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.

FILED
Sep 24 2009, 9:30 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

KENNETH R. MARTIN
Goshen, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

IAN MCLEAN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

KEVIN J. TOLLIVER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0904-CR-134
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0706-FA-37
Cause No. 20D03-0706-FA-38

September 24, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Kevin Tolliver appeals his convictions for three counts of Child Molesting,[1] a class A felony. Specifically, Tolliver argues that the two convictions involving the same victim violate Indiana's prohibition against double jeopardy. In addition, Tolliver contends that the trial court abused its discretion by admitting the testimony of the victims' mother. Finally, Tolliver challenges the sentences that were imposed, arguing that they are inappropriate in light of the nature of the offenses and his character pursuant to Indiana Appellate Rule 7(B) and that his classification as a credit restricted felon is an ex post facto violation. Finding that the trial court erred by classifying Tolliver as a credit restricted felon, but finding no other error, we affirm in part, reverse in part, and remand with instructions to the trial court to revise Tolliver's credit time classification and to recalculate his credit time consistent with this opinion.

FACTS

In November 2006, K.C., age 7, and J.C., age 5, (the Children) were spending the night at the home of their paternal aunt (Aunt) and her boyfriend, Tolliver, whom they referred to as "Uncle Kevin." Tr. p. 283. The Children had previously visited Aunt's home to play with their cousins, but had never spent the night until this occasion. Sometime in the afternoon, Aunt left for work, leaving the Children in Tolliver's care.

In the evening, the Children and their cousins watched a movie in the living room and fell asleep. K.C. awakened to find that the movie was ending. Tolliver "dragged" K.C. by the arm, forcing her into a bedroom. Id. at 334. K.C. later recalled, "He put me on the bed,

[1] Ind. Code § 35-42-4-3(a)(1).

took his clothes off. He made me took [sic] mine, and then he laid on the bed and put me on top of him, and then he started to suck my tinkie." Id. K.C. identified her "tinkie" as her vagina. Id. at 328. K.C also stated that Tolliver placed his hands on her legs and that he kissed her on her chest, and touched her "butt and []boobs" with his hands and lips. Id. at 335. Tolliver then said "suck my wee-wee," which K.C. identified as his penis. Id. at 336-37. Tolliver forced K.C. to perform oral sex on him three times and instructed her "not to bite it." Id. at 340. K.C. tried to escape, "but then he pulled me back and started kissing me on the chest." Id. at 339. Tolliver told K.C. "[t]o not tell or [she would] be a bad girl" and ordered her to take a shower. Id.

After some time, K.C. watched Tolliver transfer her cousins from the living room, where they had watched the movie, to the other bedroom; however, J.C. was left in the living room. J.C. recalled that when he was the only one left, Tolliver forced him to touch his "wee wee," which J.C. identified as Tolliver's penis. Id. at 361, 363. Tolliver made J.C. perform oral sex on him and warned him that if he ever told anyone about the incident, Tolliver would kill his parents. Tolliver then ordered J.C. to go to bed and the Children were returned to their parents the following day.

Approximately seven months later, on June 4, 2007, K.C. left her bed three times complaining of a stomachache. After K.C. had left her bed for the fourth time, she told Mother that there was something bothering her, but that she would go to jail if she told. Mother reassured K.C. that she would not go to jail and K.C. described what Tolliver had done to her. Mother spoke with the Children's father later that night and he called the police

the following day.

