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.

ATTORNEY FOR APPELLANT:

JILL M. DENMAN
Matheny, Hahn, Denman & Nix, L.L.P.
Huntington, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JANINE STECK HUFFMAN
Deputy Attorney General
Indianapolis, Indiana

FILED
Sep 07 2011, 9:35 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

JOSEPH M. CAMPBELL,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 85A04-1103-CR-126
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE WABASH CIRCUIT COURT
The Honorable Robert R. McCallen, III, Judge
Cause No. 85C01-1012-FA-225

September 7, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issues

Joseph Campbell pleaded guilty to child molesting as a Class A felony and was sentenced to forty years. He raises two issues for our review which we restate as follows: whether the trial court abused its discretion in sentencing him, and whether Campbell's sentence is inappropriate. Concluding the trial court did not abuse its discretion in sentencing and the sentence is not inappropriate, we affirm.

Facts and Procedural History

Campbell and his ex-wife, Kim Campbell, have been divorced since September of 2005. During their marriage Kim became pregnant with C., but Campbell is not C.'s biological father. Kim, who has Multiple Sclerosis, became concerned about who would take care of her son, C., if she were rendered incapable due to her disease.[1] Campbell volunteered to assume such a role if necessary, and Kim began bringing C. to Campbell's house on weekends and Wednesday nights to develop a relationship between Campbell and the young child. Although the record is vague as to the timeline of events, it appears systematic and repeated sexual abuse commenced not long after these visits began.

According to Campbell's interview with police, during a period of less than two months, he subjected four-year-old C. to repeated sexual acts, including showering with and washing C. "15 or more times," performing oral sex on C. repeatedly, sleeping naked with C. on more than one occasion so they could rub their genitalia together and Campbell could rub C.'s anus, once having C. perform oral sex on Campbell, and once

[1] The record indicates that C.'s biological father had recently passed away in May of 2010. Appendix of Appellant at 82.

having C. urinate in Campbell's mouth while Campbell was performing oral sex on C. App. of Appellant at 12-13.

After police brought Campbell in for questioning regarding molestation accusations, he quickly moved from denial of the accusations to explaining the various sexual acts and encounters he had with C. C. was also interviewed and confirmed much of what Campbell admitted to doing. After being charged with child molesting as a Class A felony, Campbell pleaded guilty without a written plea agreement. The trial court sentenced Campbell to forty years of imprisonment. Additional facts will be provided as necessary.

Discussion and Decision

I. Abuse of Discretion

A. Proposed Mitigating Factors

At the sentencing hearing, Campbell proposed the following mitigating factors: he lacks a prior criminal record, pleaded guilty with an open plea agreement, has significant employment history, confessed his actions to police, sought counseling, was labeled low risk by recidivism probability tests, and had a constructive relationship with the victim. Of these, the trial court concluded Campbell's lack of a prior criminal record and open guilty plea were significant mitigating factors.

In addition, the trial court found the following aggravating factors: Campbell occupied a position of trust with C., "imposing a reduced sentence or less than somewhat enhanced would depreciate the seriousness of the offense," the acts were not a single occurrence but a series of events, and, rather than appearing remorseful, Campbell attempted to place blame on four-year-old C. by saying C. pressured Campbell for sexual

acts and Campbell merely gave in to C.'s pleadings. Transcript at 35-36. Indiana Code section 35-50-2-4 provides for a sentence between twenty and fifty years for Class A felonies, with the advisory sentence being thirty years. The trial court found an enhanced sentence of forty years appropriate after weighing the above mitigating and aggravating factors.

Sentencing decisions "rest within the sound discretion of the trial court and are reviewed on appeal 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. (quotations and citation omitted). A trial court may abuse its discretion by failing to enter a sentencing statement, entering findings of aggravating and mitigating factors unsupported by the record, omitting factors clearly supported by the record and advanced for consideration, or giving reasons that are improper as a matter of law. Id. at 490-91. "Under those circumstances, 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. at 491.

Campbell correctly states that several of the mitigating factors he proposed were not discussed by the trial court during sentencing or found to be significant. Specifically, his employment history, confession to the crime, pursuit of counseling, and test results suggesting he would respond affirmatively to probation or short term imprisonment are all factors Campbell proposed and the trial court did not identify as significant. Upon

review, although these proposed factors enjoy some support in the record, we cannot say that they are clearly supported by the record such that the trial court's sentence constitutes an abuse of discretion.

While the record does indicate Campbell has been employed in various capacities for most of his adult life, it is not clear from the record that this is a significant mitigating factor. His most recent employer fired him for poor attendance. In any event, his employment history is unrelated to the sexual acts Campbell performed with four-year-old C. Similarly, while Campbell did begin to seek counseling during the period between his charging date and sentencing hearing, he only did so on two occasions and his motives for pursuing counseling are unclear. It would not be unreasonable, based on the record, for the trial court to assign little weight to this factor.

The record does show that Campbell confessed to the crimes after being detained for questioning by the police and there is some evidence to suggest he acknowledged his actions were wrong, but these factors are overshadowed by the fact that Campbell attempted to justify his actions and place blame on four-year-old C. by claiming that C. asked Campbell about sex and pleaded with Campbell to perform sexual acts with him. Thus, Campbell's confession and acknowledgment of wrongdoing are not clearly mitigating.

Campbell next argues that recidivism probability tests administered by the Wabash County Probation Department determined he was a low risk for recidivism and a low risk to the community, and, due to these results, he is likely to respond affirmatively to probation or a shorter prison sentence. However, further reading of the record reveals that the probation officer who administered the recidivism tests upgraded Campbell to

"high risk" due to the nature and circumstances of his offense. App. of Appellant at 86. Thus, Campbell's proposed mitigating factor is not clearly supported by the record.

