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IN THE
COURT OF APPEALS OF INDIANA

LIBERIO AGUIRRE,	)	
	)	
Appellant/Defendant,	)	
	)	
vs.	)	No. 03A01-0904-CR-161
	)	
STATE OF INDIANA,	)	
	)	
Appellee/Plaintiff.	)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause No. 03D01-0606-FB-1038

October 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Liberio Aguirre appeals following his conviction for Sexual Misconduct with a Minor, a Class B felony.[1] On appeal, Aguirre contends that the trial court abused its discretion in sentencing him and that his sentence is inappropriate in light of the nature of his offense and his character. We affirm.

FACTS AND PROCEDURAL HISTORY

According to the factual basis entered during the February 2, 2009 plea hearing, during the months of September through November 2004, Aguirre engaged in a sexual relationship with a minor, C.M. Aguirre, who was twenty-seven years old at the time, was aware that C.M. was fifteen years old. Aguirre later admitted that he had lied to C.M. about his age and that at the time of their relationship, he had led C.M. to believe that he was nineteen years old.

At some point, C.M. learned that she was pregnant with Aguirre's child. C.M. told Aguirre that she was expecting their child. Aguirre, however, never saw C.M. again after learning that she was pregnant.

On February 2, 2009, Aguirre pled guilty to Class B felony sexual misconduct with a minor in exchange for a sentence of no more than ten years, with sentencing left to the discretion of the trial court. The trial court conducted a sentencing hearing on March 3, 2009. During this hearing, the trial court heard evidence relating to Aguirre's criminal history as well as the instant offense. At the conclusion of the sentencing hearing, the trial court made the following statement regarding aggravating and mitigating factors:

[1] Ind. Code § 35-42-4-9(a)(1) (2004).

> You have other situations in which protection orders are issued against you. You have other cases in which there is an assault. And while you didn't have a conviction for sexual misconduct with a minor in another case, you were certainly put on notice that that was clearly against the law. And you were told you could get up to twenty years for it. And thereafter, without regard … [y]ou go and lie to a young lady about your age. You find out her age clearly.… You either just completely don't care about anybody or anything else, or you're just lying. Well I don't know.… But the problem that it presents is I think you are highly likely to do it again. There are references to three fifteen year olds in your dating history. Two by your own admission. And you lie.… What's important is you and your life and doing what you want to do. Hitting people, disrespecting people, treating people as sex objects, being on notice that this is a major felony and going out and doing it again anyway. I mean you don't seem to take a warning. And the best I can figure out from the record here is that's just because you just want to do what you want to do. That's also indicated by not a huge offense, but operating a motor vehicle without ever receiving a license.… [T]hen you have an invasion of privacy, which means you violated a Court order before which indicates it's highly unlikely that you will follow probation rules because you don't follow Court orders. So those are all extremely aggravating factors. I don't really see any mitigating factors.… So I think you certainly would be entitled to an aggravating sentence above the ten years with the four previous misdemeanor offenses that you have. That wouldn't be a huge aggravation but probably worth one to three years or so. So the deal you got was pretty good. And frankly, I don't see remorse from you at all. And the story you give in here just from my observation of your body language and your behavior and the tone of your voice is that you're just trying to talk your way out of something, charm your way out of it. I don't buy it.

Tr. pp. 65-69. The trial court sentenced Aguirre to "ten years executed with the Indiana Department of Correction." Tr. p. 69. Aguirre now appeals.

DISCUSSION AND DECISION

I. Abuse of Discretion

Aguirre contends that the trial court abused its discretion in finding several aggravating factors which he claims are not supported by the record and in failing to

recognize a mitigating factor which he claims was advanced for consideration and is clearly supported in the record. In determining whether Aguirre was properly sentenced, we initially observe that Indiana's sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences and comply with the holdings in *Blakely v. Washington*, 542 U.S. 296 (2004), and *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005). The Indiana Supreme Court has subsequently held that upon review of a defendant's sentence, we apply the sentencing scheme in effect at the time of the defendant's offense. *Upton v. State*, 904 N.E.2d 700, 702 (Ind. Ct. App. 2009); *see also Robertson v. State*, 871 N.E.2d 280, 286 (Ind. 2007) ("Although Robertson was sentenced after the amendments to Indiana's sentencing scheme, his offense occurred before the amendments were effective so the pre-*Blakely* sentencing scheme applies to Robertson's sentence."). Here, Aguirre committed the instant offense before the amendments to Indiana's sentencing scheme took effect but was sentenced after the effective date. Consequently, the pre-April 25, 2005 presumptive sentencing scheme applies to Aguirre's conviction.

Under the pre-April 25, 2005 sentencing statutes, sentencing decisions rest within the discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Upton*, 904 N.E.2d at 702 (citing *Smallwood v. State*, 773 N.E.2d 259, 263 (Ind. 2002)). "An abuse of discretion occurs if 'the decision is clearly against the logic and effect of the facts and circumstances.'" *Id.* (quoting *Pierce v. State*, 705 N.E.2d 173, 175 (Ind. 1998)).

