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# IN THE
# COURT OF APPEALS OF INDIANA

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| MICHAEL GRAY, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 49A02-0906-CR-542 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
The Honorable Jeffrey Marchal, Commissioner
Cause No. 49G06-0804-FA-071521

**December 31, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## Case Summary

Michael Gray appeals his conviction and sentence for Class A felony child molesting. We hold that (1) the trial court did not err by denying Gray's untimely request for an elected judge to preside over the case, (2) the trial court did not abuse its discretion in refusing to consider various alleged mitigators at sentencing, (3) the trial court did not err by assessing Gray with a child abuse prevention fee and a sexual assault victims assistance fee, but (4) the trial court did err by assessing a public defender service fee without a hearing on Gray's ability to pay. We affirm Gray's conviction but remand for a determination of Gray's ability to pay the costs of his appointed representation.

## Facts and Procedural History

In April 2008 Gray was charged with one count of Class A felony child molesting and one count of Class C felony child molesting. An initial hearing was convened the following July. The Master Commissioner set Gray's omnibus date for September 2, 2008. On April 14, 2009, Gray moved for an elected judge to preside over his trial. The trial court denied Gray's motion because it had not been timely filed.

Gray was brought to trial in May 2009. The Master Commissioner presided. A jury found Gray guilty of Class A felony child molesting and not guilty of Class C felony child molesting. At sentencing Gray proffered the following mitigators: that his family and friends showed concern and continuing support for him and that his past offenses were unlike the one committed in this case. The trial court found no mitigating circumstances. The court did find the following aggravators: Gray's criminal history and

his commission of the instant offense while on parole. The court sentenced Gray to thirty-five years.

The trial court did not conduct a hearing on Gray's ability to pay fees and costs, though after sentencing the trial court pronounced Gray "indigent to all fines, costs, and fees" and indigent for purposes of appeal. Tr. 216-17. In any event, Gray's chronological case summary reflects that he was assessed a $100 child abuse prevention fee, a $250 sexual assault victims assistance fee, and a $100 supplemental public defender service fee. Gray now appeals.

## Discussion and Decision

Gray raises three issues which we reorder and restate as follows: (I) whether the trial court erred by denying his request for an elected judge to preside over his trial, (II) whether the trial court abused its discretion by failing to consider various alleged mitigators at sentencing, and (III) whether the trial court erred by assessing specific fees and costs against him.

### I. Request for Elected Judge to Hear Trial

Gray argues that the trial court erred by denying his motion for an elected judge to preside over his trial.

"A party to a superior court proceeding that has been assigned to a magistrate appointed under this section may request that an elected judge of the superior court preside over the proceeding instead of the magistrate to whom the proceeding has been assigned." Ind. Code § 33-33-49-32(c). Upon a timely request made by either party, the magistrate shall transfer the proceeding back to the superior court judge. *Id.* Such a

request "must be in writing and must be filed with the court . . . in a criminal case, not later than ten (10) days after the omnibus date." *Id.* Section 33-33-49-32(c) applies to both magistrates and commissioners. *Capehart v. Capehart*, 771 N.E.2d 657, 662 (Ind. Ct. App. 2002). An "omnibus date" is a reference point from which various trial-related deadlines are established. Ind. Code § 35-36-8-1(b). The date is set by a judicial officer at an initial hearing. *Id.* § 35-36-8-1(a)(1). The omnibus date for felony proceedings must be no earlier than forty-five days and no later than seventy-five days after the completion of the initial hearing, unless the prosecuting attorney and the defendant agree to a different date. *Id.* § 35-36-8-1(a)(2).

Gray's omnibus date was September 2, 2008. His request for an elected judge was due ten days thereafter. He did not file his request until April 14, 2009. Gray's motion was therefore untimely, and the presiding judge did not err by denying it.

**II. Sentencing**

Gray argues that the trial court abused its discretion in sentencing him to a thirty-five-year term. He specifically contends that the trial court overlooked several mitigating circumstances when imposing the sentence.

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). An abuse of discretion occurs if the decision is 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. *Id.* We review the presence or absence of reasons justifying a sentence for an abuse of

discretion, but we cannot review the relative weight given to these reasons. *Id.* at 491. When an allegation is made that the trial court failed to find a mitigating factor, the defendant is required to establish that the mitigating evidence is both significant and clearly supported by the record. *Id.* at 493. However, a trial court is not obligated to accept a defendant's claim as to what constitutes a mitigating circumstance. *Rascoe v. State*, 736 N.E.2d 246, 249 (Ind. 2000). Generally, if a defendant fails to advance a mitigating circumstance at sentencing, we presume that the circumstance is not significant, and the defendant is precluded from advancing it as a mitigating circumstance for the first time on appeal. *Sargent v. State*, 875 N.E.2d 762, 770 (Ind. Ct. App. 2007).

