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IN THE
COURT OF APPEALS OF INDIANA

TIMOTHY WOODRUFF,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 09A04-0612-CR-704
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CASS SUPERIOR COURT
The Honorable Thomas C. Perrone, Judge
Cause No. 09D01-0408-FA-3

June 28, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Timothy Woodruff ("Woodruff") pleaded guilty in Cass Superior Court to two counts of Class A felony child molesting. The trial court sentenced him to two terms of forty years, to be served concurrently. Woodruff now appeals, raising the following arguments for our review:

I. Whether the trial court abused its discretion in its consideration and weighing of aggravating and mitigating circumstances;

II. Whether Woodruff's forty-year sentence is inappropriate in light of the nature of the offense and character of the offender; and,

III. Whether the trial court erred in not clearly setting out aggravating and mitigating circumstances.

We affirm.

Facts and Procedural History

The facts demonstrate that between August of 2002 and May of 2004, Woodruff repeatedly molested his daughter, R.S., subjecting her to various forms of sexual abuse. During this time, he also repeatedly molested his long-term girlfriend's granddaughter, N.G.

On August 2, 2004, the State charged Woodruff with one count of Class A felony child molesting and two counts of Class C felony child molesting. On September 7, 2006, the State added two counts of Class A felony child molesting and three counts of Class C felony child molesting. Woodruff agreed to plead guilty to two counts of Class A felony child molesting, and in return the State dismissed the remaining counts and agreed not to file any additional charges against Woodruff for previous molestations of the victims in this case. The State also agreed to dismiss pending charges under a separate cause number.

On November 6, 2006, the trial court held a sentencing hearing. It found that the aggravating circumstances outweighed the mitigating circumstances, and sentenced Woodruff to forty years on each count to be served concurrently. Woodruff now appeals his sentence. Additional facts will be provided as necessary.

I. Aggravating and Mitigating Circumstances

Woodruff first contests the trial court's consideration and weighing of aggravating and mitigating circumstances. Initially, we note that Woodruff's convictions are based upon conduct that happened before Indiana Code section 35-50-2-5 was amended to provide for an "advisory" sentence rather than a presumptive sentence. See P.L. 71-2005, § 8 (eff. April 25, 2005). This amendment to Indiana's sentencing scheme was our legislature's response to Blakely v. Washington, 542 U.S. 296 (2004). Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied. Since this amendment, our court has been split as to whether the advisory sentencing scheme should be applied retroactively. Compare Weaver, 845 N.E.2d at 1070 (concluding that application of advisory sentencing statute violates the prohibition against ex post facto laws if defendant was convicted before effective date of the advisory sentencing statutes but was sentenced after) with Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (concluding that change from presumptive sentences to advisory sentences is procedural rather than substantive and therefore application of advisory sentencing scheme is proper when defendant is sentenced after effective date of amendment even though offense was committed before). Our supreme court has not yet resolved this issue.

Under the presumptive sentencing scheme, trial courts do not have discretion to sentence a criminal defendant to more than the presumptive sentence unless the defendant waives his right to a jury at sentencing, a jury first determines the existence of aggravating factors, or the defendant has a criminal history. Rembert v. State, 832 N.E.2d 1130, 1132 (Ind. Ct. App. 2005) (citation omitted). Although our supreme court has not yet interpreted the amended statute providing for advisory sentences, the plain language of the statute seems to indicate that under the advisory scheme, "a sentencing court is under no obligation to find, consider, or weigh either aggravating or mitigating circumstances." Fuller v. State, 852 N.E.2d 22, 26 (Ind. Ct. App. 2006), trans. denied.

However, if a trial court does find, identify, and balance aggravating and mitigating factors, it must do so correctly, and we will review the sentencing statement to ensure that the trial court did so. See Ind. Code § 35-38-1-3 ("if the court finds aggravating circumstances or mitigating circumstances, [the trial court shall record] a statement of the court's reasons for selecting the sentence that it imposes"). Therefore, because the trial court here identified and weighed aggravating and mitigating circumstances, the analysis and result are the same under both sentencing schemes, and we need not determine the issue of retroactivity herein. See Primmer v. State, 857 N.E.2d 11, 16 (Ind. Ct. App. 2006), trans. denied.

We bear in mind that sentencing determinations, including whether to vary from the presumptive sentence, are within the sound discretion of the trial court. Ruiz v. State, 818 N.E.2d 927, 928 (Ind. 2004). If a trial court relies upon aggravating or mitigating circumstances, it must do the following: (1) identify all significant aggravating or

mitigating circumstances; (2) explain why each circumstance is aggravating or mitigating; and (3) articulate the evaluation and balancing of the circumstances. Id.