On June 25, 2007, the State filed two informations under different cause numbers, charging Tolliver with class A felony child molesting. The first information (FA-37) pertained to J.C. and alleged one count of child molesting, and the second information (FA-38) pertained to K.C. and alleged two counts of child molesting. On October 10, 2008, the State filed a motion to consolidate the two cause numbers, and on October 31, 2008, Tolliver entered into a stipulation consolidating the two cause numbers for trial purposes.[2]

Tolliver's two-day jury trial commenced on November 17, 2008, and the jury found him guilty as charged. On February 5, 2009, the trial court conducted a sentencing hearing, where it concluded there were "two separate incidents" with "two separate victims." Sent. Tr. p. 14. The trial court found that Tolliver's adult criminal history, consisting of two misdemeanor convictions, to be of little aggravating weight, but gave significant aggravating weight to Tolliver's juvenile history of sex offenses. The trial court also noted that the psychosexual evaluation, which indicated that there was a significant risk that Tolliver would reoffend, was an aggravating circumstance. The trial court also observed that Tolliver was the sole adult in charge of the Children when he molested them and that the Children were too young to defend themselves in any way. The trial court declined to consider Tolliver's work history to be mitigating, noting that there was no nexus between his work history and the offense. The trial court found the absence of past felony offenses to be the sole mitigating circumstance, but declined to give it substantial weight in light of Tolliver's

[2] The cause numbers were also consolidated for the purposes of sentencing and this appeal.

juvenile adjudications for sex offenses.

Upon balancing the aggravating factors with the sole mitigating factor, the trial court concluded that an elevated sentence was appropriate and sentenced Tolliver to forty years imprisonment on the one count of child molesting in FA-37. In addition, the trial court sentenced Tolliver to forty years on each of the two counts in FA-38, to be served concurrently with each other but consecutively with the sentence imposed in FA-37, for an aggregate term of eighty years imprisonment. The trial court also classified Tolliver as a credit restricted felon, and, accordingly, gave him 595 days credit for the time that Tolliver had spent in custody prior to sentencing, together with eighty-five days of good-time credit. Tolliver now appeals.

DISCUSSION AND DECISION

I. Double Jeopardy

Tolliver argues that his convictions on two counts of child molesting under FA-38 violate Indiana's prohibition against double jeopardy. Specifically, Tolliver contends that because the charging information did not explicitly describe the alleged acts of molestation, his convictions constitute double jeopardy.

Article I, section 14 of the Indiana Constitution states that "[n]o person shall be put in jeopardy twice for the same offense." Our Supreme Court has held that "two or more offenses are the 'same offense' . . . if, with respect to <u>either</u> the statutory elements of the challenged crimes <u>or</u> the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense."

Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999) (emphases in original). Because Tolliver was charged with two counts under the same statute, we will focus on the actual evidence test.

Under the actual evidence test, multiple convictions constitute double jeopardy if there is "a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense." Id. at 53. To determine which facts were used by the jury, a reviewing court will examine the charging information, evidence, arguments, and jury instructions. Davis v. State, 770 N.E.2d 319, 324 (Ind. 2002).

Here, the charging information in FA-38 read:

> COUNT I
>
> The undersigned affiant swears that on or about [] November, 2006, . . . one KEVIN J. TOLLIVER, a person at least twenty-one (21) years of age, did, with a child under fourteen (14) years of age, to-wit: one K.C., knowingly perform or submit to deviate sexual conduct; all of which is contrary to the form of I.C. § 35-42-4-3(a)(1). . . .
>
> COUNT II
>
> The undersigned affiant swears that on or about [] November, 2006, . . . one KEVIN J. TOLLIVER, a person at least twenty-one (21) years of age, did, with a child under fourteen (14) years of age, to wit: one K.C., knowingly perform or submit to deviate sexual conduct; all of which is contrary to the form of I.C. § 35-42-4-3(a)(1). . . .

Appellant's App. p. 123.

Although the charging information could have been drafted with more specificity, the evidence, arguments, and jury instructions provide further assistance. The jury was presented

with evidence that Tolliver performed oral sex on K.C. and forced her to perform oral sex on him. In addition, during its closing argument, the prosecution stated:

> If you remember, K.C. described to you two acts of criminal deviate conduct. One act was the licking of her tinkie by the defendant's tongue, and the second act was her sucking the defendant's wee wee. You will see that, by the definition of deviate sexual conduct, those are the two acts that the state has charged.

