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**IN THE
COURT OF APPEALS OF INDIANA**

TIMOTHY RAY CREECH,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 35A02-0612-CR-1140

APPEAL FROM THE HUNTINGTON CIRCUIT COURT
The Honorable Thomas M. Hakes, Judge
Cause No. 35C01-0605-FC-24

August 6, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Timothy Ray Creech appeals his six-year sentence for child molesting as a Class C felony. We find that Creech has waived his right to a direct appeal of his sentence because he expressly agreed to do so in his plea agreement. Waiver notwithstanding, we conclude that Creech's sentence is not inappropriate given the nature of the offense and his character. We therefore affirm the trial court.

Facts and Procedural History

On May 26, 2006, the State filed a charging information against Creech alleging that he committed child molesting as a Class C felony. The charging information provides as follows:

Sometime during 2005 and/or 2006 in Huntington County, Indiana, Timothy Ray Creech performed or submitted to touching or fondling of a child or himself with the intent to arouse or satisfy his own sexual desires or the sexual desires of the child, when the child was under fourteen (14) years of age, to wit: a female child whose initials are M.B.

Appellant's App. p. 5. Thereafter, Creech filed a Motion to Enter a Plea of Guilty. That motion provides, in pertinent part:

I am pleading guilty to Child Molesting, a class C felony. In exchange for my plea of guilty the State has agreed to cap the executed portion of my sentence at six (6) years.

...

I understand that I have a right to appeal my sentence if there is an open plea. An open plea is an agreement which leaves my sentence to the Judge's discretion. I hereby waive my right to appeal my sentence so long as the Judge sentences me within the terms of my plea agreement.

Id. at 36, 38 (numbering omitted). At the guilty plea hearing, the State established the following factual basis for this crime:

[D]uring the year 2005 until very recently, at least while the Defendant's been living with his wife in Huntington County[,] Indiana, his grandchildren frequently come to the home, or did, to visit. During 2005 and through March 31, 2006, several different times his granddaughter whose initials are M.B. came to their home. He would hug her, he admitted that he placed his hands on her breasts and touch[ed] and rubbed her breasts and he admits that he did so to satisfy his sexual desires at the time. These events occurred to M.B. The granddaughter was ten and[/]or eleven years of age.

Tr. p. 8-9. On November 27, 2006, the trial court held a hearing at which it accepted Creech's plea of guilty, entered judgment of conviction, and sentenced him. Specifically, the trial court found three aggravators—Creech's criminal history, M.B.'s age, and that Creech was in a position of trust and control—and one mitigator—Creech's guilty plea. Finding that the aggravators outweighed the mitigator for the reason that Creech received the benefit of a sentence cap in return for his plea, the trial court sentenced Creech to a term of six years, the maximum under the plea agreement. Creech now appeals his sentence.

Discussion and Decision

Creech contends that his six-year sentence for child molesting as a Class C felony is inappropriate. The State responds that Creech has waived this argument on appeal because in the plea agreement, he expressly waived his right to appeal his sentence as long as the trial court sentenced him within the terms of the agreement. Waiver notwithstanding, the State argues that Creech's sentence is not inappropriate. We first address waiver.

This Court recently addressed the validity of a defendant's waiver in a plea agreement of his right to appeal his sentence in *Perez v. State*, 866 N.E.2d 817 (Ind. Ct.

App. 2007), *trans. denied*. In that case, the defendant’s plea agreement provided, “Defendant waives any right to appeal his conviction and sentence in this cause either by direct appeal or by post conviction relief.” *Id.* at 819. In addition, the trial court “expressly reviewed with [the defendant] that he was agreeing to waive any right to appeal the sentence to be imposed, that he would not be complaining about the sentence he received as long as it was within the parameters of thirty to fifty years.” *Id.* The defendant then confirmed with the court that this was what he was requesting. *Id.*

On appeal, this Court first noted that there were no Indiana decisions addressing an express waiver of the right to a direct appeal as part of a plea bargain agreement. *Id.* Relying on authority that plea agreements are contractual in nature and bind the defendant, the State, and the trial court, this Court held, “We find that a defendant may in a plea agreement waive his right to a direct appeal of his sentence.” *Id.* at 820 (footnote omitted). We added that a “trial court may, of course, choose to reject a plea agreement with such waiver provisions.” *Id.* at n.3. Noting that the defendant agreed both in the written plea agreement and in his colloquy with the court that he was waiving his right to a direct appeal of his sentence as long as it was within the parameters of the agreement, this Court concluded that his waiver was valid. *Id.*

Here, Creech’s plea agreement provided, in pertinent part, “I hereby waive my right to appeal my sentence so long as the Judge sentences me within the terms of my plea agreement.” Appellant’s App. p. 38. This provision constitutes an express waiver of Creech’s right to a direct appeal of his sentence, as in *Perez*. The fact that the trial court did not engage Creech in a colloquy at the guilty plea hearing regarding the effect of this

waiver provision, as in *Perez*, does not invalidate it. Therefore, we find that Creech has waived his right to a direct appeal of his sentence.

Waiver notwithstanding, we will address the merits of Creech's inappropriate sentence argument. As an initial matter, we note that the record is unclear whether Creech committed this crime before or after April 25, 2005, which is the date Indiana switched from a presumptive to an advisory sentencing scheme. *See* Appellant's App. p. 5 (alleging in the charging information that the crime took place "[s]ometime during 2005 and/or 2006"). The determination of which statutory scheme applies might be relevant if Creech challenged the trial court's finding of aggravators and mitigators. *See generally Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007) (discussing the different roles of aggravators and mitigators under the presumptive and advisory schemes). However, Creech only challenges his sentence under Indiana Appellate Rule 7(B). *See* Appellant's Br. p. 5 ("In light of Creech's confession, expressions of remorse, and guilty plea, and evidence that the instant offense was out of character for him, a six year sentence is inappropriately harsh, and this Court should exercise its power to review and revise sentences to impose a shorter sentence."). Our authority to review and revise sentences under Appellate Rule 7(B) is no different under the advisory scheme than it was under the presumptive scheme, so we need not determine which scheme applies to Creech's crime. *Anglemyer*, 868 N.E.2d at 490, 494. We now turn to Creech's Appellate Rule 7(B) claim.

Appellate Rule 7(B) states: "The 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.” “Although appellate review of sentences must give due consideration to the trial court’s sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied.” *Purvis v. State*, 829 N.E.2d 572, 587 (Ind. Ct. App. 2005) (internal citations omitted), *trans. denied, cert. denied*, 547 U.S. 1026 (2006). The burden is on the defendant to persuade us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). After due consideration of the trial court’s decision, we cannot say that Creech’s sentence is inappropriate.

Regarding the nature of his offense, Creech admitted to fondling his granddaughter M.B.’s breasts “[s]everal different times” in order to “satisfy [his] sexual desires.” Appellant’s App. p. 37. M.B. was ten and eleven years old during these molestations. As for his character, the record shows that Creech, who was forty-seven years old at the time of sentencing, has a criminal history that spans four decades and includes felony and misdemeanor convictions for crimes such as burglary, theft, public intoxication, operating while intoxicated, disorderly conduct, and false informing. Creech also has numerous failures to appear. It is apparent that Creech’s criminal activity remains undeterred by his previous periods of incarceration and probation, which casts doubt on his expression of remorse at the sentencing hearing. Given the nature of the offense and his character, Creech has failed to persuade us that his six-year sentence for molesting his granddaughter is inappropriate. We therefore affirm the trial court.

Affirmed.

SULLIVAN, SR. J., and ROBB, J., concur.