A. *Consideration of Aggravating Circumstances*

Woodruff contends that the trial court's consideration of the victims' ages and his position of trust with the victims as aggravating factors violated his constitutional right to a jury trial under Blakely v. Washington, 542 U.S. 296 (2004). Facts that are admitted by the defendant do not require a jury's sanction or approval to be used as aggravating circumstances. White v. State, 846 N.E.2d 1026, 1035 (Ind. Ct. App. 2006), trans. denied. Here, Woodruff admitted to his close familial relationship with the victims. He referred to himself as N.G.'s "step-grandfather" at the sentencing hearing. Tr. p. 40. His attorney clarified this statement, explaining that Woodruff had lived with N.G.'s grandmother for the past ten years and that they considered each other common law spouses. Woodruff further admitted that R.S. was his daughter. Id.

A position of trust is frequently considered an aggravating factor where the defendant is the victim's mother, father, or stepparent. See e.g. Plummer v. State, 851 N.E.2d 387, 390 (Ind. Ct. App. 2006); Kincaid v. State, 839 N.E.2d 1201, 1205 (Ind. Ct. App. 2005); Devries v. State, 833 N.E.2d 511, 515 (Ind. Ct. App. 2005), trans denied, disapproved of on other grounds by Ryle v. State, 842 N.E.2d 320 (Ind. 2005). In fact, a "position of trust" by itself constitutes a valid aggravating factor, which supports the maximum enhancement of a sentence for child molesting. Hart v. State, 829 N.E.2d 541, 544 (Ind. Ct. App. 2005). Because Woodruff admitted to his close familial relationship with the victims, there is no Blakely violation.

Regarding the victims' young age, we again observe that Woodruff admitted to the children's ages. He responded that N.G.'s date of birth is May 28, 1997 and that R.S.'s date of birth is April 28, 1997. Tr. pp. 39-40. Given that Woodruff pleaded guilty to molesting these girls between 2002 and 2004, he necessarily admitted that the girls were between the ages of five and seven when the abuse occurred.

Woodruff further contends that the age of the victims is an element of the crime and therefore cannot be considered as an aggravating factor. Woodruff raised this concern at the sentencing hearing as well. In response, the trial court stated

> [Defendant's counsel] accurately points out, on your behalf, that the age is something that you can't be convicted of this crime without taking age into consideration. That is absolutely true. However, in this particular case these are little children. You can be convicted of this crime with victims that are far in more access, far more mature, far more able frankly to defend themselves then these little girls were and because of that business they are younger then what statuary [sic] requirement is, much younger, much more unable to, to stand up to the abuse in anyway whatsoever that you visited upon them, I will find that age of the victim is in fact an aggravating factor in this case and I will take that into consideration as well.

Id. at 90-91.

Here, Woodruff was convicted under Indiana Code section 35-42-4-3, which prohibits deviate sexual conduct with a person under the age of fourteen. As the trial court pointed out, there was evidence presented that the victims were much younger than what was statutorily required. It is well settled under Indiana law that a trial court may assign aggravating weight to the fact that the defendant molested a victim who was of particularly young age, and presumably more susceptible to the abuse. Garland v. State, 855 N.E.2d 703, 709 (Ind. Ct. App. 2006); see also Buchanan v. State, 767 N.E.2d 967, 971 (Ind. 2002); Stewart v. State, 531 N.E.2d 1146, 1150 (Ind. 1988); Kien v. State, 782

N.E.2d 398, 414 (Ind. Ct. App. 2003), trans. denied. We decline to overrule these precedents.

B. *Consideration of Mitigating Circumstances*

Woodruff next claims that the trial court overlooked several mitigating circumstances. "The finding of mitigating factors is not mandatory and rests within the discretion of the trial court." O'Neill v. State, 719 N.E.2d 1243, 1244 (Ind. 1999) (quoting Wingett v. State, 640 N.E.2d 372, 373 (Ind. 1994)). "A trial court must include mitigators in its sentencing statement *only if* they are used to offset aggravators or to reduce the presumptive sentence, and only those mitigators found to be 'significant' must be enumerated." Allen v. State, 722 N.E.2d 1246, 1252 (Ind. Ct. App. 2000) (emphasis added) (citing Battles v. State, 688 N.E.2d 1230, 1236 (Ind. 1997)). "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." Henderson v. State, 848 N.E.2d 341, 344 (Ind. Ct. App. 2006).

