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IN THE
COURT OF APPEALS OF INDIANA

JOSHUA CUNNINGHAM,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0701-CR-84
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-0606-FC-230

July 31, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Joshua Cunningham (Cunningham), appeals his conviction for Count I, child solicitation, a Class C felony, Ind. Code § 35-42-4-6(b)(1); Count II, child solicitation, a Class D felony, I.C. § 35-42-4-6(b)(1); and Count III, dissemination of harmful materials to a minor, a Class D felony; I.C. § 35-49-3-3(1).

We reverse and remand with instructions.

ISSUE

Cunningham raises two issues on appeal, which we consolidate and restate as the following single issue: Whether the trial court properly sentenced Cunningham.

FACTS AND PROCEDURAL HISTORY

On June 13, 2006, twenty-nine year old Cunningham exchanged emails with someone he believed to be a fifteen year old female. In fact, Cunningham was exchanging emails with a Noblesville Police Department detective. The emails contained inappropriate comments. The same day he also spoke via telephone with a female assisting the detective. Cunningham also used a web camera to send pictures of himself masturbating to the supposed fifteen year old girl.

On June 16, 2006, the State filed an Information charging Cunningham with Count I, child solicitation, a Class C felony, I.C. § 35-42-4-6(b)(1); Count II, child solicitation, a Class D felony, I.C. § 35-42-4-6(b)(1); and Count III, dissemination of harmful materials to a minor, a Class D felony, I.C. § 35-49-3-3(1). On October 2, 2006, Cunningham plead guilty as charged. In exchange the State agreed that all sentences must run concurrently.

On October 30, 2006, the trial court sentenced Cunningham to eight years on Count I, child solicitation, a Class C felony, eighteen months on Count II, child solicitation, a Class D felony, and eighteen months on Count III, dissemination of harmful materials to a minor, a Class D felony. With respect to aggravating and mitigating circumstances, the trial court said:

> He was twenty-nine (29) years old when this occurred. He had . . . no prior criminal history. He has been a dedicated public servant for a number of years. He did cooperate fully and he pleaded guilty and he has, in fact, expressed some remorse. But I don't think [defense counsel] is correct when he says there's no aggravation. It seems to me that this statute makes it a crime to solicit a person they believe to be a minor and engage in any sexual activities. And here's page after page after page after page of explicit sexual innuendos and some of it not innuendos. . . . [S]ir, your explanation that you told my probation staff is that you were sexually lonely, which . . . I can understand that, but you're a firefighter. You use to work on the ambulance. You're a public safety employee. And although there [are] not statutory aggravators that say [] it[']s worse if it's a policeman or a firefighter that does something like this, there's just something not right about a man who[se] sworn duty is to serve and protect that's preying on what he thought was a fifteen-year-old-girl. You're lonely, fine. Go find you an adult woman. I've been in Marion. [There are] plenty of good-looking women in Marion. There's got to be. I [] don't understand this. The truth is I'm not sure you understand this. The … maybe the first time, but there's [] this web cam business quite frankly I cannot think of an appropriate word other than that's simply disgusting. I've got a public . . . safety employee with a very good record who seems to be dedicated to his job doing this to who he perceives to be a fifteen-year-old girl? There's just something really, really troubling and that kind of conduct is just not right. Unlike Mr. Bloom and unlike other folks, I don't have any training in this kind of depravity. I don't know. I see enough of it from up here, but I really don't have any way of understanding why any adult man with children . . . .
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> Well I . . . have the highest regard and respect for [defense counsel] who I know to be a very, very experienced attorney, but I think he's just wrong. I think there is aggravation. There's just something not right about this. . . . I

> think there is aggravation. The aggravation is that [Cunningham] went through page after page after page of explicit conversation with . . . [who] he thought was a young girl. And this web cam business, . . . I'm sure it's out of character, sir, but there does not seem to be any doubt that you did it. Pursuant to the plea agreement . . . these sentences are to run concurrently. . . . The court finds the aggravating circumstances outweigh the mitigating circumstances.

(Transcript pp. 54-56).

Cunningham now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Cunningham argues the eight year sentence imposed by the trial court is inappropriate. Specifically, Cunningham claims the sentence is inappropriate in light of his nonexistent criminal history, the fact that he cooperated with the police, plead guilty, his remorse, and the fact that he had been a productive member of society prior to this crime. We agree.

"[S]o long as a sentence is within the statutory range, it is subject to review only for abuse of discretion." *Anglemyer v. State*, --- N.E.2d ---, 2007 WL 1816813, 6 (Ind. June 26, 2007). An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Payne v. State*, 854 N.E.2d 7, 13 (Ind. Ct. App. 2006). However, "[i]n order to carry out our function of reviewing the trial court's exercise of discretion in sentencing, we must be told of [its] reasons for imposing the sentence. . . . This necessarily requires a statement of facts, in some detail, which are peculiar to the particular defendant and the crime, as opposed to general impressions or conclusions. Of course[,] such facts must have support in the record." *Anglemyer*, 2007 WL 1816813 at 6 (quoting *Page v. State*, 424 N.E.2d 1021,

1023 (Ind. 1981)). Where the trial court has entered a reasonably detailed sentencing statement explaining its reasons for a given sentence that is supported by the record, we may only review the sentence under Indiana Appellate Rule 7(B), which provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we] find that the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Anglemyer*, 2007 WL 1816813 at 7.