Tr. p. 384. Furthermore, the jury was instructed that deviate sexual conduct "is defined by law as meaning an act involving a sex organ of one person and the mouth or anus of another person; or the penetration of the sex organ or anus of a person by an object." Appellant App. p. 200. Under these circumstances, we cannot say that there is a reasonable possibility that the jury used the same evidentiary facts to find Tolliver guilty on both counts of child molesting in FA-38, and this argument fails.

II. Protected Person Statute

Following a hearing on October 30, 2008, the trial court concluded that K.C. was a protected person under the Protected Person Statute and entered an order allowing Mother to testify as to what K.C. said when she first told her about the molestation.[3] Tolliver contends that the trial court abused its discretion by allowing this testimony.

Indiana Code section 35-37-4-6, the Protected Person Statute, allows otherwise inadmissible out-of-court statements of child sex victims to be admissible if certain conditions are met. Surber v. State, 884 N.E.2d 856, 862 (Ind. Ct. App. 2008), trans. denied. However, Tolliver argues that our Supreme Court's recent decision in Tyler v. State, 903

[3] The trial court also determined that J.C. was a protected person.

N.E.2d 463 (Ind. 2009), prohibited the admission of K.C.'s out-of-court statements to Mother because K.C. testified at trial.

In Tyler, our Supreme Court stated that "[w]e exercise our supervisory power to hold that a party may not introduce testimony via the Protected Person Statute if the same person testifies in open court as to the same matters." Id. at 465. Nevertheless, the Tyler Court noted that "[r]ules implemented by use of supervisory powers are not applicable to proceedings conducted prior to publication." Id. at 467 (citing Pierce v. State, 677 N.E.2d 39, 46 (Ind. 1997)). Tyler was not published until March 31, 2009, and Tolliver's trial ended on November 18, 2008. Therefore, the rule announced in Tyler is inapplicable to this case.

Notwithstanding the above analysis, Tolliver argues that K.C.'s statements to Mother were inadmissible because K.C. waited seven months to tell Mother, which presented an opportunity for Mother to coach K.C. into making the statements. Before a victim's out-of-court statements may be admitted into evidence under the Protected Person Statute, the trial court must determine "that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability." I.C. § 35-37-4-6(e)(1). To determine whether the statements are reliable, the trial court is to consider: (1) the time and circumstances of the statement, (2) whether there was significant opportunity for coaching, (3) the nature of the questioning, (4) whether there was a motive to fabricate, (5) use of age appropriate termination, and (6) spontaneity and repetition. Pierce v. State, 677 N.E.2d 39, 44 (Ind. 1997).

In the instant case, the seven-month delay is explained by K.C.'s fear that she would

go to jail if she told anyone that Tolliver had molested her. In any event, the time when the statement is made is only one factor to consider. Trujillo v. State, 806 N.E.2d 317, 328 (Ind. Ct. App. 2004). Here, there is no evidence in the record that Mother coached K.C.'s statements or that K.C. had any motive to fabricate her statements. Perhaps even more compelling, K.C. repeated her accusations several times following her initial disclosure, and each repetition was substantially consistent with the others. Finally, K.C. used age appropriate terminology, and her disclosure was unsolicited and spontaneous. Under these circumstances, we cannot say that the trial court abused its discretion when it concluded that K.C.'s out-of-court statements were sufficiently reliable.

Finally, Tolliver argues that Mother's testimony was unfairly prejudicial. Indiana Evidence Rule 403 provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." Initially, we note that Tolliver's objection at trial was based on hearsay and not that the objection was unfairly prejudicial to him. Consequently, he has waived the argument on appeal. See Grace v. State, 731 N.E.2d 442, 444 (Ind. 2000) (stating that "[g]rounds for objection must be specific and any grounds not raised in the trial court are not available on appeal").

Waiver notwithstanding, even if the trial court erroneously admitted Mother's testimony, the error was harmless, inasmuch as Mother's testimony was merely cumulative of other properly-admitted evidence. See Truax v. State, 856 N.E.2d 116, 124 (Ind. Ct. App. 2006) (observing that "any error caused by the admission of evidence is harmless error . . . if the erroneously-admitted evidence was cumulative of other evidence properly admitted").

