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**IN THE
COURT OF APPEALS OF INDIANA**

DENNIS SNYDER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 39A04-0702-CR-85

APPEAL FROM THE JEFFERSON CIRCUIT COURT
The Honorable Ted R. Todd, Judge
Cause No. 39C01-0503-FA-34

July 6, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Dennis Snyder (“Snyder”) pleaded guilty to Class C felony child molestation in Jefferson Circuit Court. The trial court sentenced him to six years, two years above the presumptive. Snyder now appeals his sentence, raising the following issues for our review:

- I. Whether the trial court’s reliance on the presentence investigation report violates Indiana’s Separation of Powers Clause and Judicial Canon Three; and,
- II. Whether the trial court abused its discretion in assigning aggravating weight to Snyder’s criminal history and position of trust with the victim.

We affirm.

Facts and Procedural History

Between November 1996 and November 1998, Snyder began dating Thelma Ashby (“Ashby”). During the ten years that Snyder and Ashby lived together, Snyder molested Ashby’s minor daughter, J.A. On March 1, 2005, the State charged Snyder with four counts of Class A felony child molesting. Each count was based on events that occurred between November 25, 1996, and November 24, 1998. The State amended these charges on April 20, 2005, in response to Snyder’s motion to dismiss. On May 27, 2005, the State filed its Notice to Defendant of Aggravating Circumstances.

On September 5, 2006, Snyder pleaded guilty to an amended charge of Class C felony child molesting, and the State agreed to dismiss the other charges. At the guilty plea hearing, Snyder waived his right to have a jury trial on any sentencing factors. The trial court subsequently conducted a sentencing hearing on October 3, 2006. Pursuant to the presentence investigation report and Snyder’s testimony, the trial court found two

aggravating circumstances: Snyder's criminal history and his position of trust with the victim. The trial court assigned mitigating weight to Snyder's guilty plea. Finding that the aggravating circumstances outweighed the mitigating circumstance, the trial court sentenced Snyder to six years, a two-year enhancement to the presumptive sentence. Snyder now appeals. Additional facts will be provided as necessary.

I. Presentence Investigation Report

Snyder contends that the trial court improperly relied on his criminal history outlined in the presentence investigation report, as such reliance violates Indiana's Separation of Powers Clause as well as Judicial Canon Three. In essence, Snyder contends that because the probation officer is considered an employee of the court, see Indiana Code section 11-13-1-1, it is inconsistent with the separation-of-powers doctrine and Judicial Canon Three to allow the probation officer to prepare a report investigating aggravating factors.

Upon a review of the sentencing hearing transcript, it appears that Snyder failed to properly object to the trial court's use of the presentence investigation report. The trial court specifically asked Snyder, "Do we have any additions or corrections [to the presentence investigation report]?" Tr. p. 18. Snyder did not object to the report's admission at this time on any grounds. Instead, Snyder's counsel clarified that Snyder did not believe that one of his operating while intoxicated charges resulted in a felony conviction. Id. at 18-19. Snyder's counsel later referenced this report in arguing that Snyder's criminal history consisted of minor crimes. Therefore, Snyder has failed to preserve for appellate review the issue of whether the use of the report violates the

separation of powers clause and Judicial Canon Three. See Hornbostel v. State, 757 N.E.2d 170, 177 (Ind. Ct. App. 2001), trans. denied (failure to object at trial results in waiver of the issue on appeal unless appellant can establish fundamental error).

Waiver notwithstanding, we note that another panel of this court rejected the same separation-of-powers argument in Smith v. State, 829 N.E.2d 1021, 1026 (Ind. Ct. App. 2005), trans. denied. In Smith, our court relied on United States v. Belgard, 894 F.2d 1092, 1096-99 (9th Cir. 1990), which held that a probation officer's involvement in sentencing did not "violate the separation of powers doctrine or due process because the officer's report is not binding on the judge and the court's power to appoint an independent investigator to gather information for sentencing is consistent with prior Supreme Court holdings." Smith, 829 N.E.2d at 1026 (quoting Belgard, 894 N.E.2d at 1099).

