreme." *Id.*

On appeal, Cain tries to distinguish *Reyes* because that case involves child molesting while this case involves child exploitation. However, this distinction does not make a difference because age is an element of both offenses. In fact, child molesting has a lower age limit than child exploitation. Just as in *Reyes*, although the trial court here could have been more specific in tying B.C.'s age to the particular nature and

circumstances of the offense, the court twice referenced B.C.'s unquestionably young age of six. *See* Tr. p. 57 ("[T]here's no question here that . . . B.C. was six years of age."), 63 ("[T]he age of the child, uh, in my mind . . . justifies a six year sentence, with four to serve . . . ."). There is a big difference between a seventeen year old and a six year old. The trial court did not abuse its discretion in identifying B.C.'s tender age as an aggravator.

Cain next contends that the trial court abused its discretion in identifying his juvenile and criminal history as an aggravator. Cain, who was twenty-four years old at the time of sentencing, was adjudicated a juvenile delinquent at the age of fourteen for burglary. He also had another child molesting case pending at the time this case was proceeding, and it appears this charge was ultimately dismissed. While Cain was out on bond in this case, he was arrested in Kentucky for trafficking in a controlled substance and arrested in Indiana for possession of marijuana and possession of paraphernalia. The Kentucky charge was dismissed, but the Indiana charges were pending at the time of sentencing in this case. Thus, at the time of sentencing in this case, Cain had one juvenile adjudication, no prior convictions (although he had a pending child molesting charge in another cause number), and had been arrested twice while out on bond in this case.

A record of arrest, without more, does not establish the historical fact that a defendant committed a criminal offense and may not be properly considered as evidence of criminal history. *Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005). However, a record of arrest may reveal that a defendant has not been deterred even after having been subject to the police authority of the State. *Id.* Such information may be relevant to the court's

assessment of the defendant's character in terms of the risk that he will commit another crime. *Id.*

The State concedes that Cain's marijuana activity is unrelated to exploiting a child. As the State highlights, the trial court expressed its concerns, based on Cain's recent postings and pictures of himself smoking marijuana on his MySpace page, that "circumstances may cause him to commit another crime." Tr. p. 60. We agree with the State that the trial court linked Cain's history of criminal activity with his likelihood to reoffend, and in doing so, did not abuse its discretion.

Finally, Cain contends that the trial court abused its discretion in failing to accord sufficient mitigating weight to his guilty plea. However, we will not reconsider the weight the trial court assigns to aggravators and mitigators. *Anglemyer*, 868 N.E.2d at 491.

Finding no abuse of discretion, we affirm Cain's sentence.

KIRSCH, J., and MATHIAS, J., concur.