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**IN THE
COURT OF APPEALS OF INDIANA**

RAYMOND SHOOK,)
)
Appellant-Defendant,)
)
vs.) No. 49A04-0603-CR-125
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William Robinette, Commissioner
Cause No. 49G03-0508-FA-138771

September 26, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Raymond Shook appeals the eighteen-year sentence that was imposed following his guilty plea to Child Molesting,¹ a class B felony. Specifically, Shook contends that his sentence must be set aside because (1) the trial court failed to consider his guilty plea a significant mitigating circumstance, and (2) his sentence was inappropriate in light of the nature of the offense and his character because his criminal history should not have been afforded significant weight because his prior convictions consisted primarily of drug and alcohol offenses. Concluding that Shook was properly sentenced, we affirm the judgment of the trial court.

FACTS

On October 22, 2004, thirty-seven-year-old Shook drank twelve beers, a fifth of Hot Damn liquor, and smoked between six and eight joints of marijuana. He then entered the bedroom of twelve-year-old T.W. in Indianapolis and engaged in sexual intercourse with her.² After the incident, T.W.'s family took her to Riley Hospital, where a vaginal semen sample was recovered from her underwear. On August 5, 2005, the Marion County Crime Lab confirmed that the semen sample matched Shook's DNA profile.

Shook was charged with class A felony child molesting for engaging in sexual intercourse with T.W. and class C felony child molesting for touching and fondling T.W. Pursuant to an agreement negotiated with the State, Shook agreed to plead guilty to class B felony child molesting for engaging in sexual intercourse with T.W. in exchange for the

¹ Indiana Code § 35-42-4-3.

² The record reveals that Shook was friends with T.W.'s father, appellant's app. p. 13, but it is not clear how Shook gained entry to the father's residence or T.W.'s bedroom.

dismissal of the other two charges. The plea agreement left sentencing to the discretion of the trial court.

On February 10, 2006, the trial court accepted the plea agreement and identified Shook's prior criminal history as the sole aggravating factor at the sentencing hearing. After the trial court found that no mitigating factors existed, Shook was sentenced to eighteen years with three of those years suspended. Shook now appeals.

DISCUSSION AND DECISION

I. Standard of Review

In addressing Shook's contention that he was improperly sentenced, we initially observe that sentencing decisions are within the sound discretion of the trial court. Jones v. State, 790 N.E.2d 536, 539 (Ind. Ct. App. 2003). Sentencing decisions are given great deference on appeal and will only be reversed for an abuse of discretion. Beck v. State, 790 N.E.2d 520, 522 (Ind. Ct. App. 2003). When the trial court imposes a sentence other than the presumptive sentence,³ we will examine the record to insure that the trial court explained its reasons for selecting the sentence it imposed. Kelly v. State, 719 N.E.2d 391, 395 (Ind.

³ Indiana's sentencing statutes were amended by P.L. 71-2005, sec. 7, with an emergency effective date of April 25, 2005, to alter "presumptive" sentences to "advisory" sentences. In Weaver v. State, 845 N.E.2d 1066 (Ind. Ct. App. 2006), a panel of this court determined that the proper sentencing statutes to be applied were those in effect when the defendant had been convicted of the offense, rather than the amended versions that became effective after the conviction but before sentencing. Specifically, the Weaver court observed "Application of the amended statutes to persons convicted before the amendments took effect would, we believe, violate the constitutional protections against ex post facto laws." Id. at 1070. Inasmuch as Shook committed the instant offense on October 22, 2004—approximately six months before the effective date of P.L. 71-2005—we believe that the rule advanced in Weaver should apply in these circumstances and that the propriety of Shook's sentence should be reviewed under the former sentencing statute. In accordance with that version, "A person who commits a Class B felony shall be imprisoned for a fixed term of ten (10) years,

1999). The trial court's statement of reasons must include the following components: (1) identification of all significant aggravating and mitigating circumstances; (2) the specific facts and reasons that led the court to find the existence of each such circumstance; and (3) an articulation demonstrating that the mitigating and aggravating circumstances were evaluated and balanced in determining the sentence. Id.

We also note that a single aggravating factor may be sufficient to support an enhanced sentence. Powell v. State, 769 N.E.2d 1128, 1135 (Ind. 2002). A defendant's criminal history alone may be a sufficient basis for imposing an enhanced sentence when considering the gravity, nature, and number of prior offenses as they relate to the current offense. Morgan v. State, 829 N.E.2d 12, 15 (Ind. 2005). Additionally, the determination of the existence of, and the weight to be given to, mitigating factors falls within the trial court's discretion. Allen v. State, 722 N.E.2d 1246, 1251 (Ind. Ct. App. 2000). A trial court is not required to give the same weight to mitigating evidence as does the defendant, nor must the court accept the defendant's assertions as to what constitutes a mitigating circumstance. Id. at 1252. In other words, the trial court need not consider alleged mitigating factors that are highly disputable in nature, weight, or significance. Newsome v. State, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003).

Additionally, a defendant's substance abuse may be rejected as a mitigating circumstance. Rose v. State, 810 N.E.2d 361, 367 (Ind. Ct. App. 2004). Moreover, alcoholism and drug abuse may be found to be an aggravating factor. See Bryant v. State,

with not more than ten (10) years added for aggravating circumstances or not more than four (4) years

802 N.E.2d 486, 501 (Ind. Ct. App. 2004), trans. denied (holding that the defendant's substance abuse was a proper aggravating factor when the evidence showed that defendant was aware of his drug and alcohol problems but had taken no positive steps to treat those addictions).

