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IN THE
COURT OF APPEALS OF INDIANA

DONALD. E. JONES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 47A01-0705-CR-203
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAWRENCE CIRCUIT COURT
The Honorable Richard D. McIntyre, Sr., Judge
Cause No. 47C01-0601-FB-31

November 30, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Donald E. Jones, Jr. (Jones), appeals his sentence for child molesting, a Class B felony, Ind. Code § 35-42-4-3.

We reverse the trial court's sentencing order and remand for a new sentencing determination.

ISSUE

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

FACTS AND PROCEDURAL HISTORY

On two occasions between December 4, 2004 and January 2005, R.J., Jones' longtime girlfriend's thirteen-year-old daughter, performed oral sex on him. R.J. reported the incidents to the police and on January 19, 2006, the State filed an Information charging Jones with child molesting, a Class B felony, I.C. § 35-42-4-3. On March 5, 2007, Jones entered a guilty plea pursuant to a plea agreement that provided Jones' sentence would be capped at ten years executed, but left all other aspects of his sentence to the discretion of the trial court. On April 3, 2007, the trial court accepted Jones' guilty plea and after reviewing the pre-sentence investigation report, found three aggravating factors and no mitigating factors. The aggravating factors found by the trial court were: (1) Jones' criminal history consisting of a 1990 conviction for theft, as a Class C felony, I.C. § 35-43-4-2, and a 1996 conviction for possession of marijuana, as a Class A misdemeanor, I.C. § 35-48-4-11; (2) Jones violated a position of trust when committing his crime; and (3) Jones' previous violation of probation.

Thereafter, the trial court sentenced Jones to fifteen years at the Department of Correction with five years suspended to probation.

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

DISCUSSION AND DECISION

I. *Blakely*

Jones argues that the trial court's imposition of an enhanced sentence violates *Blakely v. Washington*, 542 U.S. 296 (2004), *reh'g denied*. Jones contends that the trial court erred when it found two of the aggravating factors without a jury or admission from Jones, and used them to enhance his sentence. Specifically, Jones argues the trial court erroneously found as aggravating that: (1) Jones violated his position of trust when committing his offense; and (2) Jones had previously violated probation for an unrelated conviction for possession of marijuana.

Jones committed his offenses during the time when our previous presumptive sentencing scheme was still in effect, but was sentenced after an amendment to I.C. § 35-50-2-5, which provided for an "advisory" sentence, rather than a presumptive. Although our supreme court has not yet definitely addressed the question whether the advisory sentencing scheme should be applied retroactively, it has nevertheless indicated its view on the issue. In footnote 4 of *Gutermuth v. State*, 868 N.E.2d 427, 435 n.4 (Ind. 2007), the court states

> The General Assembly responded to the decision in *Smylie* by changing our state's sentencing statute to replace "presumptive" with "advisory" sentences. We noted this change in a footnote in a recent opinion. We stated that "[w]e apply the version of the statute in effect at the time of Prickett's sentence." *Prickett v. State*, 856 N.E.2d 1203, 1207 n.3 (Ind.2006). This language has appeared to cause some confusion. In *Prickett*, both the crime and the

> sentencing pre-dated the enactment of the new regime. This was not meant to question the long-standing rule that the sentencing statute in effect at the time a crime is committed governs the sentence for that crime. *Smith v. State*, 675 N.E.2d 693, 695 (Ind.1996) (citing *Jackson v. State*, 257 Ind. 477, 484, 275 N.E.2d 538, 542 (1971)). Because both the crime and the sentencing in *Prickett* pre-dated the enactment of the new regime, the same statute was in effect at the time of Prickett's sentence and his crime. Had the new statute become effective between the date of Prickett's crime and his sentencing, the version of the statute in effect at the time of Prickett's crime would have applied.

While we acknowledge that "footnotes are comments upon the text rather than a part of it," such footnotes, as are indicative of an intent to benefit the bench and bar, are deserving of "respect from an intermediate court and require [] special consideration." *Ewing v. State*, 358 N.E.2d 204, 206 (Ind. Ct. App. 1976); *see also Townsend v. State*, 860 N.E.2d 1268, 1274 (Ind. Ct. App. 2007), *trans. denied*. In light of our supreme court's clear intent approving that any sentence imposed after April 25, 2005 must be viewed under the pre-existing sentencing scheme if the offense for which the sentence is being imposed was committed prior to April 25, 2005, we will review Jones' sentencing under the presumptive sentencing scheme.

Normally under the presumptive sentencing scheme, the determination of the appropriate sentence rests within the discretion of the trial court and we will not reverse the trial court's determination absent a showing of manifest abuse. *Altes v. State*, 822 N.E.2d 1116, 1123 (Ind. Ct. App. 2005) (citing *Powell v. State*, 751 N.E.2d 311, 314 (Ind. Ct. App. 2001). However, in *Blakely*, the United States Supreme Court held that the Sixth Amendment requires a jury to determine beyond a reasonable doubt the existence of aggravating factors used to increase sentence for a crime above the presumptive sentence

assigned by the legislature. *Altes*, 822 N.E.2d at 1123 (citing *Blakely*, 542 U.S. at 301).