Although tarnished by the instant offenses and Indiana's public policy that protects children and punishes child abusers for such contemptible crimes, Cunningham's character does not belong in the worst offender category. *See Singer v. State*, 674 N.E.2d 11, 15 (Ind. Ct. App. 1996). He has no criminal history. He cooperated with the police. He plead guilty to the charges against him and left sentencing to the discretion of the trial court and Indiana courts have recognized that a guilty plea is a significant mitigating factor in some circumstances because it saves judicial resources and spares the victim from a lengthy trial. *Ruiz v. State*, 818 N.E.2d 927, 929 (Ind. 2004). Where the State reaps a substantial benefit from the defendant's act of pleading guilty, the defendant deserves to have a substantial benefit returned. *Sensback v. State*, 720 N.E.2d 1160, 1164 (Ind. 1999). However, a guilty plea is not automatically a significant mitigating factor. *Id.* at 1165. Here, Cunningham plead guilty four months after charged with the instant offenses and the only *benefit* he received was that his sentences would run concurrently. Additionally, Cunningham expressed remorse for his actions. He has also been a productive member of society working as a volunteer firefighter for thirteen years, and then working as an EMT before eventually joining the City of Marion Fire Department.

Thus, we believe the eight-year sentence imposed for Count I, child solicitation, a Class C felony, is inappropriate.

Considering the nature of the offense, we also find the eight year sentence imposed for Count I, child solicitation, a Class C felony, is inappropriate. While the statute does not take into consideration whether there actually was a child on the receiving end of the telephone or computer for charging purposes, it only seems appropriate to consider that fact for sentencing purposes. The reality is no child was on the receiving end of Cunningham's efforts. Thus, with respect to the nature of this offense, a maximum sentence is inappropriate. We find the advisory four year sentence for a Class C felony is appropriate based on Cunningham's character and the nature of the offense.

CONCLUSION

Based on the foregoing, we find the eight-year sentence imposed by the trial court inappropriate.

Reversed and remanded with instructions.

BARNES, J., concurs

NAJAM, J., dissents with separate opinion.

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	)	
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	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

NAJAM, Judge, dissenting.

I respectfully dissent. The majority relies on the mitigating circumstances of Cunningham's lack of a criminal history, his cooperation with police, his guilty plea, and his position as a firefighter and EMT in reducing his sentence. But the trial court considered all of those factors, assigned them various weights, and balanced them against each other and against aggravators. I cannot say that Cunningham's resultant sentence is inappropriate in light of the nature of the offense and his character.[1] See Gibson v. State, 856 N.E.2d 142 (Ind. Ct. App. 2006).

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[]

[1] The majority acknowledges that, "[w]here the trial court has entered a reasonably detailed sentencing statement explaining its reasons for a given sentence that is supported by the record, we may only review the sentence under Indiana Appellate Rule 7(B)." Slip op. at 5 (citing Anglemyer v. State, No. 43S05-0606-CR-230, ___ N.E.2d ___, slip op. at 11 (Ind. June 26, 2007)). Relying on that statement but without discussion, the majority does not address Cunningham's additional argument that the trial court abused its discretion in sentencing him. I agree that the trial court has entered a reasonably detailed sentencing statement that is supported by the record and not improper as a matter of law, and I likewise limit my review to Appellate Rule 7(B).

independent appellate review and revision of a sentence imposed by the trial court." Anglemyer v. State, No. 43S05-0606-CR-230, ___ N.E.2d ___, slip op. at 11 (Ind. June 26, 2007) (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Under Appellate Rule 7(B), we assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson, 856 N.E.2d at 142 (Ind. Ct. App. 2006). However, "a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." Anglemyer, ___ N.E.2d at ___, slip op. at 15 (quoting Childress, 848 N.E.2d at 1080) (alteration in original).

Here, I find that a review of the trial court's recognized aggravators serves as a useful guide in determining whether the sentence it imposed was inappropriate. The majority, on the other hand, completely ignores the most salient aggravators identified by the trial court and the court's assessment of those aggravators. Specifically, the majority disregards the nature and circumstances of Cunningham's crimes and misconstrues the significance of his public service positions.

It is indisputable that the nature and circumstances of a crime is a valid aggravator. See, e.g., McCarthy v. State, 749 N.E.2d 528, 539 (Ind. 2001). As thoroughly discussed by the trial court and the State, yet ignored by the majority, the nature of Cunningham's offense was egregious. As the court stated, there was "page after page after page after page of explicit sexual innuendos and some of it not innuendos." Transcript at 54. In

addition, Cunningham transmitted a video of himself masturbating and sent that video to the presumed victim, a fifteen year-old girl, via the Internet.

