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IN THE
COURT OF APPEALS OF INDIANA

THOMAS LEE NICKELS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A05-0905-CR-297
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Daniel J. Pfleging, Judge
Cause No. 29D02-0806-FC-62

September 28, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Thomas Lee Nickels appeals his sentence for Class C felony child solicitation,[1] which was enhanced because he is a repeat offender.[2] We affirm.

FACTS AND PROCEDURAL HISTORY

On October 22, 2003, Nickels was convicted of molesting his daughter. He was sentenced to five years with three years suspended, but spent only a few days in jail. He participated in a sex offender program through the Indianapolis Treatment Center from 2003 to 2006 and successfully completed probation on October 21, 2006.

In June 2008, Nickels chatted online with a Carmel Police Officer posing as a fourteen-year-old girl. They made arrangements to meet to engage in oral sex and other sexual conduct. Nickels was charged with three counts of Class C felony child solicitation, corresponding to three online chats with the undercover officer. Nickels was also charged with three repeat offender enhancements. On October 30, 2008, Nickels agreed to plead guilty to one count of child solicitation and one sentence enhancement in exchange for dismissal of the other charges.

A sentencing hearing was held on January 15, 2008. Nickels' father, James, testified he believed Nickels' attitude had changed since he had been incarcerated for this offense, and he did not think Nickels had a problem anymore. Nickels' wife, Kathryn, agreed Nickels' attitude had changed, and she thought he was unlikely to reoffend. Nickels has a son and a daughter. Kathryn and both the children have disabilities. Kathryn testified Nickels' incarceration would be a hardship on the family:

[1] Ind. Code § 35-42-4-6(c).
[2] Ind. Code § 35-50-2-14.

> [W]e've always been pretty much a 2 income family. With our children having the disabilities that they have, they have a lot of different doctors they go to, therapies. And, also, we put both of our children in private schools where, as you know, has a very hefty tuition but it's a place that they can thrive because it is a small school and those schools can help them with their special needs.

(Tr. at 82) (errors in original).

Nickels testified he had been reading religious books, he has a sexual addiction, and needs help. He compared his problem to a drinking problem: "You're never cured of it. There's always something that could always trigger it." (*Id*. at 109.) However, he felt he could successfully manage his problem with counseling and family support. He acknowledged he had previously received counseling, but felt he had a "closed mind" and a "closed heart" at that time and was now prepared to deal with his issues. (*Id*. at 113.) Nickels read a statement apologizing for his actions and recognizing he had hurt his wife, children, and parents.

Carol Bruns, the author of the pre-sentence investigation report, spoke to the court concerning a change to her sentencing recommendation. She initially recommended eight years on the underlying offense plus a two-year enhancement; however, after reviewing the applicable statute, she believed a four-year enhancement was required. She recommend the maximum sentence for the underlying offense when an enhancement will be attached, and felt that was appropriate in Nickels' case because of the nature of this offense and his recent completion of probation for a similar offense. (*Id*. at 138.)

The trial court imposed a sentence of ten years with the following statement:

> The Court is finding that there is [a] mitigating factor that imprisonment of a person could result in a hardship on his depend[e]nts. The Court is not

> finding that the fact that he entered the Plea of Guilty make[s] any factor because Counts II, III, V and VI were dismissed so he did receive a benefit of the bargain. The Court notes that human nature of the charges that he's [pled] guilty to, he is admitting that he has had a prior history of criminal or delinquent activity, the Court is imposing its Sentence of 6 years on Count I. That Sentence is enhanced due to the judgment of conviction that's being entered as being a repeat sex offender. . . . That enhancement is 4 years.

(*Id*. at 146-47.)

DISCUSSION AND DECISION

Nickels challenges his sentence on several grounds: (1) the trial court did not give a reasonably detailed statement of the reasons for imposing the sentence; (2) the trial court abused its discretion by not recognizing certain mitigating circumstances; and (3) the sentence is inappropriate in light of his character and the nature of his offense.

1. Sentencing Statement

A trial court must provide a reasonably detailed statement of the reasons for imposing a particular sentence. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g on other grounds* 875 N.E.2d 218 (Ind. 2007). "If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." *Id*. Sentencing statements serve two primary purposes: (1) to guard against arbitrary and capricious sentences, and (2) to provide an adequate basis for appellate review. *Id*. at 489.

The trial court recognized one mitigator, the hardship to Nickels' dependents. The trial court then explained that it would not give mitigating weight to Nickels' guilty plea because of the substantial benefit he received from that plea. The court noted he had a

prior offense and noted the nature of the offenses with which he had been charged. We find this to be a reasonably detailed statement that provides an adequate basis for our review. Nickels' primary argument is that the trial court did not comment on every proffered mitigator, but it was not required to do so. *See id*. at 493 (trial court is not required to explain why it has found a mitigating factor does not exist).

2. Mitigating Circumstances

Nickels argues the trial court should have recognized as mitigators his admission of responsibility, his remorse, that he was unlikely to commit another offense, and that he was likely to respond to short-term imprisonment. "An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record." *Id*. We review the court's finding of mitigators for abuse of discretion. *Id*. at 491. An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court. *Id*. at 490.

The record reflects the trial court considered Nickels' admission of responsibility and declined to give it weight because of the benefit he received from his plea bargain. This is not an abuse of discretion. *See Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999) (guilty plea was not a significant mitigator where Sensback received substantial benefits). The record also reflects Nickels apologized for his actions, admitted he had a problem, and recognized he had hurt his family. However, the trial court is in the best position to determine whether remorse is sincere and entitled to mitigating weight. *See*

Penick v. State, 659 N.E.2d 484, 489 (Ind. 1995) ("[A] finding of remorse is within the sound discretion of the trial court.").

Nickels argues he is unlikely to commit another offense and is likely to respond to short-term imprisonment because he recognized his sexual addiction and need for counseling, he has the support of his family, and he had previously been successful on probation. This falls short of the clear support in the record needed to show the trial court abused its discretion. After his first offense, Nickels was treated leniently and obtained counseling. Nevertheless, he reoffended soon after completing probation. Although his family members appeared to enthusiastically offer their support, at the same time they were reluctant to acknowledge Nickels has a problem. We cannot say the trial court abused its discretion by not recognizing these mitigators.

3. Appropriateness of Sentence

Nickels argues his sentence is inappropriate. Even if a trial court acts within its lawful discretion in determining a sentence, the Indiana Constitution authorizes us to conduct an independent review. *Anglemyer*, 868 N.E.2d at 491. 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). We give deference to the trial court, recognizing its special expertise in making sentencing decisions. *Barber v. State*, 863 N.E.2d 1199, 1208 (Ind. Ct. App. 2007), *trans. denied*. The defendant bears the burden of persuading us the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

As to the nature of his offense, Nickels argues it was not violent and no actual victim was involved. This offense may not be worse than the typical Class C felony child solicitation; however, we cannot say the sentence is inappropriate in light of Nickles' character. Nickels previously molested his disabled daughter. He received a short term of probation and was required to complete counseling, but less than two years after completing those, he was caught searching for a new victim on the internet. Nickels argues he should not receive an aggravated and enhanced sentence because he has only one prior conviction; however, he acknowledges that is permissible under *Pedraza v. State*, 887 N.E.2d 77, 80 (Ind. 2008). We cannot say an aggravated sentence in addition to an enhancement is inappropriate in this case.

Affirmed.

CRONE, J., and BROWN, J., concur.