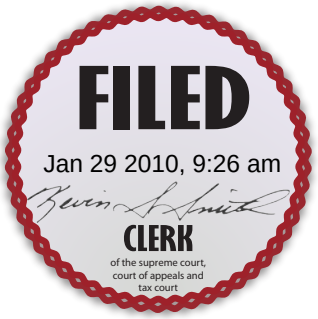

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IN THE
COURT OF APPEALS OF INDIANA

TOMMY RAY WALLACE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A04-0907-CR-430
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0810-FC-280

January 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Tommy Ray Wallace appeals his four-year sentence for one count of Class C felony child molestation. We affirm.

Issue

The sole restated issue is whether Wallace was properly sentenced.

Facts

In June 2008, Wallace touched his granddaughter K.F.'s vagina with his hand. K.F. was nine years old at the time. The State charged Wallace with two counts of Class C felony child molestation. After a trial held on June 17-18, 2009, the jury found Wallace guilty of one of the counts and not guilty of the other count.

At the sentencing hearing, Wallace presented evidence that his wife has physical and mental health issues that cause her to be highly dependent upon him. He also called his pastor, his family doctor, and a co-worker to testify as to his positive character. Wallace also has no criminal history. The trial court found Wallace's lack of criminal history and hardship upon his wife as mitigating circumstances. As aggravating, it noted the position of trust Wallace violated in molesting K.F. It also stated that it would depreciate the seriousness of the offense to suspend the entirety of Wallace's sentence. It then imposed a sentence of four years, with two years executed and two years suspended to probation. Wallace now appeals.

Analysis

We engage in a four-step process when evaluating a sentence. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007). First, the trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id. Even if a trial court abuses its discretion by not issuing a reasonably detailed sentencing statement or in its findings or non-findings of aggravators and mitigators, we may choose to review the appropriateness of a sentence under Rule 7(B) instead of remanding to the trial court. See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007).

Wallace's first contention is that the trial court abused its discretion in its identification of aggravating circumstances. An abuse of discretion in identifying or not identifying aggravators and mitigators occurs if it is "'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'" Anglemyer, 868 N.E.2d at 490 (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)). Additionally, an abuse of discretion occurs if the record does not support the reasons given for imposing sentence, the sentencing

statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Id. at 490-91.

We do not find any abuse of discretion in the trial court's identification of aggravating circumstances. Wallace's violation of a position of trust as K.F.'s grandfather clearly was a proper aggravating circumstance, and he does not argue otherwise. To the extent Wallace contends that the trial court separately found as aggravating the nature of the offense and the impact on the victim, we are convinced after reading the trial court's sentencing statement that these were merely references to the fact that Wallace was K.F.'s grandfather.

Wallace also argues the trial court abused its discretion when it stated, "I believe that a fully suspended sentence in these circumstances would depreciate the seriousness of this offense and would find that that's an aggravating factor . . . ." Sentencing Tr. p. 22. In the past, use of this particular aggravating factor to justify a refusal to impose a reduced sentence of some kind required some indication that the trial court actually was considering a reduced sentence. See Bacher v. State, 686 N.E.2d 791, 801 (Ind. 1997) (holding that trial court erred in relying upon this aggravator when there was no indication trial court had considered a sentence below the then-presumptive). Whether this still applies under the advisory sentencing scheme is unclear. Cf. Pedraza v. State, 887 N.E.2d 77, 80 (Ind. 2008) (holding that, after switch from presumptive to advisory sentences, it is no longer improper to rely upon element of an offense as an aggravating circumstance). In any event, we believe there is a clear indication the trial court was

considering completely suspending Wallace's sentence, particularly in light of the court's discussion of the hardship incarceration would impose for his wife, and the fact that Wallace requested a completely suspended sentence. The trial court did not abuse its discretion in mentioning this aggravating circumstance.

We now address Wallace's claim that his sentence is inappropriate. Although Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id. The principal role of Rule 7(B) review "should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case." Cardwell v. State, 895 N.E.2d 1219, 1225 (Ind. 2008).

We first observe that Wallace does not specify what he believes an appropriate sentence would be in this case. His argument seems to be a mixture of contending that the total length of the sentence is inappropriate, or in the alternative that the entirety of his sentence should have been suspended. Placement, i.e. how or where a sentence is to be served, may also be reviewed under Rule 7(B). See Biddinger v. State, 868 N.E.2d 407, 414 (Ind. 2007). However, it is "quite difficult" for a defendant to successfully

argue that a particular placement is inappropriate. King v. State, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008).

Regarding Wallace's character, it does appear that prior to committing the present offense, his character was highly positive. We also accept that Wallace's incarceration will pose a hardship to his family. Nonetheless, with respect to the nature of the offense, it is particularly egregious for a grandfather to molest his granddaughter. See Medina v. State, 828 N.E.2d 427, 433 (Ind. Ct. App. 2005), trans. denied. The trial court was correct in emphasizing the gross violation of trust Wallace committed. That factor alone convinces us that Wallace's four-year sentence, and the requirement that he serve two years of that sentence in the Department of Correction, is not inappropriate.

Conclusion

This is a case in which reasonable minds could differ as to what an "appropriate" sentence would be. Wallace's sentence, however, is not an "outlier," and we decline to find that the trial court abused its discretion in sentencing him or that the sentence is inappropriate. We affirm.

Affirmed.

MATHIAS, J., and BROWN, J., concur.