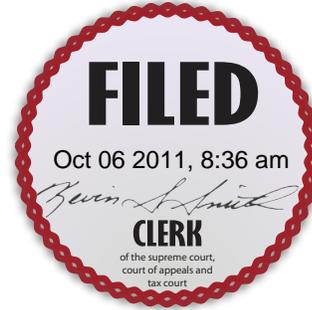


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ANTHONY J. SIMS,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 84A01-1102-CR-80

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable Michael J. Lewis, Judge
Cause No. 84D06-0904-FB-1164

October 6, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Anthony J. Sims (“Sims”) appeals his sentence for Rape, as a Class B felony.¹ We affirm that sentence, but remand with instructions to the trial court to vacate the conviction and sentence for Incest, as a Class C felony.²

Issues

Sims presents two issues for review:

- I. Whether the trial court abused its sentencing discretion; and
- II. Whether the sentence is inappropriate.

Facts and Procedural History

On April 1, 2009, eighteen-year-old N.S. went to sleep in her bedroom at her mother’s house. As N.S. slept, Sims came into the bedroom, got into bed with N.S., pulled down her pajama bottoms, and penetrated N.S.’s vagina with his penis. N.S. awoke and several times told Sims to stop. However, Sims continued until he ejaculated. He then left the bedroom and the house.

N.S. reported to family members that she had been raped. Her brother’s girlfriend took her to a local hospital, where N.S. spoke with a police officer. On April 17, 2009, the

¹ Ind. Code § 35-42-4-1.

² Ind. Code § 35-46-1-3. Sims does not specifically challenge his conviction or five-year concurrent sentence for Incest. However, we observe that the proof adduced by the State established a single harm to a single victim and, because of its fundamental nature, sua sponte raise the issue of whether there is a Double Jeopardy violation. The Double Jeopardy Clause states that no person “shall be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. Multiple convictions are not permissible upon proof of a single act causing the harm alleged. See Howard v. State, 481 N.E.2d 1315, 1318 (Ind. 1985). Here, a single act of sexual intercourse was alleged and proved. We therefore direct the trial court, upon remand, to vacate the conviction and sentence for Incest.

State charged Sims with Rape and Incest. He was convicted by a jury and given concurrent sentences of sixteen years and five years, respectively. This appeal ensued.

Discussion and Decision

I. Abuse of Discretion

Upon conviction of a Class B felony, Sims faced a sentencing range of six years to twenty years, with the advisory sentence being ten years. See Ind. Code § 35-50-2-5. Accordingly, his sixteen-year sentence is six years greater than the advisory. He presents two sentencing challenges, first arguing that the trial court abused its discretion in the consideration of aggravating and mitigating circumstances, and second arguing that his sentence is inappropriate.

“So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion.” Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on other grounds, 875 N.E.2d 218 (Ind. 2007) (“Anglemyer II”). This includes the finding of an aggravating circumstance and the omission to find a proffered mitigating circumstance. Id. at 490-91. When imposing a sentence for a felony, the trial court must enter “a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence.” Id. at 491.

The trial court’s reasons must be supported by the record and must not be improper as a matter of law. Id. However, a trial court’s sentencing order may no longer be challenged as reflecting an improper weighing of sentencing factors. Id. A trial court abuses its discretion if its reasons and circumstances for imposing a particular sentence are 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. Hollin v. State, 877 N.E.2d 462, 464 (Ind. 2007). Here, the trial court recognized as aggravators Sims' lengthy history of juvenile and adult offenses, and the fact that he was on probation at the time of the rape. With regard to mitigation evidence, the trial court acknowledged that Sims had claimed to have a mental health problem, but also observed that there was no corresponding documentation in the pre-sentence report.

Sims alleges that the trial court improperly considered force, an element of the crime of Rape, to also be an aggravating circumstance. "The law is clear that a material element of a crime may not be used as an aggravating factor." Waldon v. State, 829 N.E.2d 168, 183 (Ind. Ct. App. 2005), trans. denied. Here, the trial court observed, "I just think, Rape is by force or imminent threat of force. I think it's a violent offense, no matter if there was no violence, apparent violence in this." (Sent. Tr. 35.) The observation was made after defense counsel had argued: "This was not one that involved a threat of violence, the use of violence, any kind of real coercion, it just kind of happened while she was asleep." (Sent. Tr. 25-26.) As such, the trial court was explaining why the claim of lack of force was not entitled to mitigating weight; force was not being identified as an aggravating circumstance.

Sims also argues that the trial court ignored a mitigating circumstance, specifically, that his incarceration would result in undue hardship to his three children. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is not only supported by the record but also that the mitigating

evidence is significant. Anglemyer II, 875 N.E.2d at 220-21. A trial court “is not required to find that a defendant’s incarceration would result in undue hardship upon his dependents.” Davis v. State, 835 N.E.2d 1102, 1116 (Ind. Ct. App. 2005), trans. denied. Indeed, “[m]any persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship.” Dowdell v. State, 720 N.E.2d 1146, 1154 (Ind. 1999). Sims presented no evidence as to his relationships with his three children; it is not apparent that he provided either financial support or supervision. The trial court did not ignore a mitigating circumstance clearly supported by the record.

II. Appropriateness of Sentence.

Under Indiana Appellate Rule 7(B), this “Court may revise a sentence authorized by statute 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.” In performing our review, we assess “the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case.” Cardwell v. State, 895 N.E.2d 1219, 1224 (Ind. 2008). A defendant ““must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.”” Anglemyer, 868 N.E.2d at 494 (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)).

As for the nature of the offense, Sims took advantage of N.S.’s vulnerability as she was sleeping at her mother’s house, a house to which Sims was allowed free access. Sims

ignored N.S.'s repeated requests that he stop. After N.S. reported the rape, Sims attempted to place blame on N.S., claiming that she had flirted with him and wanted sexual intercourse with him.

As to the character of the offender, Sims has a substantial history of juvenile offenses and adult crimes. He admitted to acts that would be battery on a law enforcement officer and disorderly conduct, if committed by an adult. He also committed acts that would be criminal mischief and theft if committed by an adult. He was placed on probation; subsequently, the State filed numerous petitions to revoke probation. As an adult, Sims had convictions related to illegal alcohol possession and consumption. He was convicted of Burglary as a Class B felony, receiving a ten-year sentence, with four years suspended to probation. He was on probation when he committed the instant offense.

In sum, there is nothing in the nature of the offense or the character of the offender to persuade us that the sixteen-year sentence is inappropriate.

Conclusion

Sims has demonstrated no abuse of the trial court's sentencing discretion. His sixteen-year sentence for Rape is not inappropriate. However, to obviate Double Jeopardy concerns, we remand to the trial court with instructions to vacate the conviction and sentence for Incest.

Affirmed in part, reversed in part, and remanded.

MATHIAS, J., and CRONE, J., concur.