Further, the trial court's recognition of Cunningham's service in public positions as an aggravator was valid. In Campbell v. State, 551 N.E.2d 1164, 1165-69 (Ind. Ct. App. 1990), we affirmed the trial court's use of a defendant's violation of a position of trust to the community, stating:

> [Indiana Code Section] 35-38-1-7(d) [now I.C. § 35-38-1-7.1(c)] does not limit trial courts from considering other factors than those listed in sub-sections (b) and (c) [now I.C. § 35-38-1-7.1 subsections (a) and (b)]. By so stating, the legislature recognizes other factors warranting aggravation or mitigation of sentence may exist under the peculiar facts of other cases which are not listed in (b) and (c). Subsection (d) leaves to the sound discretion of the trial court the question of whether a particular crime's dynamism has an overall effect upon the community as a whole which warrants enhancement or diminution of sentence even though the factors listed in (b) or (c) may or may not be present. Trial judges are uniquely qualified to assess such dynamics.
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> These crimes were perpetrated as part of a cold and calculated criminal scheme formulated by a pillar of the Kokomo community. These crimes are all the more heinous because its perpetrator by his external social conduct chose to set an example for others to follow, including . . . [those] who were or may have been influenced by his leadership and conduct in the community. . . . The trial judge did not abuse his discretion by assessing these peripheral matters in aggravation of the basic crimes here involved.

It does not matter that Cunningham did not commit his crimes while in the course of exercising his duties as a public servant. For example, in Marshall v. State, 643 N.E.2d 957, 963 (Ind. Ct. App. 1995), trans. denied, an off-duty police officer molested a neighbor's child inside of the officer's home. In affirming his sentence enhancement, we noted that, by virtue of his public service position, the defendant "had been in a position

of trust with the victim and members of the community. . . . [The defendant] breached the trust the victim and the community had placed in him, and such a breach is a valid aggravating factor." Id. (emphasis added). Thus, even though the officer in Marshall had committed his crimes while off duty, we affirmed the trial court's use of his position of trust to the community as a valid aggravator.

The majority emphasizes that Cunningham "has . . . been a productive member of society working as a volunteer firefighter . . . and then working as an EMT." Slip op. at 5. But again, the majority ignores the aggravating circumstances attributable to Cunningham's employment. Although the trial court may not have been the most articulate in its statements, it plainly determined that Cunningham's commission of these crimes constituted a violation of the community's trust in him by virtue of his past status as a public servant. Indeed, the trial court's sentencing statements imply that it felt that this one aggravator outweighed all of the mitigating circumstances, including Cunningham's lack of a criminal history, his cooperation with police, his remorse, and his guilty plea.

I also cannot agree with the majority that the fact that a minor child did not actually receive Cunningham's messages and video entitles Cunningham to a reduced sentence. It was not for lack of trying that Cunningham failed to have actual contact with a fifteen-year-old child. Cunningham's crimes were equivalent to attempts to commit the underlying felonies for which he was convicted. As the Indiana Code plainly states, in relevant part: "An attempt to commit a crime is a felony . . . of the same class as the crime attempted. . . . It is no defense that, because of a misapprehension of the

circumstances, it would have been impossible for the accused person to commit the crime attempted." Ind. Code § 35-41-5-1 (West 2004).

Regarding the nature of Cunningham's character, I am persuaded by the trial court's assessment that Cunningham is, ultimately, a man of poor character who is willing to inflict damage to his community by virtue of ignoring his past status as a public servant. EMTs and firefighters are often admired by other members of a community, especially children. The fact that Cunningham had been both placed him in a position of unique respect in his community. Nonetheless, Cunningham was willing to degrade himself and other members of those professions by committing the instant offenses. As with the off-duty officer in Marshall, it is irrelevant that Cunningham did not commit these offenses while in the course of his employment as an EMT or a firefighter.

In sum, I would affirm the judgment of the trial court and Cunningham's eight-year sentence. Using the trial court's sentencing statements for guidance, I cannot say that Cunningham's sentence is inappropriate in light of the nature of the offenses or his character. Again, Cunningham engaged in multiple pages of illicit sexual discussions with a presumed fifteen-year-old girl, in addition to sending that presumed child a video of himself masturbating, and Cunningham had occupied multiple public service positions. While I do not consider the majority's new sentence unreasonable, on appeal we cannot merely substitute what we believe to be an appropriate sentence for what trial court found to be an appropriate sentence. Our standard of review under Appellate Rule 7(B) is whether the sentence imposed by the trial court is "inappropriate," not whether the court

gave the most appropriate sentence. The trial court's sentencing decision was not inappropriate under Appellate Rule 7(B).