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IN THE
COURT OF APPEALS OF INDIANA

STEPHEN FITZGERALD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 47A01-0906-CR-278
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAWRENCE SUPERIOR COURT
The Honorable Michael A. Robbins, Judge
Cause No. 47D01-0806-FB-346

October 27, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Stephen Fitzgerald appeals his twenty-year sentence for Sexual Misconduct with a Minor, as a Class B felony,[1] alleging that his sentence is inappropriate. We affirm.

Facts and Procedural History

In September of 2004, Fitzgerald pled guilty to Sexual Misconduct with a Minor, as a Class C felony, and was sentenced to eight years imprisonment with five years suspended to probation. While on probation, twenty-four-year-old Fitzgerald had sexual intercourse with fifteen-year-old T.R. in Lawrence County in December of 2007. On June 18, 2008, the State charged Fitzgerald with Sexual Misconduct with a Minor, as a Class B felony, and filed a Notice of Intent to Seek Repeat Sexual Offender Status. While there was no formal written agreement, Fitzgerald pled guilty to the Class B felony charge with the understanding that the State would dismiss the Repeat Sexual Offender Notice as well as a separate charge for failing to register as a sex offender. The trial court accepted the guilty plea, dismissed the Notice and the failure to register charge, and sentenced Fitzgerald to twenty years imprisonment to be fully executed.

Fitzgerald now appeals.

Discussion and Decision

In Reid v. State, our Supreme Court reiterated the standard by which appellate courts independently review criminal sentences:

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[1] Ind. Code § 35-42-4-9.

> Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence through Indiana Appellate Rule 7(B), which provides that a 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 burden is on the defendant to persuade us that his sentence is inappropriate.

Reid v. State, 876 N.E.2d 1114, 1116 (Ind. 2007) (internal quotation and citations omitted).

More recently, the Court reiterated that "sentencing is principally a discretionary function in which the trial court's judgment should receive considerable deference." Cardwell v. State, 895 N.E.2d 1219, 1222 (Ind. 2008). Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented. See id. at 1224. One purpose of appellate review is to attempt to "leaven the outliers." Id. at 1225. "[W]hether we regard a sentence as appropriate at the end of the day turns on our sense of 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." Id. at 1224.

Fitzgerald pled guilty to a Class B felony, which has a sentencing range of six to twenty years, with ten years as the advisory. See Ind. Code § 35-50-2-5. The trial court sentenced Fitzgerald to twenty years executed. Fitzgerald argues that his sentence is inappropriate and requests that it be reduced or a portion be suspended to probation.

As to the nature of the offense, Fitzgerald knowingly had sexual intercourse with a fifteen-year-old while on probation for a similar offense. Fitzgerald's poor character is reflected in his criminal history. In the time span of a year and one-half, Fitzgerald pled

guilty to Conversion and Criminal Mischief, as Class A Misdemeanors, Criminal Mischief, as a Class B Misdemeanor, Operator Never Licensed and Failure to Stop After an Accident, as Class C Misdemeanors, Identity Theft, as a Class D felony, and Sexual Misconduct with a Minor, as a Class C felony. In three of the four of these cases in which Fitzgerald was placed on probation, his probation was revoked. Fitzgerald admitted to each instance of alleged probation violation. Furthermore, Fitzgerald committed the instant offense while on probation for his last Sexual Misconduct with a Minor offense. While this is Fitzgerald's second conviction for Sexual Misconduct with a Minor, he admitted during his interview for his presentence report that prior to the current offense he has had sexual contact with children on three prior occasions.

While Fitzgerald continued his pattern of pleading guilty in this case, he received the benefit of the dismissal of a separate charged offense and the pursuit of a repeat offender enhancement[2] by the State. Based on his criminal history and the benefit received for his guilty plea, Fitzgerald has not convinced this Court that his sentence of twenty years is inappropriate. As to the request that we suspend part of his sentence to probation, Fitzgerald has not presented any argument which convinces us that his placement on probation yet again would yield any different result from his past placements.

Affirmed.

VAIDIK, J., and BRADFORD, J., concur.

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[2] See Ind. Code § 35-50-2-14 (If proven that defendant is a repeat sexual offender, the court may sentence the defendant to an additional term that is the advisory sentence for the underlying offense but may not exceed ten years.).