> Specifically, the Supreme Court held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The Supreme Court defined this statutory maximum as the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any addition findings.

Id. (internal citations and quotation marks omitted) (emphasis in original). Accordingly, we have held that our trial courts no longer have discretion to sentence a criminal defendant to more than the presumptive sentence unless the defendant waives his right to a jury at sentencing, a jury first determines the existence of aggravating factors, or the defendant has a criminal history. *Krebs v. State*, 816 N.E.2d 469, 475 (Ind. Ct. App. 2004).

As preliminary matter, we find that the trial court enhanced Jones' sentence. Jones pled guilty to child molesting, as a Class B felony. The presumptive sentence for a Class B felony is ten years, with a maximum sentence of twenty years, and a minimum sentence of six years. I.C. § 35-50-2-5 (2004). By sentencing Jones to fifteen years, with five years suspended to probation, the trial court enhanced Jones' sentence beyond the presumptive.

a. *Position of Trust*

Addressing the first disputed aggravator, violation of a position of trust, the State argues that Jones' admissions are sufficient to support this finding, and directs our attention to *Trusley v. State*, 829 N.E.2d 923, 926-27 (Ind. 2005). Our supreme court held in *Trusley* that certain observations by a trial court do not involve judicial fact-finding; specifically,

when the observations are supported by facts otherwise admitted or found by a jury, and the observation is meant to be a concise description of what the underlying facts demonstrate, then the observation is a legal determination, which does not violate *Blakely*. *Id*. (citing *Morgan v. State*, 829 N.E.2d 12, 17 (Ind. 2005)). In *Trusley*, the defendant admitted she was a daycare provider for the victim and was caring for the victim when he died. The trial court observed that the defendant was in a position of trust with the victim. Thus, our supreme court concluded that the trial court had merely attempted to "articulate the obvious nature of the relationship that existed between the defendant and victim at the time the crime was committed." *Id*.

Specifically, the State now contends, like *Trusley*, Jones "admitted that he was in a long-term relationship with the victim's mother, which is the fact from which the trial court concluded that [Jones] bore a trust relationship with R.J. as well." (Appellee's Brief p. 6). However, upon thoroughly reviewing the record, we have been unable to find where the trial court was presented with such an admission. The factual basis to which Jones pled guilty stated:

> In this cause specifically that being the allegation that on or between December 2004 and January 2005 that you were over the age of 21 and submitted to deviate sexual conduct by allowing [R.J.] to perform oral sex on your penis and that she was under the age of 14[.]

(Appellant's App. p. 15). We find that the factual basis for the guilty plea gives no insight as to the relationship between Jones and R.J.

At the sentencing hearing, the State argued that the trial court should find Jones was in a position of trust with R.J. due to the fact that the presentence report stated he was R.J.'s

mother's boyfriend for about ten years. Although Jones did not object to the presentence report, he never confirmed its accuracy, and we conclude his failure to object to the presentence investigation report does not constitute an admission that he was in a position of trust with R.J. *See i.e. Howell v. State,* 859 N.E.2d 677, 684 (Ind. Ct. App. 2006), *trans. denied* (holding that because Howell not only failed to object to the presentence report, but rather confirmed its accuracy, Howell admitted that the victim was her son as stated in the report) (citing *Ryle v. State*, 842 N.E.2d 320 (Ind. 2005), *cert. denied* --- U.S. ----, 127 S.Ct. 90 (2006)).[1] Even assuming for the sake of argument that Jones did admit to the statements in the presentence report, we find the statement that Jones has been R.J.'s mother's boyfriend does not equate to an admission that Jones held a position of trust with R.J. Thus, we conclude that the trial court improperly found Jones' violation of a position of trust as an aggravating factor when sentencing him.

b. *Probation Violation*

As for Jones' second contention that the trial court violated *Blakely* by finding his prior probation violation to be an aggravator without an admission from Jones or a finding by

[1] In *Ryle*, our supreme court stated in footnote 5 that "using a defendant's failure to object to a presentence report to establish an admission to the accuracy of the report implicates the defendant's Fifth Amendment right against self-incrimination." *Id*. at 323 n. 5.

a jury. The State makes no argument disputing Jones' contention. If such a prior probation violation could be used without Jones' admission or a jury finding, the justification would seem to be because trial courts are given the authority to find a defendant's criminal history as aggravating without an admission or jury finding. *See Johnson v. State*, 830 N.E.2d 895, 897 (Ind. 2005). However, under *Blakely*, only convictions may be used as criminal history for purpose of an aggravating factor without an admission or finding by a jury. *See Duncan v. State*, 857 N.E.2d 955, 959 (Ind. 2006) (citing *Blakely*, 542 U.S. at 301). Thus, we conclude that the trial court improperly found Jones' prior probation violation was an aggravating factor.

