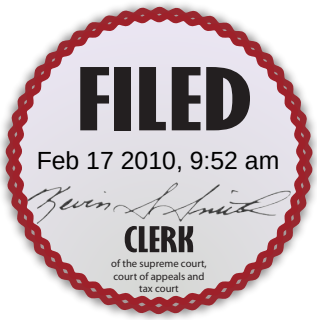

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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL K. RICHWINE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0909-CR-893
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0809-FC-335
Cause No. 48D03-0811-FD-386

February 17, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Michael K. Richwine appeals his aggregate sentence of nine years for Attempted Robbery, as a Class C felony,[1] and Battery, as a Class A misdemeanor.[2] We revise and remand.

Issues

Richwine raises two issues on appeal:

I. Whether the trial court abused its discretion in failing to identify age as a mitigator and in assigning the relative weight to the factors of his criminal history and his guilty plea; and

II. Whether his sentence is inappropriate.

Facts and Procedural History

On September 23, 2008, the State, under cause number 48D03-0809-FC-335 (FC-335), charged Richwine with Residential Entry, a Class D felony,[3] and Battery with a Deadly Weapon, a Class C felony.[4] Approximately two months later under cause number 48D03-0811-FD-386 (FD-386), the State charged Richwine with Sexual Battery, as a Class D felony,[5] and Battery Resulting in Bodily Injury, as a Class A misdemeanor.[6] Pursuant to an agreement with the State that was not reduced to writing, Richwine agreed to plead guilty to the lesser included offense of Battery, as a Class A misdemeanor, in FC-335 and to an

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[1] Ind. Code §§ 35-42-5-1; 35-41-5-1.
[2] Ind. Code § 35-42-2-1(a)(1)(A).
[3] Ind. Code § 35-43-2-1.5.
[4] Ind. Code § 35-42-2-1(a)(3).
[5] Ind. Code § 35-42-4-8.
[6] Ind. Code § 35-42-2-1(a)(1).

amended charge[7] of Attempted Robbery, as a Class C felony, (as opposed to the original charge of Sexual Battery) in FD-386. In exchange, the State agreed to dismiss the remaining charges. Additionally, the length of the imposed sentence was left to the discretion of the trial court.

The trial court accepted Richwine's guilty plea, entered judgments of conviction and sentenced him to imprisonment for one year for Battery and eight years for Attempted Robbery. These were ordered to be served consecutively for an aggregate sentence of nine years to be fully executed.

Richwine now appeals.

Discussion and Decision

I. Abuse of Discretion- Mitigators

First, Richwine contends that the trial court abused its discretion by failing to find his young age as a mitigator, failing to accord his guilty plea significant weight as a mitigator, and assigning too much weight to his criminal history as an aggravator. Sentencing decisions rest within the discretion of the trial court. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). As long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. Id. An abuse of discretion occurs when the decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be

[7] On April 30, 2009, the State amended the count of Sexual Battery in FC-386 to Attempted Robbery, as a Class C felony.

drawn therefrom." Id. (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)). In Anglemyer, the Indiana Supreme Court noted examples of ways in which a trial court abuses its discretion:

> One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that explains reasons for imposing a sentence-including a finding of aggravating and mitigating factors if any-but the record does not support the reasons, or 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. Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.

Id. at 490-91. However, under the new advisory statutory scheme, the relative weight or value assignable to reasons properly found, or to those that should have been found, is not subject to review for abuse of discretion. Id. at 491.

As Richwine argues in part that the trial court failed to allocate the proper weight to his guilty plea and his criminal history, these contentions are not reviewable for abuse of discretion. However, the trial court did not mention Richwine's age as a consideration for a mitigator. Because it was propounded as a possible mitigator by Richwine, the absence of his age as a mitigator can be reviewed for an abuse of discretion. Richwine was eighteen-years old when he committed the offenses. Thus, he is "beyond the age at which the law commands special treatment by virtue of youth." Sensback v. State, 720 N.E.2d 1160, 1164

(Ind. 1999).[8]

> Age is neither a statutory nor a per se mitigating factor. There are cunning children and there are naïve adults. In other words, focusing on chronological age, while often a shorthand for measuring culpability, is frequently not the end of the inquiry for people in their teens and early twenties. There are both relatively old offenders who seem clueless and relatively young ones who appear hardened and purposeful.

Monegan v. State, 756 N.E.2d 499, 504 (Ind. 2001) (citations and quotations omitted).[9] When propounding age as a mitigator, Richwine's argument is simply based on the bare fact that he was eighteen. Therefore, it was within the trial court's discretion to find that Richwine's age was not a mitigating factor.

