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**IN THE
COURT OF APPEALS OF INDIANA**

JESUS LOZANO RODRIGUEZ,)

Appellant-Defendant,)

vs.)

STATE OF INDIANA,)

Appellee-Plaintiff.)

No. 48A04-0704-CR-189

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-0609-FB-162

OCTOBER 3, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Jesus Lozano Rodriguez appeals the sentence he received for his convictions of sexual battery, a Class D felony, Ind. Code § 35-42-4-8; and operating a motor vehicle with an alcohol concentration equivalent (ACE) of .08 or more, a Class C misdemeanor, Ind. Code § 9-30-5-1.

We remand for resentencing.

ISSUES

Rodriguez presents two issues for our review, which we restate as:

- I. Whether the trial court abused its discretion in finding a certain aggravating factor.
- II. Whether Rodriguez's sentence is inappropriate.

FACTS AND PROCEDURAL HISTORY

In September 2006, Rodriguez forced his way into the female victim's apartment, struggled with the victim, and attempted to have sexual contact with the victim. On November 17, 2006, Rodriguez pleaded guilty to sexual battery, as a Class D felony, and operating a vehicle with an ACE of .08 or more, as a Class C misdemeanor. On that same day, Rodriguez was sentenced to three years on the D felony and thirty days on the C misdemeanor, to be served concurrently. It is from this sentence that he now appeals.

DISCUSSION AND DECISION

I. AGGRAVATING FACTOR

As an initial matter, we note that prior to the commission of these offenses, our state legislature amended Indiana's sentencing scheme with regard to felony offenses,

effective April 25, 2005. Under the new sentencing regime, a court may impose any legal sentence “regardless of the presence or absence of aggravating circumstances or mitigating circumstances.” Ind. Code § 35-38-1-7.1(d). Although this statute allows for the imposition of any sentence within the statutory range without regard to mitigating or aggravating circumstances, it is worth noting that the statute does not prohibit the trial court from identifying facts in mitigation or aggravation. *Anglemyer v. State*, 868 N.E.2d 482, 489 (Ind. 2007).

Our supreme court very recently decided *Anglemyer*, which sets forth definitive answers to numerous sentencing questions that have arisen in the aftermath of the legislative revisions. In the instant case, we are concerned only with the trial court’s finding of aggravating circumstances, which, following *Anglemyer*, remains a determination within the sound discretion of the trial court. *Id.* at 490. Thus, on appeal, we review the trial court’s sentencing decisions for an abuse of that discretion. *Id.* An abuse of discretion occurs if the trial court’s decision is clearly against the logic and effect of the facts and circumstances of the case. *Groves v. State*, 823 N.E.2d 1229, 1231 (Ind. Ct. App. 2005).

Rodriguez contends that the trial court improperly enhanced his sentence using facts that support the charges that were dismissed pursuant to his plea agreement. Ind. Code § 35-50-2-7 provides that the fixed term for a Class D felony is between six months and three years, with the advisory sentence being one and one-half years. Here, Rodriguez was sentenced to three years for his conviction of sexual battery, a Class D felony. In support of Rodriguez’s enhanced sentence for this conviction, the trial court

identified one aggravator: the fact that Rodriguez's actions went beyond sexual battery and involved attempted rape.

Rodriguez was charged initially with operating a vehicle with an ACE of .08 or more, attempted rape, and sexual battery. In exchange for Rodriguez's plea of guilty to operating a vehicle with an ACE of .08 or more and sexual battery, the charge of attempted rape was dismissed. Rodriguez claims that the sentencing court improperly relied on facts that support the dismissed rape charge in order to enhance his sentence for his sexual battery conviction. At sentencing, the trial court stated:

This is an attempted rape. You took out your penis in this woman's house. You threw her on her bed own bed and tried to penetrate her, sir. All women don't want to tell these horrible stories in front of strangers, so she agreed to the lesser charge. I understand exactly what happened. You went into her home uninvited. You sexually assaulted her. You tried to forcibly remove her clothing. And you took out your penis and tried to stick it in her. If that's not aggravation, I don't know what aggravation is.

Tr. at 43-44.

The rape charge alleged that Rodriguez knowingly attempted to have sexual intercourse with the victim when she was compelled by force or by the imminent threat of force. In contrast, the sexual battery charge alleged that Rodriguez did, with the intent to arouse or satisfy his own sexual desires or those of the victim, knowingly touch the victim, when she was compelled to submit to the touching by force or imminent threat of force. It is clear that the trial court used the facts of the dismissed charge to enhance Rodriguez's sentence for his conviction of sexual battery. This is improper. *See Farmer v. State*, 772 N.E.2d 1025, 1027 (Ind. Ct. App. 2002) (holding that sentencing court

improperly circumvented plea agreement by enhancing defendant's sentence due to its reliance on facts supporting charges that were dismissed pursuant to plea agreement).

At sentencing, the trial court found three mitigating factors: (1) lack of criminal history, (2) guilty plea, and (3) work ethic. Thus, in light of the multiple mitigators found by the court and the trial court's reliance on an improper aggravator, we remand to the trial court for resentencing in accordance with this opinion.

III. INAPPROPRIATE SENTENCE

Rodriguez asks this Court to revise his sentence on grounds of inappropriateness pursuant to Article VII, Section 6 of the Indiana Constitution. However, having determined that the appropriate remedy is to remand to the sentencing court, we decline to exercise our constitutional prerogative.

CONCLUSION

Based upon the foregoing, we conclude that the trial court erred in finding the facts of the dismissed charge to be an aggravating circumstance justifying an enhanced sentence for the charge to which Rodriguez pleaded guilty.

Remanded for resentencing.

BARNES, J., and BAILEY, J., concur.