In Williams v. New York, 337 U.S. 241, 249-50 (1949) the U.S. Supreme Court surveyed the importance of probation officers' function in our criminal justice system, noting that:

Under the practice of individualizing punishments, investigational techniques have been given an important role. Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders. Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information. . . . To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation.

We agree with the Ninth Circuit that this language demonstrates a clear repudiation of the notion that probation officers cannot properly function within the

judicial branch of government. Belgard, 894 F.2d at 1096-97. Given the significant importance of probation officers' task coupled with the federal courts' acceptance of their role within the judicial branch, we are not persuaded by Snyder's arguments that we should overturn this long-standing practice and relationship.

II. Aggravating Circumstances

Snyder next contends that the trial court improperly assigned aggravating weight to his criminal history and position of trust with the victim. We bear in mind that sentencing determinations, including whether to adjust 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.

Initially, we note that Snyder'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. However, we need not address this issue since Snyder's sentence would be appropriate under both schemes.

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). Here, pursuant to the plea agreement, Snyder signed a waiver, which stated:

I understand I have the right to a jury trial as to any sentencing factors that may be used to increase my sentence on any count, sentencing enhancement, or allegation, to the upper or maximum term provided by law. I hereby give up the right to a jury trial on any sentencing factors and consent to the judge determining the existence of any sentencing factors with the judge's discretion as allowed by existing statutes and Rules of Court.

Appellant's App. pp. 73-74. "When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding." Blakely, 542 U.S. at 310; see also Strong v. State, 820 N.E.2d 688, 690 (Ind. Ct. App. 2005), trans. denied. Therefore, because

Snyder signed a waiver consenting to judicial factfinding, we find no abuse of discretion in the trial court's finding of aggravating circumstances.¹

Regarding the position of trust aggravator, we are not convinced by Snyder's argument that the waiver did not apply to this aggravator. Snyder maintains that Indiana statutes do not enumerate this particular aggravator, and therefore the trial court abused its discretion in considering it. Indiana Code section 35-38-1-7.1(a)(8) specifically states that in determining what sentence to impose for a crime, the court may consider whether "the person was in a position having care, custody, or control of the victim of the offense." This is equivalent to what a trial court refers to as a "position of trust." Therefore, pursuant to the waiver, the trial court was allowed to consider this aggravating factor.

Moreover, in addition to the written waiver, at the sentencing hearing Snyder admitted to living with the victim's mother for ten years. On appeal he contends that this was not necessarily an admission that he lived with the victim. Snyder's argument rests on the erroneous assumption that a position of trust only occurs when the defendant lives with the victim. The position of trust aggravator applies in cases where the defendant has a more than casual relationship with the victim and has abused the trust resulting from that relationship. While this often occurs when the defendant is living with the victim, it can also be found where the parties are not living together. For example, our case law has concluded that consideration of this aggravator may be appropriate where the

¹ Furthermore, with regard to Snyder's criminal history, we note that in addition to the written waiver, Snyder acknowledges that he failed to object to the accuracy of the presentence investigation report's enumeration of his past convictions at the sentencing hearing. If a defendant fails to dispute the accuracy of the report, then he has waived the issue. See Howell v. State, 859 N.E.2d 677, 683 (Ind. Ct. App. 2006), trans. denied.

defendant is the victim's day care provider, see e.g. Trusley v. State, 829 N.E.2d 923, 926-927 (Ind. 2005), and in circumstances similar to those before us here. Rodriguez v. State, No. 34A02-0604-CR-329 (Ind. Ct. App., June 21, 2007).

“Generally, cohabitation arrangements of nearly any character between adults do in fact, and should, establish a position of trust between the adults and minors living or staying together.” Id. While Snyder did not specifically admit to living under the same roof as the victim, his long-term cohabitation arrangement with the victim's mother necessarily involved more than a casual relationship with J.A. and more than an inference of authority over the minor. We therefore conclude that the trial court did not abuse its discretion when it identified Snyder's violation of his position of trust with J.A. as an aggravating circumstance.

Conclusion

Snyder has failed to preserve the question of whether his presentence investigation report violates Indiana's Separation of Powers Clause or Judicial Canon Three. The trial court did not abuse its discretion in assigning aggravating weight to Snyder's criminal history and his position of trust with the victim.

Affirmed.

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