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IN THE
COURT OF APPEALS OF INDIANA

BOBBY L. LONG,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0901-CR-100
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE COUNTY SUPERIOR COURT
The Honorable, Thomas Busch, Judge
Cause No. 79D02-0805-FB-17

August 19, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Bobby Long appeals his sentence following a plea of guilty to sexual misconduct with a minor as a class B felony.[1]

We affirm.

ISSUE

Whether the trial court erred in sentencing Long.

FACTS

On April 29, 2008, Lafayette Police Detective Matthew Devine received a telephone call from M.R. M.R. reported that Long, her stepfather, had molested her on one occasion in 2006, when she was fifteen years old. According to the probable cause affidavit, Long admitted that he had licked M.R.'s vagina. He also admitted that the "tip of his penis may or may not have touched [M.R.]'s vagina" and that M.R. had stroked his penis. (App. 5).

On May 7, 2008, the State charged Long with three class B felony counts of sexual misconduct with a minor. On October 9, 2008, the State and Long entered into a plea agreement, whereby Long agreed to plead guilty to one count of class B felony sexual misconduct with a minor; namely, performing or submitting to sexual intercourse with M.R. In exchange, the State agreed to dismiss the remaining, pending charges. The plea agreement provided for a sentence as deemed appropriate by the trial court.

The trial court held a guilty plea hearing on October 9, 2008. Long admitted to engaging in sexual intercourse with M.R. in 2006. He also admitted to having known

[1] Ind. Code § 35-42-4-9.

M.R. since she was two years old and having raised her "as [his] own stepdaughter." (Guilty Plea Hr'g Tr. 35).

The trial court ordered a pre-sentence investigation report ("PSI") and held a sentencing hearing on December 3, 2008. According to the PSI, Long and M.R.'s mother were married in 1995, shortly before M.R.'s fourth birthday. It also showed that the State of Virginia had convicted Long of two misdemeanor property-related crimes in 1995.

After hearing evidence of mitigating and aggravating circumstances, the trial court found as follows:

> The aggravating factor is the defendant's position of trust. The mitigating factor [sic] the defendant had led a law-abiding life for a substantial period before commission of the crime and the defendant pleaded guilty and took responsibility for the crime. Also, the defendant has family support and a good work history. . . . The Court finds that the aggravating and mitigating circumstances balance in this case. . . . It is a[s] the prosecutor has said a really awful thing to do to engage in sexual activity with somebody who looks upon you as a father. It can screw her up as you can probably imagine and it is a violation of the relationship of trust that you've developed there. Its [sic] an abuse of the love that she had—and your wife ha[s] entrusted you with. The reason that I find that the aggravating factors don't outweigh the mitigating factors is it doesn't appear to be a characteristic thing for you to do and that you do show and are already remorseful for the—for it so I don't think it's likely to happen again. But you do need to spend some time in prison and you'll be serving a six year prison sentence because anything else would certainly convey the wrong message to you or to people like you about just how wrong the—what you did is.

(Sentencing Hr'g Tr. 12-14).

The trial court also issued a written sentencing order, which reads as follows:

> The Court finds as aggravating factors [sic] the defendant was in a position of trust.

> The Court finds as mitigating factors the defendant has led a law-abiding life for a substantial period before commission of the crime. The defendant has pled guilty and taken responsibility for his crime. The defendant is remorseful. The defendant's family support. The defendant's good work history.
>
> The Court further finds that the aggravating factors and mitigating factors balance.

(App. 18-19). The trial court sentenced Long to ten years with four years suspended, including one year of home detention.

DECISION

Long asserts that the trial court erred in sentencing him. Specifically, he argues that the trial court considered improper aggravating circumstances and that his sentence is inappropriate.

1. Aggravating Circumstances

Long contends that the trial court abused its discretion in finding the imposition of a decreased sentence would depreciate the seriousness of the crime and the impact of the crime on M.R. as an aggravating circumstances. A sentence that is within the statutory range is subject to review only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). "An abuse of discretion occurs if 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.* at 490 (quoting *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006)).

One way in which a trial court may abuse its discretion is if the sentencing statement "explains reasons for imposing a sentence—including a finding of aggravating

and mitigating factors if any—but the record does not support the reasons, . . . or the reasons given are improper as a matter of law." *Id.* at 490-91. However, the relative weight or value assignable to reasons properly found, or to those which should have been found, is not subject to review for abuse of discretion. *Id.*

a. *Depreciate the seriousness of the crime*

Long argues that the trial court improperly found that any sentence below the advisory sentence would depreciate the seriousness of the crime. We disagree.

