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**IN THE
COURT OF APPEALS OF INDIANA**

REX HOWARD, SR.,)

Appellant-Defendant,)

vs.)

No. 20A03-0707-CR-349

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE ELKHART SUPERIOR COURT

The Honorable George W. Biddlecome, Judge

Cause No. 20D03-0605-FC-14

October 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Rex Howard, Sr., appeals his sentence following his convictions for Child Molesting, as a Class C felony, and Battery Upon a Child, as a Class D felony, pursuant to a guilty plea. Howard raises a single issue for our review, namely, whether the trial court abused its discretion in sentencing him.

We affirm.

FACTS AND PROCEDURAL HISTORY

Throughout 2003, Howard performed or submitted to fondling or touching with F.H., his fourteen-year-old granddaughter and adopted daughter, with the intent to arouse or satisfy either his or F.H.'s sexual desires. And on January 1, 2004, Howard struck F.H. across her face, causing her pain. On May 15, 2006, the State charged Howard with three counts of child molesting, each as a Class C felony. On August 17, 2006, the State added a charge of battery upon a child, as a Class D felony.

That same day, Howard pleaded guilty to one count of child molesting and the charge of battery upon a child. In exchange, the State agreed to drop the other child molesting charges. The trial court held a sentencing hearing on September 7, after which the court entered the following findings:

The Court finds the following aggravating circumstances.

1. The Defendant violated his position of trust as the biological grandfather of his victim and as the adoptive father of his victim when he chose to molest her.

2. The Defendant has admitted to molesting another daughter in the past, thus, indicating an ongoing course of pedophilia which the Defendant has refused to successfully address.

3. The Defendant engaged in an ongoing course of criminal conduct with respect to his victim in this case by molesting her repeatedly over a series of months, if not years.

The Court finds the following mitigating circumstances.

1. The Defendant's lack of criminal history is a mitigator; however, in light of the Defendant's history of molesting children, the Court declines to accord substantial weight to this mitigator.

2. The Defendant has accepted responsibility for his criminal conduct; however, the Court declines to ascribe significant weight to this mitigator, noting that the Defendant received consideration by way of his plea bargain, thus he has already benefited from his acceptance of responsibility.

3. The Defendant has professed remorse for his criminal acts; however, the Court is not persuaded that the Defendant's expressions of remorse are genuine and, therefore, the Court declines to give substantial weight to this mitigator.

4. The Defendant has a laudable work record.

5. The Defendant earned an honorable discharge from the United States Air Force.

6. The Defendant's mental illness is a mitigator; however, the Court is not persuaded that any nexus exists between the Defendant's mental illness and his illegal conduct, and, therefore, the Court declines to accord substantial weight to this mitigator.

The Court finds that the aggravators listed above outweigh the mitigators also listed, thus justifying [an] enhanced sentence.

Appellant's App. at 34. The court then sentenced Howard to seven years for the Class C felony and one year on the Class D felony, to be served consecutively. This appeal ensued.

DISCUSSION AND DECISION

On appeal, Howard asserts that the trial court abused its discretion in sentencing him. Specifically, Howard argues that the court failed to assign proper weight to his mitigating circumstances. As an initial matter, it is well settled that the advisory sentencing scheme does not apply retroactively. See Hightower v. State, 866 N.E.2d 356, 370 (Ind. Ct. App. 2007), trans. denied. As our Supreme Court observed in Anglemyer v. State, 868 N.E.2d 482, 491 n.9 (Ind. 2007): “The amended sentencing scheme was enacted on April 25, 2005. It thus applies to Anglemyer whose crimes were committed thereafter.” (Citation omitted.) As such, we review Howard’s sentence under the presumptive sentencing scheme in place when he committed his crimes.

In general, sentencing determinations under the presumptive scheme are within the trial court’s discretion. Henderson v. State, 769 N.E.2d 172, 179 (Ind. 2002). We review sentencing decisions only for abuse of discretion, including a trial court’s decisions to increase or decrease the presumptive sentence because of aggravating or mitigating circumstances and to run the sentences concurrently or consecutively. Id. If a trial court relies upon aggravating or mitigating circumstances to enhance or reduce the presumptive sentence, it must (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate the court’s evaluation and balancing of the circumstances. Id.