II. Shook's Claims

A. Guilty Plea as Significant Mitigating Factor

Shook first argues that the trial court erred by failing to find his guilty plea a mitigating factor at sentencing. Initially, we note that an allegation that the trial court failed to identify a particular mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied. Our courts have held that guilty pleas should generally be given mitigating weight, but not every guilty plea is a significant mitigating circumstance for sentencing purposes. Ruiz v. State, 818 N.E.2d 927, 929 (Ind. 2004); Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999). A guilty plea must be accorded some mitigating weight when it confers a benefit on the State, little or no benefit on the defendant, and the defendant demonstrates his remorse and acceptance of responsibility. Cotto v. State, 829 N.E.2d 520, 225-26 (Ind. 2005). Our court has stressed that pleading guilty is but one factor to be considered by the trial court in sentencing and that the trial court has wide discretion in balancing aggravating and mitigating factors. Kinthead v. State, 791 N.E.2d 243, 247 (Ind. Ct. App. 2003).

subtracted for mitigating circumstances.” Ind. Code § 35-50-2-5.

At sentencing, after detailing Shook's extensive criminal history, the trial court found that the "aggravators outweigh any mitigators." Tr. 25. Under the plea agreement, Shook was allowed to plead guilty to class B felony child molesting instead of going to trial for class A felony child molesting as he had been charged. A conviction for class A felony child molesting can be obtained if, at the time of the offense, the defendant is over twenty-one years of age and the victim is under fourteen years of age. I.C. § 35-42-4-3(a)(1). Shook was thirty-seven years old when he molested twelve-year-old T.W. Thus, the factors needed to enhance Shook's offense from a class B felony to a class A felony could easily have been proven by the State.

Shook obtained a significant benefit from the plea agreement because the sentencing range for the charged class A felony is twenty to fifty years and the sentencing range for the class B felony is six to twenty years. Ind. Code §§ 35-50-2-4, -5. By pleading guilty to the class B felony, the maximum sentence Shook could receive was twenty years, which was thirty years lower than the maximum sentence he could have received if he had been found guilty of the class A felony. In fact, any enhanced sentence Shook could have received under the plea was at most equal to the minimum sentence he could have received if he had been found guilty of the class A felony. Because Shook received a substantial benefit from the plea bargain, the trial court was not required to find Shook's guilty plea a significant mitigating factor at sentencing. Cf. Cotto, 829 N.E.2d at 525-26. Therefore, we cannot say that the trial court abused its discretion by not giving Shook's guilty plea significant mitigating weight. Shook's claim fails, consequently, because he has not established that the

mitigating evidence is both significant and clearly supported by the record. See Wells, 836 N.E.2d at 479.

B. Appropriateness of the Sentence

Shook also argues that his eighteen-year sentence was inappropriate in light of the nature of his offense and his character. Specifically, Shook argues that his prior alcohol-related convictions are only marginally significant aggravating factors; therefore, his sentence was improperly enhanced.

Our court has the constitutional authority to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is "inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). However, sentence review under Appellate Rule 7(B) is very deferential to the trial court's decision, Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003), and we refrain from merely substituting our judgment for that of the trial court, Foster v. State, 795 N.E.2d 1078, 1092 (Ind. Ct. App. 2003).

As to the nature of Shook's character, his criminal history involves four prior misdemeanor convictions and one prior felony conviction. As the trial court noted, all of Shook's prior convictions involve drugs or alcohol: public intoxication, visiting a common nuisance, conversion to support a drug habit, resisting law enforcement while intoxicated, and two convictions for operating a vehicle while intoxicated. Tr. 18-20, 24-25. Shook's criminal history alone may be a sufficient basis for imposing an enhanced sentence considering the gravity, nature, and number of his prior offenses as they relate to the current

offense. See Morgan v. State, 829 N.E.2d 12, 15 (Ind. 2005).

Shook, however, directs us to Cotto, 829 N.E.2d at 520, and Neale v. State, 826 N.E.2d 635 (Ind. 2005), to support his argument that his prior alcohol-related convictions should not have been used to enhance his sentence. However, these cases are distinguishable. In Cotto, our Supreme Court concluded that three alcohol-related misdemeanors were not sufficiently aggravating to enhance the defendant's sentence for drug possession. Cotto, 829 N.E.2d at 525-26. In Neale, our Supreme Court held that it was improper for the trial court to use prior alcohol-related misdemeanors to enhance the defendant's sentence for child molesting because "[h]ere there was neither drinking nor driving involved in the acts of child molesting." Neale, 826 N.E.2d at 639. First, unlike the defendants in Cotto and Neale, Shook molested T.W. while under the influence of twelve beers, a fifth of Hot Damn liquor, and multiple joints of marijuana. Therefore, Shook's prior substance abuse offenses are directly related to the current child molestation offense. Moreover, Shook has been convicted of four substance-related misdemeanors and one substance-related felony. Shook's criminal history, therefore, is more extensive and severe than either of the defendants in Cotto or Neale. Consequently, Shook's prior convictions were properly used to enhance his sentence.

The judgment of the trial court is affirmed.

VAIDIK, J., and CRONE, J., concur.