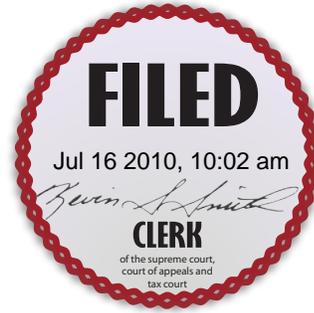


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

MICHAEL SHELTON SCOTT,)

Appellant-Defendant,)

vs.)

No. 48A02-1003-CR-235)

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0212-FA-387

July 16, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Michael Scott appeals his forty-year sentence for one count of Class A felony child molesting. We affirm.

Issue

The sole issue before us is whether the trial court properly sentenced Scott.

Facts

Sometime in April 2001, Scott had sexual intercourse with thirteen-year-old K.P. Scott was twenty-one at the time and lived in the same house, which was divided into apartments, as K.P. He had sex with her after talking to her over a period of time and developing what the prosecutor described as a “relationship.” Tr. p. 8. The prosecutor also described the intercourse as “consensual sexual activity.” *Id.* In 2000, Scott had been convicted of Class D felony sexual misconduct with a minor and Class D felony child solicitation; shortly before this incident, Scott had violated parole for these prior offenses by failing to undergo sex offender treatment as ordered.

On December 11, 2002, the State charged Scott with Class A felony child molesting. Scott’s trial was set for May 1, 2003, but he appeared in court on that date and agreed to plead guilty as charged. Sentencing was left to the trial court’s discretion, except that it could not impose an executed sentence in excess of forty years. On May 19, 2003, the trial court sentenced Scott to a term of forty years executed. It found as aggravating circumstances Scott’s criminal history, his recent parole violation, and that he “is in need of correctional rehabilitative treatment that can best be provided by his

commitment to a penal facility.” App. p. 12. It found no mitigators. On November 17, 2009, Scott moved for and was granted permission to file a belated appeal. He now appeals.

Analysis

Scott was sentenced well before Indiana’s sentencing scheme changed from a presumptive to an advisory one, in response to the United States Supreme Court’s decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), and the Indiana Supreme Court’s decision in Smylie v. State, 823 N.E.2d 679 (Ind. 2005). Scott does not make any argument that his sentencing violated Blakely, as implemented in Indiana through Smylie.

Scott’s sentence represents a ten-year enhancement above what was the presumptive for a Class A felony. When faced with a non-Blakely challenge to an enhanced sentence under the presumptive sentencing scheme, the first step is to determine whether the trial court issued a sentencing statement that (1) identified all significant mitigating and aggravating circumstances; (2) stated the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulated the court’s evaluation and balancing of the circumstances. Hope v. State, 834 N.E.2d 713, 717-18 (Ind. Ct. App. 2005). If there is an error in the sentencing statement, we may remand to the trial court for clarification or a new sentencing determination, affirm the sentence if the error is harmless, or independently reweigh the proper aggravating and mitigating circumstances at the appellate level. Id. at 718. We review a trial court’s

sentencing decision under the presumptive scheme for an abuse of discretion. Buchanan v. State, 767 N.E.2d 967, 970 (Ind. 2002).

With respect to the aggravators found by the trial court, Scott does not dispute that he has a criminal history and that he had recently violated parole before committing this offense. He does challenge the trial court's finding that he needs rehabilitative treatment that can best be provided by a penal facility. It was well-settled that trial courts could not use this factor to enhance a sentence above the presumptive unless it provided a specific or individualized reason why the defendant required correctional treatment in excess of the presumptive term. Id. at 719. The trial court here failed to give any such individualized reason for this aggravator and, therefore, it abused its discretion in relying upon it.

Scott also contends the trial court erred in failing to mention his guilty plea as a mitigating circumstance. Generally, "a defendant who pleads guilty deserves to have some mitigating weight extended to the guilty plea in return." Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005). "A guilty plea demonstrates a defendant's acceptance of responsibility for the crime and at least partially confirms the mitigating evidence regarding his character." Id. The defendant in Cotto, like Scott, did not plead guilty until the date of his trial; also, the State in Cotto agreed to dismiss several charges. Despite these circumstances, our supreme court held that the trial court abused its discretion in failing to identify the guilty plea at all as a mitigating factor. Id. at 526.

We conclude the trial court here likewise erred in failing to completely mention Scott's guilty plea as a mitigating factor. The plea demonstrated some acceptance of responsibility and, although it occurred on the day trial was set to begin, it spared K.P. the potential trauma of having to testify about the incident and alleviated the State's burden of proving its case. Scott did receive some benefit from the plea, in the form of the forty-year executed sentence cap. However, we do not believe that this deprived the guilty plea of all of its mitigating weight.

Scott also contends his remorse warrants separate mitigating weight, apart from his guilty plea. Generally, we grant substantial deference to a trial court's determination of whether a defendant has exhibited true remorse, because it is able to directly observe the defendant first hand. Allen v. State, 875 N.E.2d 783, 788 (Ind. Ct. App. 2007). Here, Scott did express remorse for what he did, but in the same breath also blamed his conduct on drugs and alcohol. We cannot say this is a situation in which the trial court abused its discretion in not finding Scott's remorse to be a mitigating circumstance.

We have, however, found error in the trial court's sentencing statement. We elect to reweigh the proper aggravating and mitigating circumstances ourselves. First, although we have held that the trial court erred in failing to assign any mitigating weight to Scott's guilty plea, we do not believe it is entitled to overwhelming weight. As noted, his plea included a sentencing cap, and he did wait until the day of trial before pleading.

In aggravation, Scott had been convicted just the year before committing the current offense for engaging in very similar conduct, although the victim of his behavior

in the earlier case may have been slightly older. In an attempt to curb his deviant sexual behavior, Scott was ordered to undergo sex offender treatment after the 2000 convictions as a condition of his parole, but he failed to do so. In the context of the current offense, these aggravators are especially troubling. As such, despite the errors in the trial court's sentencing statement, we ultimately agree that a sentence of forty years is warranted.¹

Conclusion

Although the trial court's sentencing statement contained two clear errors, we conclude after balancing the proper aggravators and mitigators that Scott's sentence of forty years should remain intact. We affirm.

Affirmed.

BAILEY, J., and MAY, J., concur.

¹ Although Scott mentions Indiana Appellate Rule 7(B) in his brief, he fails to develop a separate analysis that his sentence is inappropriate in light of his character and the nature of the offense.