Generally, finding that a reduced sentence would depreciate the seriousness of the crime "serves only to support a refusal to impose less than the presumptive [now advisory] sentence and does not serve as a valid aggravating factor supporting an enhanced sentence." *Cotto v. State*, 829 N.E.2d 520, 524 (Ind. 2005); *Davidson v. State*, 849 N.E.2d 591, 595 (Ind. 2006) ("This circumstance is properly considered only when the trial court is considering imposing a sentence below the presumptive term."); *but cf. Mathews v. State*, 849 N.E.2d 578, 590 (Ind. 2006) ("[I]t is not error to enhance a sentence based upon the aggravating circumstance that a sentence less than the enhanced term would depreciate the seriousness of the crime committed."). Consideration of this circumstance is improper where there is nothing in the record to indicate that the trial court was considering less than the advisory sentence. *See Cotto*, 829 N.E.2d at 824.

Here, we cannot say that the trial court considered the depreciation aspect as an aggravating circumstance when sentencing Long to the advisory sentence of ten years.[2] Rather, a reading of the sentencing transcript demonstrates that the trial court merely considered that ordering less than six of the ten years be executed would send the "wrong message . . . ." (Tr. 14). There is nothing in the record to indicate that the trial court considered this circumstance in sentencing Long to a total sentence of ten years. *See Weaver v. State*, 845 N.E.2d 1066, 1072 n.4 (Ind. Ct. App. 2006) (explaining that a defendant's total sentence includes both the executed and suspended portion of the sentence), *trans. denied*. This is supported by an examination of the trial court's written sentencing statement, which only finds Long's position of trust as an aggravating circumstance. *See McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007) (holding that the reviewing court is to examine the written statement alongside the oral statement to discern the findings of the trial court). We therefore find no abuse of discretion.

b. *Victim impact*

Long also argues that the trial court improperly considered the impact on M.R. as an aggravating circumstance. The impact of the crime on the victim is an improper aggravating circumstance where there is nothing in the record to indicate that the impact on the victim was different than that usually associated with the crime. *Id.* at 590.

The oral sentencing statement does not demonstrate that the trial court considered the impact of the crime on M.R. as an aggravating circumstance. Rather, it is merely a

[2] Indiana Code section 35-50-2-5 provides that "[a] person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years."

discussion of what violating Long's position of trust could do to M.R. A review of the written sentencing order supports this conclusion. Thus, we find no abuse of discretion.

In this case, the trial court properly found one aggravating circumstance: Long's position of trust. It found as mitigating circumstances his lack of substantial criminal history, guilty plea, work history, and family support. As to the weight assigned to those circumstances, it is not subject to review for abuse of discretion. *See Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007).

2. Inappropriate Sentence

Long also asserts that his sentence is inappropriate. We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). It is the defendant's burden to "'persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.'" *Id.* at 494 (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

In determining whether a sentence is inappropriate, the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Childress*, 848 N.E.2d at 1081. The advisory sentence for a class B felony is ten years. I.C. § 35-50-2-5.

Here, Long received the advisory sentence. He advances the following reasons to support his argument that his character renders the sentence inappropriate: 1) he had maintained steady employment; 2) he showed remorse for his actions; 3) he lacked a substantial criminal history; and 4) he was unlikely to reoffend.

We recognize that these points may reflect favorably on Long's character. However, the positive nature of his lack of criminal history is diminished by his two prior convictions, indicating that he has not always led a law-abiding life. While we recognize that Long accepted some responsibility for his crimes by pleading guilty, we also recognize that he received a significant benefit for doing so, where the State dismissed two pending class B felony charges. Although commendable, we do not find Long's employment with one company "for approximately five (5) years" remarkable. Long's Br. at 12. As to Long's contention that he is unlikely to reoffend, we note that, according to the PSI, there is also "an 11.7% chance he will re-offend within one year if no services are provided." (PSI at 6). Thus, we cannot say that Long's character renders his sentence inappropriate.

Finally, we are not persuaded that Long's sentence is inappropriate given the nature of his offense: engaging his fifteen-year-old stepdaughter, a girl whom he had known and raised since she was two years old, in sexual intercourse. Accordingly, we do not find that his sentence is inappropriate, particularly where he received the advisory sentence.

Affirmed.

ROBB, J., and MATHIAS, J., concur.