Indeed, K.C. testified that Tolliver performed oral sex on her and that he forced her to perform oral sex on him "three times." Tr. p. 338. In addition, K.C. stated that Mother was the first adult whom she told about the abuse and that she told her because she was having bad dreams about Tolliver. Thus, this claim fails.

II. Sentencing

A. Inappropriate Sentence

Tolliver argues that the trial court imposed an inappropriate sentence in light of the nature of the offenses and his character. As stated earlier, Tolliver was sentenced to forty years imprisonment on the one count of child molesting in FA-37 and to forty years on each of the two counts in FA-38. The two counts in FA-38 were to be served concurrently with each other but consecutively to the forty-year sentence imposed in FA-37, for an aggregate term of eighty years imprisonment.

Although sentencing decisions are within the trial court's discretion, this court has the constitutional authority to revise an otherwise proper sentence where, after due consideration of the trial court's sentencing determination, we find that the sentence imposed is inappropriate in light of the nature of the offense and the defendant's character. Mishler v. State, 894 N.E.2d 1095, 1103-04 (Ind. Ct. App. 2008) (citing App. R. 7(B)). The defendant carries the burden to convince this court that the sentence imposed is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)).

Indiana Code section 35-50-2-4 provides that "[a] person who commits a Class A felony shall be imprisoned for a fixed term between twenty (20) and fifty (50) years, with the

advisory sentence being thirty (30) years." Thus, each of Tolliver's forty-year terms was ten years above the advisory sentence but ten years less than the maximum sentence.

Tolliver claims that this case is analogous to Tyler v. State, 903 N.E.2d at 469. In Tyler, the defendant had been convicted on two counts of class A felony child molestation. Id. at 465. The defendant was sentenced to forty years imprisonment on each count, to be served consecutively to each other. Id. In addition, the defendant was sentenced to an additional thirty years for being a habitual offender, for an aggregate term of 110 years. Id.

On appeal, the defendant argued that his sentence was inappropriate in light of the nature of the offenses and his character pursuant to Rule 7(B). Id. at 468. Our Supreme Court concluded that because the defendant had committed the offenses against multiple victims, the imposition of consecutive sentences was justified. Id. Nevertheless, the Tyler Court revised each sentence to the advisory term of thirty years, reasoning that "there is no evidence that [the defendant] used physical force on the children, and . . . none of the children was physically injured by the incident." Id. at 469. In addition, the Court observed that the defendant "was babysitting his victims at the time of the offenses, but the record does not suggest that he actively sought opportunities to supervise the children, and there is no evidence of his having sought to establish a prior position of trust or confidence." Id. The Court also noted that the defendant "had no previous convictions for child molesting or any other sex offense." Id.

The Tyler Court also recognized that the defendant had been emotionally troubled from a young age and had been placed in various institutions throughout his adolescence. Id.

Moreover, the defendant had been the victim of physical and verbal abuse, diagnosed as suicidal at the age of nine or ten, and had had "a brain tumor [] reported that affected his ability to control his behavior." Id. Finally, the defendant had taken "at least five IQ tests with scores ranging from 61 to 72." Id.

Here, we note that there are similarities between Tolliver and Tyler. Specifically, in the instant case, the Children were not physically injured during the molestations. In addition, there is evidence that Tolliver suffered physical and sexual abuse as a child, has experienced mental health issues, has only a sixth grade education, and has been on his own since the age of fourteen.

Nevertheless, there are also some important differences. First, Tolliver was in a position of trust to the Children. They were the niece and nephew of his girlfriend, with whom he lived, and the children referred to him as "Uncle Kevin." Tr. p. 283. In addition, Tolliver threatened the Children in an effort to keep them from telling anyone about the molestations. Specifically, Tolliver threatened K.C. that if she told anyone, she would be a bad girl, and, indeed, she remained silent for seven months because she feared going to jail. Similarly, Tolliver warned J.C. that if he told anyone, Tolliver would kill his parents. Furthermore, at least with respect to K.C., physical force was used. See id. at 334 (stating that Tolliver "dragged" her into the bedroom).