Woodruff contends the trial court abused its discretion in not assigning mitigating weight to his troubled childhood. Initially, we note that "[e]vidence of a troubled childhood does not require the trial court to find it to be a mitigating circumstance." Page v. State, 615 N.E.2d 894, 896 (Ind. 1993). From the record, it appears that the trial court clearly considered the evidence that Woodruff had presented regarding his abusive childhood. However, the trial court also considered that Woodruff admitted to "violating" his sisters when he was a juvenile. Tr. p. 91. The trial court decided not to afford mitigating weight to Woodruff's childhood because he had failed to "learn to deal

with those problems in a way that would have kept [him] from offending." Id. Therefore, the trial court did not merely overlook this factor. A difficult childhood may warrant little, if any, mitigating weight. See Rose v. State, 810 N.E.2d 361, 366 (Ind. Ct. App. 2004). Therefore, we find no abuse of discretion in failing to consider Woodruff's troubled childhood as a mitigating circumstance.

Woodruff next maintains that the trial court overlooked his remorse as a mitigating circumstance. The trial court did not specifically mention Woodruff's remorse in its sentencing statement. However, without evidence of some impermissible consideration by the trial court, we will not disturb the trial court's determination as to remorse. Pickens v. State, 767 N.E.2d 530, 535 (Ind. 2002). Woodruff does not allege any impermissible considerations. Although Woodruff expressed remorse in a letter to the court, it was up to the trial court to determine whether that remorse was genuine and significant. The trial court was able to observe Woodruff first-hand at the sentencing hearing, and on that basis alone is a much better judge than we are of his demeanor and the sincerity of his expression of remorse. Corralez v. State, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). We decline to second-guess the trial court's evaluation of Woodruff's remorse or lack thereof.

Woodruff further claims the trial court abused its discretion in failing to assign mitigating weight to his disability and dependence on a wheelchair. With regard to this proffered mitigating circumstance, the trial court noted

> With respect to your physical condition, the Department of Correction does an analysis of the people that they have coming under their jurisdiction and control and makes decisions as to where those people will get sent and what

> it is that their, their terms of incarceration based upon taking those things into consideration.

Tr. pp. 92-93. Clearly, this factor was not merely overlooked. In Wooley v. State, 716 N.E.2d 919, 931 (Ind. 1999), our Supreme Court found no abuse of discretion where the trial court failed to consider the defendant's seizures as a mitigating circumstance. The court noted, "Wooley makes no connection between his disorder and his crime. Without a showing by Wooley that his disorder affects his behavior or reduces his responsibility for his crime in some other way, we find no error in the trial court's failure to address Wooley's seizure disorder as a proffered mitigating circumstance." Id. Likewise, Woodruff has made no connection between his being confined to a wheelchair and his crimes. His disability does not reduce his responsibility for this crime, and we find no error in the trial court's failure to assign mitigating weight to his disability.

C. *Weighing of Mitigating Circumstances*

Woodruff next contends that the trial court did not accord enough mitigating weight to his guilty plea, his community service, and his lack of a criminal history. In reviewing the balancing of factors, we keep in mind that a trial court is not obligated to weigh or credit mitigating factors as a defendant requests. Highbaugh v. State, 773 N.E.2d 247, 252 (Ind. 2002). Moreover, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Newsome v. State, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003), trans. denied.

Regarding Woodruff's guilty plea, we note that our Supreme Court has determined that the significance of a guilty plea as a mitigating factor may vary from case to case. See Francis v. State, 817 N.E.2d 235, 238 n.3 (Ind. 2004). In that regard, it is well

established that a guilty plea is not significantly mitigating where the defendant has received a substantial benefit from it or where the evidence of guilt is such that the decision to plead guilty is merely a pragmatic one. See Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied. In pleading guilty, Woodruff benefited substantially from the dismissal of one Class A felony count and five Class C felony counts. The State also agreed not to bring any more charges against Woodruff for other incidents of sexual abuse against these two victims, and the State agreed to dismiss charges pending under another cause number. The plea agreement further stated that the sentences for the two Class A felonies would run concurrently, even though the abuse involved two victims. Therefore, as the trial court noted at the sentencing hearing, Woodruff "got a bargain." Tr. p. 92. Woodruff received a substantial benefit from the plea agreement, which indicates that his plea "was more likely the result of pragmatism than acceptance of responsibility and remorse." Davies v. State, 758 N.E.2d 981, 987 (Ind. Ct. App. 2001), trans. denied.

Furthermore, Woodruff's guilty plea did not extend a significant benefit to the State, as Woodruff contends. Woodruff pleaded guilty more than two years after he was charged. During this delay, the trial court continued to reschedule the jury trial, and the State was involved in substantial discovery and preparations for the scheduled jury trial. Because of this long delay, Woodruff did not extend a substantial benefit to the State by pleading guilty. See Francis, 817 N.E.2d at 238 n.3 (citing Sensback v. State, 720 N.E.2d 1160, 1165, 1165 n.4 (Ind. 1999)). Given the substantial benefit Woodruff received from the plea agreement as well as the lack of a substantial benefit extended to the State by his

plea agreement, we cannot agree that the trial court abused its discretion in failing to assign more mitigating weight to Woodruff's guilty plea.