Lastly, Campbell proposed that his constructive relationship with the victim should be a mitigating factor, relying on Rivers v. State, 915 N.E.2d 141 (Ind. 2009). In Rivers, while discussing positive character attributes of a defendant, our supreme court included that the defendant "served as a father figure" to the victim for a number of years, the victim testified that her relationship with the defendant was positive and they frequently engaged in family activities prior to his sexual abuse, and "the record does not indicate that [the defendant's] interaction and involvement in [the victim's] life prior to his crimes was anything short of constructive." Id. at 143. Unlike Rivers, where the record clearly showed that the defendant had a constructive relationship and that it existed for a number of years prior to any sexual abuse, here, the record does not clearly support Campbell's proposal that his relationship with C. was constructive. If anything, the record shows the opposite because before a constructive relationship could develop, Campbell began molesting C.

B. Improper Use of an Aggravating Factor

Campbell next argues that in imposing its sentence, the trial court improperly considered whether "imposing a reduced sentence or less than somewhat enhanced would depreciate the seriousness of the offense." Tr. at 37. Campbell is correct that, unless the trial court is considering a sentence lower than the advisory sentence, it is error for a trial court to consider whether reducing the sentence below the advisory sentence would depreciate the seriousness of the offense. See Hawkins v. State, 748 N.E.2d 362, 363 (Ind. 2001); Thompson v. State, 793 N.E.2d 1046, 1053 (Ind. Ct. App. 2003). However,

the State correctly points out that while such a consideration by a trial court is in error, it is not error for a trial court to consider whether selecting a sentence less than an enhanced sentence would depreciate the seriousness of the offense. See Walter v. State, 727 N.E.2d 443, 447 (Ind. 2000).

Here, a plain reading of the sentencing hearing transcript reveals the trial court may have considered both the improper and proper factors just illustrated. However, any error is harmless error because we can confidently say the trial court would have imposed an identical sentence even without this aggravating factor. See Freeze v. State, 827 N.E.2d 600, 604 (Ind. Ct. App. 2005). The trial court found other aggravating factors, the strongest of which was Campbell's violation of the position of trust he had with C. It also expressed extreme disgust for Campbell's attempt to justify his actions and place blame on the victim. Lastly, the trial court found as aggravating the fact that the conduct was not a single occurrence. Campbell molested C. numerous times over a period of just under two months. These factors more than support the trial court's enhanced sentence and we are confident the trial court would have imposed an identical sentence without considering whether a sentence below the advisory sentence would depreciate the seriousness of Campbell's offense. The trial court did not abuse its discretion in sentencing Campbell.

II. Inappropriateness

This court has authority to revise a sentence "if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). In reviewing the appropriateness of a sentence, we assess the culpability of the defendant, the severity

of the crime, the damage done to others, and myriad other facts that may arise in a given case. Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008). Campbell has the burden of persuading the appellate court that his sentence meets the inappropriateness standard of review. Anglemyer, 868 N.E.2d at 494.

As to the nature of the offense, there are two circumstances that strongly indicate an enhanced sentence is appropriate. First, Campbell was acting in a position of trust to C., as the entire reason for their relationship was so that C. could have someone acting as his parent in the possible circumstance that his mother's disease would render her incapable of doing so. See Horton v. State, 949 N.E.2d 346, 348 (Ind. 2011) (stating the defendant's sentence "should be enhanced above the advisory level be-cause [sic] he did abuse the position of trust"); Harris v. State, 897 N.E.2d 927, 930 (Ind. 2008) (holding the defendant's abuse of trust coupled with child molestation occurring on multiple occasions sufficiently justified enhanced sentences).

Second, Campbell divulged in his interview with police that his sexual acts with C. began in October of 2010 and continued through most of November, and that during this time the acts were systematic and repeated, including "15 or more" showers together that were typically followed by oral sex. This is unlike Rivers, where our supreme court revised consecutive sentences to concurrent sentences where the defendant "molested [the victim] on two occasions (charged as three) in a relatively short period of time, then stopped on his own accord, and did not commit any other offenses in the seven years that passed until he was charged." 915 N.E.2d at 144. Here, while a period of no more than two months may be considered relatively short, Campbell engaged C. in sexually deviate conduct far more than a few times. The potentially damaging effects of child molestation

logically increase as the number of occurrences increases. And, unlike the defendant in Rivers, it appears the only reason Campbell stopped molesting C. is that police began investigating allegations from C.'s mother. Here, either of the negative circumstances of Campbell's offense that we highlight would likely warrant an enhanced sentence standing on their own. Together, they certainly make an enhanced sentence appropriate.

As to Campbell's character, the trial court noted as significant the mitigating facts that he has no prior criminal record and pleaded guilty with an open plea agreement. We agree with the trial court, however, that despite these displays of positive character, Campbell exhibited a serious lapse in character by attempting to partially justify his actions and place blame on C. While it is difficult to believe that a four-year-old would plead with another person to engage in sexual acts with him, even if this claim is true, it is not a valid justification for Campbell's actions. His attempt to make it so is deplorable. Moreover, even if a four-year-old could make such requests, it is even less likely that a child that young would understand the seriousness of such acts. While this lapse in character may not on its own support an enhanced sentence, the nature of the offense in this circumstance more than supports the enhanced sentence.

Conclusion

The trial court did not abuse its discretion in ordering Campbell to serve forty years for one count of child molesting, and this sentence is not inappropriate. We affirm Campbell's sentence.

Affirmed.

BARNES, J., and BRADFORD, J., concur.