II. *Jones' Criminal History*

Of the three aggravating factors found by the trial court, we are left with one valid aggravator, Jones' criminal history. "Where we find an irregularity in a trial court's sentencing decision, we have the option to remand to the trial court for a clarification or new sentencing determination, to affirm the sentence if the error is harmless, or reweigh the proper aggravating and mitigating circumstances independently at the appellate level." *Howell*, 859 N.E.2d at 686 (quoting *Barber v. State*, 842 N.E.2d 343, 345 (Ind. 2006), *cert. denied* --- U.S. ----, 127 S.Ct. 128 (2006)).

Jones now asks us to reweigh the importance given to his criminal history as an aggravating factor, and determine that he should be sentenced to the presumptive sentence. In *Bryant v. State*, 841 N.E.2d 1154 (Ind. 2006), our supreme court explained that the weight of prior convictions is determined by "their gravity, by their proximity or distance from the

present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability." *Id*. at 1156. As the *Bryant* court explained by example, "a conviction for theft six years in the past would probably not, standing by itself, warrant maxing out a defendant's sentence for class B burglary. But, a former conviction for burglary might make it appropriate to impose the maximum sentence for a subsequent theft." *Id*.

In asking us to reweigh Jones' criminal history, Jones suggests that we not consider his conviction for theft, as a Class C felony, due to the fact that he "self reported" the conviction and the official record was unavailable to the trial court. (Appellant's Br. p. 12). We do acknowledge some doubt as to whether he was convicted of theft as a Class C felony, as opposed to as a Class D felony. *See* I.C. § 35-43-4-2 (designating theft to be a Class C felony, as opposed to a Class D felony, if the fair market value of the property is at least one hundred thousand dollars). Nevertheless, Jones is a credible source of evidence of his prior conviction for theft, irrespective of its Class, especially considering that his aunt confirmed this conviction with her testimony at his sentencing hearing.

Thus, Jones' criminal history properly considered as an aggravating factor consists of a conviction for theft, likely as a Class D felony, and a conviction for possession of marijuana, as a Class A misdemeanor. The theft conviction occurred in 1990, fourteen years prior to his instant crime of child molesting, and the possession of marijuana conviction occurred in 1996, approximately nine years prior to the child molest incidents. As we explained in *Means v. State*, 807 N.E.2d 776 (Ind. Ct. App. 2004), *trans. denied*:

> Even one valid aggravating circumstance is sufficient to support an enhancement of a sentence. When the sentencing court improperly applies an aggravating circumstance but other valid aggravating circumstances exist, a sentence enhancement may still be upheld. This occurs when the invalid aggravator played a relatively unimportant role in the trial court's decision, and other aggravating circumstances were sufficient to sustain the trial court's decision. When a reviewing court can identify sufficient aggravating circumstances to persuade it that the trial court would have entered the same sentence even absent the impermissible factor, it should affirm the trial court's decision. When a reviewing court cannot say with confidence that the permissible aggravators would have led to the same result, it should remand for re-sentencing by the trial court or correct the sentencing on appeal.

Id. at 788 (internal and quotation marks omitted). We conclude that we cannot say with confidence the trial court would have entered the same sentence absent the impermissible aggravating factors that it considered. Thus, we choose to remand to the trial court for a new sentencing determination consistent with this opinion.

CONCLUSION

For the foregoing reasons, we conclude that the trial court improperly considered as aggravating factors (1) that Jones violated a position of trust when committing his crime, and (2) his prior probation violation, reverse the trial court's sentencing order, and remand to the trial court for a new sentencing determination.

Reversed and remanded.

SHARPNACK, J., concurs.

BAKER, C.J., dissents with opinion.

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	)	
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vs.	)	No. 47A01-0705-CR-203
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

BAKER, Chief Judge, dissenting.

I respectfully dissent. I disagree with the majority's conclusion that it was improper for the trial court to rely upon Jones's 1996 probation violation as an aggravating factor. Our Supreme Court reaffirmed very recently that a trial court may "properly enhance a sentence based on the fact that a defendant was on probation at the time of the instant offense without violating Blakely if that finding 'rested on prior judicial records as reflected in the presentence investigation report prepared by the probation officer.'" Robertson v. State, 871 N.E.2d 280, 287 (Ind. 2007) (quoting Ryle v. State, 842 N.E.2d 320, 325 (Ind. 2005)). The Robertson court found that the reasoning in Ryle applied equally to a defendant who violated his probation after committing the instant offense. Id. I see no reason that the same reasoning should not also apply to a defendant who violated his probation before committing

the instant offense. Thus, because Jones's prior probation violation was included in the presentence investigation report and was based on prior judicial records, I believe that Robertson and Ryle compel us to find that the trial court did not run afoul of Blakely by finding Jones's 1996 probation violation to be an aggravating factor.

Ultimately, therefore, I believe that the trial court considered two valid aggravating factors—Jones's criminal history and probation violation. Given that his criminal history includes a felony, that he violated probation, and that the trial court did not enhance Jones's sentence to the maximum term, I can say with confidence that it would have imposed the same sentence if it had considered only the proper aggravators. Thus, I would affirm the judgment of the trial court.