Regarding Woodruff's community service, Woodruff volunteered with a community-based program called React. Although he may have given to the community, his repeated abuse of two children under his care also took much away from the community. See Grund v. State, 671 N.E.2d 411, 419 (Ind. 1996). The trial court was not required to credit this mitigating circumstance as Woodruff requested, and we find no abuse of discretion.

Woodruff contends that his lack of a criminal history was entitled to more mitigating weight. We disagree. Although a lack of criminal history may be considered a mitigating circumstance, "[t]rial courts are not required to give significant weight to a defendant's lack of criminal history," especially "when a defendant's record, while felony-free, is blemished." Stout v. State, 834 N.E.2d 707, 712 (Ind. Ct. App. 2005), trans. denied. Here, there was evidence of delinquency charges brought against Woodruff for performing sexual acts on his younger sisters. In fact, Woodruff admitted that he was sorry for "violating" his sisters. Tr. p. 76. Additionally, the crimes at issue in this case involve a pattern of sexual abuse towards two young girls, which occurred over several years. Therefore, the trial court did not abuse its discretion in failing to afford more mitigating weight to this mitigating circumstance.

II. Inappropriate Sentence

Woodruff next contends that his sentence is inappropriate. Our appellate courts may revise a sentence authorized by statute if, after due consideration of the trial court's

decision, our court finds that the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B) (2007). Here, Woodruff does not offer any analysis on why his forty-year sentence is inappropriate in light of the nature of the event and the character of the offender. Therefore, this claim is waived for failure to present a cogent argument. Ind. Appellate Rule 46(A)(8)(a) (2007).

Waiver notwithstanding, we note that the nature of the offense involves a pattern of abuse of two very young girls under Woodruff's care. These girls looked to Woodruff as a father and as a grandfather figure, and he betrayed that trust. In fact, his daughter said that Woodruff had inappropriately touched her "lots of times." Ex. Vol., State's Ex. 5. He also warned her not to tell anyone, and R.S. refrained from talking about the abuse because she was afraid that he might get mad at her. Id. Regarding Woodruff's depraved character, we find it significant that Woodruff watched pornographic videos with these girls while they were under his care, and then commented to them, "I bet you can do better than that[.]" Id. at 11. In light of these facts, Woodruff's forty-year sentence is not inappropriate.

III. Sentencing Statement

Lastly, Woodruff requests that we remand for resentencing because the trial court's sentencing statement was unclear and "does not set out the specific reason why, or whether, the Defendant's 'prior situation in life both positive and negative' is either a mitigator or an aggravator." Tr. p. 13. In its consideration of Woodruff's troubled childhood, the trial court stated,

> With respect to your history, it's, it's two different things. One is that we had presented here today the situation with respect to your own childhood.

> Uh…I'm, I'm, I think about that, I'm taking that into consideration in deciding what I need to decide here. Uh…obviously you had trouble, you had problems, uh, you didn't, unfortunately, learn to deal with those problems in a way that would have kept you from offending as you have done. That's unfortunate. The prior juvenile history the trouble with that as a juvenile adjudication, I'm not thinking about it as a juvenile adjudication because of those issues but I am thinking about it as part of the history that is presented to me here today and I have a right to do that. Um…I am not deciding those things in particular in one way or another.

Id. at 91. From this discourse, it is clear that the trial court considered assigning mitigating weight to Woodruff's troubled childhood, but declined to do so in light of his juvenile delinquency which involved the sexual abuse of his two younger sisters. The presentence investigation report indicated that Woodruff was adjudicated a delinquent child in the late 1970s for performing oral sex on his younger sisters. Appellant's App. pp. 210, 215. In fact, at the sentencing hearing, Woodruff indicated that he felt bad about "violating" his sisters. Tr. p. 76. From this court's interpretation, it appears the trial court declined to assign mitigating weight to Woodruff's childhood because he failed to learn from the juvenile adjudication, which also involved sexual abuse. The trial court did not assign mitigating weight to Woodruff's childhood, and it did not assign aggravating weight to Woodruff's juvenile delinquency. Therefore, it is unnecessary to remand for clarification.

Conclusion

The trial court did not abuse its discretion in considering and weighing the aggravating and mitigating circumstances. Woodruff's forty-year sentence is not inappropriate in light of the nature of the offense and character of the offender. The trial court's sentencing order was clear as to its consideration of sentencing factors.

Affirmed.

DARDEN, J., and KIRSCH, J., concur.