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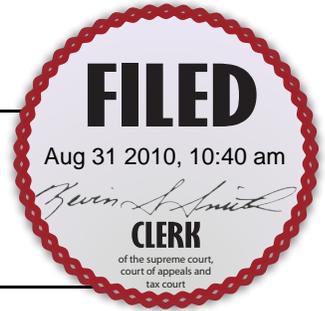
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**IN THE
COURT OF APPEALS OF INDIANA**



JAMES R. COOK,

Appellant- Defendant,

vs.

STATE OF INDIANA,

Appellee- Plaintiff,

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No. 34A04-1004-CR-307

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable George A. Hopkins, Judge
Cause No. 34D04-0903-FB-39

August 31, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

James R. Cook appeals his six-year executed sentence following a guilty plea to two counts of battery resulting in bodily injury to a person less than fourteen years of age, both Class D felonies. Cook raises one issue for our review: whether the trial court properly imposed consecutive sentences. Concluding the trial court improperly imposed consecutive sentences in excess of four years, we reverse and remand.

Facts and Procedural History

Cook was living with his girlfriend, Kelly Turpin, in a house in Kokomo, Indiana. Turpin has two children, J.T., age four, and K.T., age six. Sometime between February 21, 2009, and February 28, 2009, Cook walked into a bedroom and found J.T. and K.T. playing with their genitalia. Cook became upset and grabbed J.T.'s and K.T.'s genitals, causing pain and injury. On February 28, 2009, the children were dropped off at their great-grandmother's home, and she became aware of their injuries. The incident was reported to the police, and both children related the details of the incident. Additionally, J.T. and K.T. reported Cook "whips them as punishment," Appellant's Appendix at 22, once with a belt and other times with his hand.

On January 15, 2010, Cook pleaded guilty to two counts of battery resulting in bodily injury to a person under fourteen years of age, Class D felonies. On February 12, 2010, the trial court sentenced Cook to three years executed on each count and ordered the sentences to run consecutively for a total of six years. Cook now appeals his sentence.

Discussion and Decision

Generally the trial court has discretion to impose consecutive sentences based upon the aggravating and mitigating circumstances. Williams v. State, 891 N.E.2d 621, 630 (Ind. Ct. App. 2008). This discretion is constrained, however, by Indiana Code section 35-50-1-2(c), which provides:

The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. However, except for crimes of violence, the total of the consecutive terms of imprisonment . . . to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

Cook contends his six year sentence for two Class D felonies improperly exceeds the four-year advisory sentence for a Class C felony, as his offenses are not crimes of violence¹ and arose out of a single episode of criminal conduct. An “episode of criminal conduct” is defined as “offenses or a connected series of offenses that are closely related in time, place, and circumstance.” Ind. Code § 35-50-1-2(b). The timing of the offenses is important when considering whether a series of offenses constitutes a single episode of criminal conduct. Smith v. State, 770 N.E.2d 290, 294 (Ind. 2002). Crimes that are “simultaneous” and “contemporaneous” in nature may constitute a single episode of criminal conduct. Id. By contrast, where crimes take place at separate times and separate locations, they do not constitute a single episode of criminal conduct. Id.

Cook pleaded guilty to two counts of battery resulting in bodily injury to a person under fourteen years of age; one count for battering J.T., and one count for battering K.T.

¹ The State concedes, and we agree, that the crimes as charged are not crimes of violence. See Ind. Code § 35-50-1-2(a); Brief of Appellee at 6.

The charging information specifically refers to an incident that occurred between February 21, 2009 and February 28, 2009, and alleges Cook:

did knowingly touch [J.T.], a person under the age of fourteen (14), in a rude, insolent, or angry manner, to wit: hitting, pulling, and twisting of genitals and buttocks resulting in serious bodily injury, to-wit: redness, abrasions, bruising, and extreme pain to genitals, buttocks, and surrounding areas

Appellant's App. at 12.² Cook contends these charges related only to the incident wherein he grabbed the boys' penises. The State points out that Cook stipulated to the affidavit of probable cause and its attachments "to the extent necessary to establish a factual basis," transcript at 9, and notes the probable cause affidavit and attachments also reference incidents of Cook spanking the boys as punishment. Therefore, the State argues there were multiple battery incidents.

J.T. and K.T. both made similar statements specifically referring to the incident that occurred on the night Cook entered the bedroom and saw them masturbating. J.T. stated that "[Cook] tried to pull it off [and] this hurt badly." Appellant's App. at 22. He also stated his injuries were from "Cook 'pulling and twisting' on him." *Id.* at 25. K.T. stated Cook "pulled and twisted their penises" and his penis was "hurt bad." *Id.* at 22. Although neither child knew the exact date, J.T. stated it happened at their house in Kokomo, and his great-grandmother stated he had no injuries when he went to stay with Turpin on February 21 but both boys complained of pain when Turpin dropped them off her house on February 28. Both children also generally referred to incidents where Cook

² The information as to K.T. is identical. *See* Appellant's App. at 13. Cook was charged with two counts of battery resulting in serious bodily injury to a person less than fourteen years of age pursuant to Indiana Code section 35-42-2-1(a)(4), Class B felonies. He pleaded guilty to the lesser included offenses of battery resulting in bodily injury to a person less than fourteen years of age pursuant to Indiana Code section 35-42-2-1(a)(2)(B), Class D felonies.

either spanked them with a belt or by hand. However, the record lacks evidence regarding the date of the spankings, whether the children were also spanked on the night Cook touched their genitals, or whether the spankings caused pain or injury. During the investigation, the great-grandmother stated she “had a conversation in the past about [Cook] spanking the boys with a belt rather than his hand.” Id. at 23. It is quite possible that J.T. and K.T. were referencing spanking incidents unconnected to the night where Cook caused their injuries, or incidents outside the scope of the time frame noted in the charging information. Based on the record, it is clear that Cook battered the boys by pulling or otherwise touching their genitals during the relevant time period. These incidents took place under the same circumstances, at the same time, and at the same location. Therefore, Cook’s offenses arose out of an episode of criminal conduct, and the trial court lacked discretion under Indiana Code section 35-50-1-2 to impose consecutive sentences totaling more than four years.

Conclusion

The trial court improperly imposed consecutive sentences totaling six years for two Class D felony counts of battery resulting in bodily injury to a person under fourteen years of age that were an episode of criminal conduct. We therefore reverse and remand for resentencing consistent with this opinion.

Reversed and remanded.

MAY, J., and VAIDIK, J., concur.