II. Appropriateness of Sentence

Second, Richwine contends that his maximum sentences are inappropriate in light of the nature of the offenses and his character and requests revision of his sentences. In Reid v. State, the Indiana Supreme Court reiterated the standard by which our state appellate courts independently review criminal sentences:

> Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence through Indiana Appellate Rule 7(B), which provides that a court may revise a

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[8] "Our statutes evince strong legislative sentiment that a child younger than sixteen should be treated differently in our judicial and correctional systems than one who is sixteen or older." Sensback v. State, 720 N.E.2d 1160, 1164, n.3 (Ind. 1999) (quoting Trowbridge v. State, 717 N.E.2d 138, 150, n.7 (Ind. 1999)).

[9] We remind counsel for Richwine that when quoting an authority, here Monegan v. State, 756 N.E.2d 499, 504 (Ind. 2001), which states a proposition used within the argument of a brief, a citation along with quotation marks are required. See Ind. Appellate Rules 46(A)(8)(a) ("Each contention must be supported by citations to the authorities . . . in accordance with Rule 22.") and 22 ("Unless otherwise provided, a current edition of a Uniform System of Citation (Bluebook) shall be followed."); See also The Bluebook: A Uniform System of Citation Rule 1 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

> sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. The burden is on the defendant to persuade us that his sentence is inappropriate.

Reid v. State, 876 N.E.2d 1114, 1116 (Ind. 2007) (internal quotation and citations omitted).

More recently, the court reiterated that "sentencing is principally a discretionary function in which the trial court's judgment should receive considerable deference." Cardwell v. State, 895 N.E.2d 1219, 1222 (Ind. 2008). Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented. See id. at 1224. One purpose of appellate review is to attempt to "leaven the outliers." Id. at 1225. "[W]hether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." Id. at 1224.

Here, Richwine pled guilty to Battery, as a Class A misdemeanor, and Attempted Robbery, as a Class C felony. For a Class A misdemeanor, the maximum sentence is one year. Ind. Code 35-50-3-2. A Class C felony has a sentencing range of two to eight years, with four years as the advisory. Ind. Code § 35-50-2-6. The trial court sentenced Richwine to one year for Battery and eight years for Attempted Robbery and ordered the sentences served consecutively and fully executed. Thus, he received the maximum sentence.

As to the nature of the offenses, Tim Short, the father of a girl Richwine briefly dated, was with his family at a local gas station on September 27, 2008, and saw Richwine. Richwine had been making threats against the family in the past few days. When the family

arrived home a short time later, they realized their house had been burglarized, and Short saw Richwine leaving the area. Later that night, Richwine returned to the Short house with three other males. As the group was yelling towards the house attempting to provoke a fight with Short, he noticed that Richwine was holding a large stick. A confrontation took place, and Richwine struck Short on his forearm.

The nature of the Attempted Robbery offense was that Richwine had arranged to purchase marijuana from Erica Houton but had also planned to "rip her off" during the deal. Transcript at 34. During the exchange, a struggle ensued but Houton was eventually able to thwart Richwine's attempt to take the marijuana.

As to the character of the offender, Richwine has a continuing criminal history that began with four juvenile true findings over two years when he was fifteen and sixteen years old. All of the instances were Class A misdemeanors, including possession of marijuana, fleeing law enforcement, and two instances of criminal mischief. The battery offense was his first adult charge, but while out on bond he was charged with four misdemeanors based on two separate events. At the time of sentencing, these charges were set for trial. One of these charges involved the alleged violation of a protective order prohibiting Richwine from having contact with Short. Richwine was again released on bond and committed the acts for which he pled guilty to attempted robbery, his first felony.

Richwine did join the Army Reserves and completed basic training on July 28, 2008. However, Richwine committed these offenses within months of completing this training. At sentencing, Richwine expressed his desire to return to the military and make it his career

path. However, it remained uncertain whether the Army would permit Richwine to return due to his recent string of criminal charges.

Richwine pled guilty to both charges in an oral agreement with the State that the charge for Residential Entry, a Class D felony, be dismissed. Additionally, this is Richwine's first felony conviction. While his commission of at least eight offenses within the last three years is disconcerting, all but one of those were misdemeanors and half of the offenses were during his juvenile years. The rest of the offenses were committed while he was eighteen. Finally, the majority of the offenses were nonviolent.

"Maximum sentences are reserved for the worst offenders and offenses." Johnson v. State, 830 N.E.2d 895, 898 (Ind. 2005). Certainly, Richwine has consistently been in contact with the legal system in the past few years. However, after due consideration of Richwine's criminal history, guilty plea, young age, and the fact that this is his first felony conviction, we conclude the maximum aggregate sentence imposed to be inappropriate. We remand for the trial court to impose a five-year sentence for Attempted Robbery to be served consecutively to the one-year sentence for Battery and to suspend two years to probation.

Conclusion

The trial court did not abuse its discretion in refusing to consider Richwine's age as a significant mitigating factor. However, upon our review of the case and consideration of the maximum executed sentence imposed, we revise Richwine's sentence to an aggregate of six years with two years suspended to probation.

Revised and remanded.

BAKER, C.J., and ROBB, J., concur.