Although a sentencing court must consider all evidence of mitigating circumstances offered by the defendant, the finding of a mitigating factor rests within the

court's discretion. Id. "A court does not err in failing to find mitigation when a mitigation claim is 'highly disputable in nature, weight, or significance.'" Id. (quoting Smith v. State, 670 N.E.2d 7, 8 (Ind. 1996)). While a failure to find mitigating circumstances clearly supported by the record may imply that the sentencing court improperly overlooked them, the court is obligated neither to credit mitigating circumstances in the same manner as would the defendant, nor to explain why it has chosen not to find mitigating circumstances. Id.

Here, the trial court enhanced Howard's Class C felony¹ from the presumptive four-year sentence to a seven-year sentence. See Ind. Code § 35-50-2-6 (2004). As such, Howard contends that the court abused its discretion "by failing to give substantial weight to the following mitigating circumstances: lack of criminal history, acceptance of responsibility, and expression of remorse. Additionally, the trial court ignored the defendant's years of service in the United States Air Force." Appellant's Brief at 5. Howard does not dispute the trial court's findings of aggravators, nor does Howard maintain that his sentence is inappropriate under Indiana Appellate Rule 7(B).

The trial court did not abuse its discretion in its identification of or in the weight assigned to the mitigating circumstances challenged by Howard on appeal. First, the court recognized Howard's lack of criminal history as a mitigating circumstance, but found that it was not entitled to substantial weight "in light of the Defendant's [unprosecuted] history of molesting children." Appellant's App. at 34. That is not to say, as Howard maintains, that the trial court afforded his lack of criminal history no

¹ Howard does not appeal his one-year sentence for the Class D felony conviction or the court's order that that sentence run consecutive to his sentence on the Class C felony.

weight. Rather, the court simply did not accord that mitigator the same weight that Howard would. Again, “the court is [not] obligated . . . to credit mitigating circumstances in the same manner as would the defendant.” Henderson, 769 N.E.2d at 179. Hence, the trial court did not abuse its discretion in its assessment of Howard’s criminal history.

Second, Howard argues that the trial court abused its discretion by not giving more weight to his guilty plea. “Our courts have long held that a defendant who pleads guilty deserves to have some mitigating weight extended to the guilty plea in return.” Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005). However, “the significance of this mitigating factor will vary from case to case. Where the guilty plea [does not] demonstrate[] a defendant’s acceptance of responsibility for the crime . . . the court [does] not abuse its discretion in declining to find the guilty plea a mitigating circumstance.” Francis v. State, 817 N.E.2d 235, 238 n.3 (Ind. 2004). Here, the court specifically “decline[d] to ascribe significant weight to this mitigator, noting that the Defendant received consideration by way of his plea bargain, thus he has already benefited from his acceptance of responsibility.” Appellant’s App. at 34. That is, the court found that Howard’s guilty plea did not demonstrate his acceptance of responsibility for his crimes; rather, his plea was merely a pragmatic decision to avoid the possibility of a longer jail term. Thus, the court did not abuse its discretion on this issue.

Third, Howard asserts that his expressions of remorse should have been accorded more weight by the trial court. Undoubtedly, “remorse [is] a valid mitigating circumstance.” Cotto, 829 N.E.2d at 326. But “a trial court’s determination of a

defendant's remorse is similar to a determination of credibility. Without evidence of some impermissible consideration by the trial court, we will accept its determination as to remorse." Johnson v. State, 855 N.E.2d 1014, 1016-17 (Ind. Ct. App. 2006) (citing Pickens v. State, 767 N.E.2d 530, 535 (Ind. 2002)), trans. denied. Here, the trial court discounted Howard's proffered statements of remorse as not genuine, and Howard presents no evidence of an impermissible consideration by the trial court. As such, we cannot say that the trial court erred in its assessment of Howard's purported remorse.

Finally, Howard claims that the trial court "altogether ignored his service in the military as a mitigating factor." Appellant's Brief at 6. But Howard ignores the trial court's sentencing order, attached to his brief on appeal, in which the court plainly states as a mitigating circumstance the fact that Howard "earned an honorable discharge from the United States Air Force." Hence, Howard's appeal on this point is without merit. We cannot say that the trial court abused its discretion in sentencing Howard to seven years on the Class C felony conviction.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.