Here, the trial court issued an oral statement at the conclusion of the sentencing hearing, in which it indicated that it found Aguirre's criminal history, the likelihood that he

would reoffend, and his general disregard for the law and for others to be aggravating factors. With regard to Aguirre's criminal history, both the State and the trial court asked numerous questions relating to his past offenses, most of which were offenses committed against individuals. Aguirre, however, was unable to remember any of the specifics relating to his two battery convictions, his invasion of privacy conviction, or the three protective orders issued against him. To the extent that Aguirre claims that the trial court focused on his "poor memory" rather than his criminal record, we observe that each of the questions relating to Aguirre's alleged "poor memory" appears to have been asked in relation to its significance to his criminal history. Appellant's Br. p. 16. The record establishes that Aguirre's criminal history includes two Class A misdemeanor battery convictions, one Class B misdemeanor invasion of privacy conviction, and one Class C misdemeanor driving without ever receiving a license conviction. In addition, the record establishes that three protection orders have been issued against Aguirre. The trial court's determination that Aguirre's criminal history was an aggravating factor at sentencing is clearly supported by the record.

With regard to the likelihood that Aguirre would reoffend, the trial court noted Aguirre's repeat battery convictions, the repeat orders of protection issued against him, and his repeat sexual relationships with minors. The record demonstrates that Aguirre had engaged in at least two sexual relationships with minors. The trial court also noted that Aguirre had previously been put on notice that at his age, having sex with a minor was a crime punishable by up to twenty years incarceration but that he nevertheless continued to engage in sexual relationships with minors. In light of Aguirre's apparent tendency to

commit repeat offenses and to engage in inappropriate relationships with minors, we cannot say that the trial court's determination that Aguirre would likely reoffend was unsupported by the record.

With regard to Aguirre's general disregard for the law and for others, the trial court noted Aguirre's history of "[h]itting people, disrespecting people, treating people as sex objects, [and] being on notice that [sex with a minor] is a major felony and going out and doing it again anyway." Tr. p. 67-68. Again, the record demonstrates that Aguirre continued to engage in sexual relationships with minors after having been put on notice that such conduct was illegal and that he lied to C.M. about his age in order to engage in a sexual relationship with her. The record demonstrates that Aguirre was unable to remember the names of either the individuals whom he had assaulted or the individuals who had obtained protective orders against him. The record further demonstrates that Aguirre has a history of violating court orders and the laws of the State of Indiana. In light of these facts, we conclude that the trial court's findings relating to Aguirre's general disregard for the law and for others is sufficiently supported by the record.

Further, to the extent that Aguirre claims that the trial court abused its discretion in failing to find his guilty plea to be a mitigating factor, the record demonstrates that Aguirre received the benefit of a sentence not to exceed the ten-year presumptive sentence for a Class B felony in exchange for his plea. In addition, the trial court specifically stated that it did not find Aguirre to be remorseful. In light of the trial court's finding regarding Aguirre's lack of remorse and the sentencing benefit Aguirre received in exchange for his guilty plea, we

cannot say that the trial court abused its discretion in failing to grant significant mitigating weight to the fact that Aguirre pled guilty to the instant offense. *See Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999) (providing that a guilty plea is not automatically a significant mitigating factor).

II. Appropriateness

Aguirre also contends that his sentence is inappropriate in light of the nature of his offense and his character. Indiana Appellate Rule 7(B) provides that "The 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." The defendant bears the burden of persuading us that his sentence is inappropriate. *Sanchez v. State*, 891 N.E.2d 174, 176 (Ind. Ct. App. 2008).

With respect to the nature of his offense, the record demonstrates that Aguirre engaged C.M., whom he knew to be fifteen years old, in a sexual relationship. Aguirre, who was twenty-seven years old at the time, lied to C.M. regarding his age, telling her that he was nineteen. Moreover, C.M., who was a virgin prior to her relationship with Aguirre, was in a vulnerable emotional state having recently lost her mother. Although Aguirre argues that his actions were not among the most egregious sex offenses because C.M. was allegedly willing, we believe that Aguirre's offense was particularly egregious in light of the deceptive manner in which he convinced a vulnerable young woman to engage in a sexual relationship with him.

With respect to his character, Aguirre, as noted by the trial court, appears to be a self-

centered individual who displays little concern for others. Aguirre's relationship with C.M. resulted in C.M. becoming pregnant, and Aguirre, to date, has not accepted responsibility for his child despite the fact that paternity has been established. Aguirre claims that he has learned from his past mistakes, is sorry for his involvement with the victim, and is unlikely to reoffend. However, Aguirre's admissions and criminal history would seem to indicate otherwise. The record demonstrates that Aguirre has a tendency to engage in relationships with minors, and his criminal history includes multiple convictions for offenses against individuals, namely two convictions for Class A misdemeanor battery and one conviction for Class B misdemeanor invasion of privacy. In addition, three protective orders have been issued against Aguirre. Aguirre also has a prior Class C misdemeanor conviction for operating a motor vehicle without ever receiving a license. Moreover, Aguirre admits that he has previously been incarcerated for a period of six months for failure to support a dependent. In light of the facts surrounding Aguirre's offense and his character, we cannot say that his ten-year sentence is inappropriate.

In sum, we conclude that the trial court did not abuse its discretion in sentencing Aguirre and that Aguirre's sentence is not inappropriate in light of the nature of his offense and his character.

The judgment of the trial court is affirmed.

BAILEY, J., and VAIDIK, J., concur.