Gray argues that the trial court erred by refusing to find "family support" as a mitigator. Gray cites no evidence relating to his family's support and concern, nor does he demonstrate its substantial, positive effects on his character and future rehabilitation. Gray has therefore failed to establish that this proffered mitigator is both significant and clearly supported by the record. The trial court did not abuse its discretion by declining to accept family support as a mitigating circumstance.

Gray argues that the trial court erred by declining to find as a mitigator that his prior criminal history is unlike the instant child molesting conviction. The fact that Gray's past offenses are different from the present one is not a mitigating circumstance. The dissimilarity may make Gray's criminal history less aggravating. *See Wooley v. State*, 716 N.E.2d 919, 929 n.4 (Ind. 1999) (noting that the significance of criminal histories "varies based on the gravity, nature and number of prior offenses as they relate

to the current offense"). But that argument goes to the weight of an aggravator, which is not subject to appellate review. *Anglemyer*, 868 N.E.2d at 491.

Gray further argues that the trial court erred by declining to find as mitigators his efforts to reform and the hardship that incarceration would place on his dependents. Gray did not advance these factors as mitigators at his sentencing hearing. These arguments are therefore waived on appeal. *Sargent*, 875 N.E.2d at 770.

We conclude that the trial court did not abuse its discretion when sentencing Gray.

## III. Fees and Costs

Gray also argues that the trial court erred by assessing him with a child abuse prevention fee, a sexual assault victims assistance fee, and a public defender services fee.

### *A. Child Abuse Prevention Fee and Sexual Assault Victims Assistance Fee*

Indiana Code section 33-37-5-12 provides that "[t]he court shall order a person to pay a child abuse prevention fee of one hundred dollars ($100) to the clerk in each criminal action in which . . . the person is found to have committed the offense of . . . child molesting (IC 35-42-4-3) . . . ." Indiana Code section 33-37-5-23 provides that "[t]he court shall assess a sexual assault victims assistance fee of at least two hundred fifty dollars ($250) and not more than one thousand dollars ($1,000) against an individual convicted in Indiana of . . . Child molesting (IC 35-42-4-3)." These fees are not discretionary and do not hinge on the defendant's ability to pay. *Cf.* Ind. Code § 33-37-5-9(c) (when assessing a "drug abuse, prosecution, interdiction, and correction fee," the trial court "shall consider the person's ability to pay the fee"). The trial court therefore did not err by imposing them.

*B. Public Defender Service Fee*

Several statutes authorize the trial court to assess costs in connection with public defense. Indiana Code section 35-33-7-6(c) provides that "[i]f the court finds that the person is able to pay part of the cost of representation by the assigned counsel, the court shall order the person to pay the following: (1) For a felony action, a fee of one hundred dollars ($100). . . ." Indiana Code section 33-37-2-3(e) provides that "[i]f, after a hearing . . . , the court determines that a convicted person is able to pay part of the costs of representation, the court shall order the person to pay an amount of not more than the cost of the defense services rendered on behalf of the person." Indiana Code section 33-40-3-6 provides as follows:

> (a) If at any stage of a prosecution for a felony or a misdemeanor the court makes a finding of ability to pay the costs of representation under section 7 of this chapter, the court shall require payment . . . of the following costs in addition to other costs assessed against the person:
>
> (1) Reasonable attorney's fees if an attorney has been appointed for the person by the court.
>
> (2) Costs incurred by the county as a result of court appointed legal services rendered to the person.

Section 33-40-3-7 enumerates the factors that must be considered by the trial court when imposing costs under Section 33-40-3-6:

> (a) If a defendant or a child alleged to be a delinquent child is receiving publicly paid representation, the court shall consider:
>
> (1) the person's independently held assets and assets available to the spouse of the person or the person's parent if the person is unemancipated;
>
> (2) the person's income;
>
> (3) the person's liabilities; and
>
> (4) the extent of the burden that payment of costs assessed under section 6 of this chapter would impose on the person and the dependents of the person.

> (b) If, after considering the factors described in subsection (a), the court determines that the person is able to pay the costs of representation, the court shall enter a finding that the person is able to pay those additional costs.

The thrust of these statutes is that the trial court must conduct a hearing and make a finding as to the defendant's ability to pay before imposing public defense costs. Here we have no record of such a finding. We therefore reverse the assessment of the public defender services fee and remand to the trial court for a determination of Gray's ability to pay the costs of his representation. *See May v. State*, 810 N.E.2d 741, 746 (Ind. Ct. App. 2004).

Affirmed in part and reversed in part.

RILEY, J., and CRONE, J., concur.