Perhaps the most important difference is that Tolliver was adjudicated a juvenile delinquent for acts that would have been child molesting and sexual battery if committed by an adult. These acts involved separate victims and occurred on separate occasions.

Following these adjudications, Tolliver received intensive treatment in a sex offender program, but absconded from treatment after a little more than a year and was discharged from probation. Finally, a psychological evaluation indicated that Tolliver's juvenile and criminal history suggests that "Tolliver is subject to pedophilic arousal. Given the opportunity, he should be considered at high risk to repeat this type of behavior." Green App. p. 98. In light of these differences, Tyler is not a useful comparison.

Tolliver also maintains that the similarity between this case and Mishler "is striking." Appellant's Br. p. 14. In Mishler, the defendant was convicted on two counts of class A felony child molesting. 894 N.E.2d at 1098. The first incident occurred when the victim was in the second grade, but the second did not occur until the victim was in the fourth grade. Id. at 1097-98. The defendant was sentenced to fifty years incarceration on each count, to run concurrently. Id. at 1098.

On appeal, the defendant argued that the imposition of the maximum term for a class A felony was not warranted, even though the terms were to run concurrently. Id. at 1104. This court agreed, concluding that "[a]lthough the record supports an enhanced sentence in light of the aggravating circumstances, . . . we cannot say that a fifty-year aggregate sentence is warranted in these circumstances." Id. We revised the defendant's sentence to "thirty-eight years on each count of class A felony child molesting, to be served concurrently." Id.

We agree with Tolliver that there are many similarities between the instant case and Mishler. For instance, Mishler had juvenile adjudications for acts that would have been child molesting if they had been committed by an adult. Id. In addition, like Tolliver, Mishler had

been in a position of trust. Id. Furthermore, Mishler's adult criminal record was limited to misdemeanor convictions. Id. Finally, Mishler had undergone counseling on two separate occasions. Id.

Again, notwithstanding the similarities, there are important differences. Mishler had been sentenced to fifty years imprisonment on each count, which is the maximum sentence for a class A felony, I.C. § 35-50-2-4. Tolliver, by contrast, was sentenced to only forty years on each count. As stated above, the Mishler court acknowledged that the aggravating circumstances, which were very similar to the aggravating circumstances here, warranted an enhanced sentence, but not the maximum sentence. 894 N.E.2d at 1104. Indeed, this court revised Mishler's sentence to thirty-eight years on each count, id., which is only two years less than Tolliver's sentence on each count. We are aware that Mishler's terms were to be served concurrently while two of Tolliver's three terms are to be served consecutively, resulting in a longer aggregate term. However, we emphasize that Mishler committed multiple offenses against the same victim. Conversely, within a few hours, Tolliver committed multiple offenses against two victims at different times. It is well settled that the existence of multiple victims warrants the imposition of consecutive sentences to "vindicate the fact that there were separate harms and separate acts against more than one person." Townsend v. State, 860 N.E.2d 1268, 1273 (Ind. Ct. App. 2007) (citing Perry v. State, 845 N.E.2d 1093, 1097 (Ind. Ct. App. 2007)).

Nevertheless, Tolliver points out that his steady work history should have been considered by the trial court as a positive reflection on his character. Indeed, gainful

employment may be recognized as a mitigating circumstance reflecting on the issue of the defendant's character. See Fointno v. State, 487 N.E.2d 140, 148 (Ind. 1986) (recognizing the defendant's work history as a mitigating circumstance). But even if the trial court had recognized Tolliver's employment history as a mitigating circumstance, the aggravating circumstances, including Tolliver's violation of a position of trust, prior juvenile adjudications, risk to reoffend, the presence of multiple victims, and the tender age of the victims, support the imposition of an elevated sentence. Therefore, Tolliver has failed to prove that his sentence is inappropriate.

B. Credit Restricted Felon Statutes

Finally, Tolliver maintains that the trial court's application of the Credit Restricted Felony Statutes (the Statutes) to him violates the constitutional prohibition against ex post facto laws contained in the United States and Indiana Constitutions.

As an initial matter, the State argues that Tolliver incorrectly assumes that the ex post facto analysis is the same under both constitutions, and, because Tolliver does not present a separate analysis under the Indiana Constitution, he has waived the issue. Recently, our Supreme Court held that an independent analysis should be applied to ex post facto claims under the Indiana Constitution because even though the same test is used, the results may be different. Wallace v. State, 905 N.E.2d 371, 378 (Ind. 2009).

In the instant case, Tolliver does not present a separate analysis under the Indiana Constitution, assuming that the analysis is the same. In addition, although Wallace is a recent case, it was published on April 30, 2009, which was two months before Tolliver filed his

brief. Accordingly, Tolliver has waived his ex post facto claim under the Indiana Constitution. See Carroll v. State, 822 N.E.2d 1083, 1087-99 (Ind. Ct. App. 2005) (holding that the appellant waived review under the Indiana Constitution by failing to present a separate and independent analysis under the Indiana Constitution).

Proceeding to the merits, the Statutes became effective on July 1, 2008, and applied "only to persons convicted after June 30, 2008." Pub. L. 80-2008, Sec. 6. Indiana Code section 35-41-1-5.5 defines a "[c]redit restricted felon," in part, as "a person who has been convicted of . . . [c]hild molesting involving sexual intercourse or deviate sexual conduct." Indiana Code section 35-50-6-4(b) states that "[a] person who is a credit restricted felon and who is imprisoned for a crime or imprisoned awaiting trial or sentencing is initially assigned to Class IV. A credit restricted felon may not be assigned to Class I or Class II." "A person assigned to Class I earns one (1) day of credit time for each day the person is imprisoned" and "[a] person assigned to Class II earns one (1) day of credit time for every two (2) days the person is imprisoned." I.C. § 35-50-6-3(a), -3(b). By contrast, "[a] person assigned to Class IV earns one (1) day of credit time for every six (6) days the person is imprisoned. I.C. § 35-50-6-3(d) (emphasis added).

Article I, Section 10 of the United States Constitution states that "[n]o State shall . . . pass any . . . ex post facto Law." For a criminal law to be ex post facto, it must be retrospective and it must disadvantage the offender affected by it. Weaver v. Graham, 450 U.S. 24, 29 (1981). In addition, the ex post facto prohibition includes "the imposition of punishment more severe than the punishment assigned by law when the act to be punished

occurred." Id. at 30.

Recently, this court was presented with this issue, namely, whether the retroactive application of the Statutes was an impermissible ex post facto law. Upton v. State, 904 N.E.2d 700, 704 (Ind. Ct. App. 2009). We held that it was, citing to the United States Supreme Court's decision in Weaver, 450 U.S. at 35-36, which held that the retroactive application of a Florida statute, reducing the amount of credit time that a defendant could earn, was an impermissible ex post fact law. Upton, 904 N.E.2d at 706.

Tolliver committed the instant offenses in 2006, which was before the Statutes were passed. Pursuant to the Statutes, Tolliver was assigned to Class IV, earning one day of credit time for every six days served. If the Statutes had not been applied to Tolliver, he would have been eligible for Class I or Class II credit, earning one day of credit time for either one or two days served. Thus, the Statutes were applied retroactively to Tolliver and imposed a harsher punishment, thereby constituting an ex post facto violation. Consequently, we reverse the trial court's determination that Tolliver is a credit restricted felon.

Affirmed in part, reversed in part, and remanded with instructions to the trial court to revise Tolliver's credit time classification and to recalculate Tolliver's credit time consistent with this opinion.

FRIEDLANDER, J., and RILEY, J., concur.