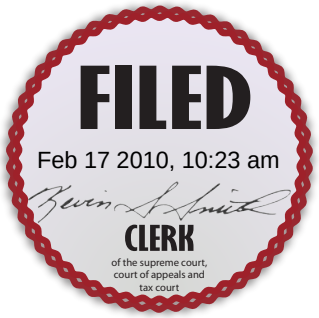

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IN THE COURT OF APPEALS OF INDIANA

JAMES R. KUNKLE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 27A02-0905-CR-422
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Randall L. Johnson, Judge
Cause No. 27D02-0703-FB-47

February 17, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

James Kunkle ("Kunkle") was convicted in Grant Superior Court of Class B felony sexual misconduct with a minor and Class A misdemeanor contributing to the delinquency of a minor. The trial court sentenced Kunkle to an aggregate term of eighteen years and ordered him to register for life as a sex offender. Kunkle appeals and presents three issues, which we restate as:

I. Whether the trial court properly denied Kunkle's motion for discharge pursuant to Criminal Rule 4(C);

II. Whether the sentence imposed by the trial court was inappropriate in light of the nature of the offense and the character of the offender;

III. Whether the trial court erred in ordering Kunkle to register for life as a sex offender.

We affirm Kunkle's conviction and sentence, but reverse the requirement that Kunkle register for life as a sex offender.

Facts and Procedural History

At the time relevant to this appeal, N.H. was a fourteen-year-old girl living in Marion, Indiana. N.H. was a small girl[1] who suffered from seizures, Tourette Syndrome, bi-polar disorder, and ADHD. In August 2006, N.H. went with some of her friends to the apartment of forty-six-year-old Kunkle in Marion, Indiana. N.H.'s friend wanted to borrow money from Kunkle. Kunkle eventually produced some marijuana, but N.H. declined to smoke and left with her friends shortly thereafter.

In October 2006, N.H. went back to Kunkle's house to look for a friend. Kunkle told N.H. that her friend was there, but when N.H. went into the apartment, she

[1] When N.H. testified at trial on March 3, 2009, she was sixteen years old but stood only four feet, nine inches tall and weighed just ninety-nine pounds.

discovered that Kunkle had lied. According to N.H., Kunkle removed her clothes, kissed her, licked her vagina, and had sexual intercourse with her. When someone knocked on the door of Kunkle's apartment, he told N.H. to go to the bathroom, put her clothes back on, and wait until the person at the door had left. N.H. did as Kunkle instructed, but left immediately after the person at the door had left. As N.H. left, Kunkle told her, "Don't tell anybody because you don't want to get in trouble." Tr. p. 147.

One of N.H.'s friends, fifteen-year-old S.M., also went to Kunkle's apartment and, while there, smoked marijuana with him. S.M. had sex with Kunkle, and Kunkle gave the girl marijuana. S.M. started to visit Kunkle at his apartment regularly, and Kunkle eventually gave the girl a cell phone so she could be "at his fingertips." Tr. p. 174.

Some time after Kunkle had had sex with N.H., he sent S.M. two text messages. The first said, "I hear [N.H.] is making up rumors but don't say anything. It's likely her seizures." Tr. p. 176. The other text message read, "Said I was supposed to rape her, but let it slide. She's not herself." Tr. p. 177.

N.H. told her sister and a friend what Kunkle had done to her. Eventually, N.H.'s sister told her parents, who in turn contacted the police. The police then interviewed both N.H. and S.M. On January 30, 2007, Detective Larry Shaw ("Detective Shaw") went to Kunkle's residence and asked if he would come to the police department for an interview. Kunkle initially agreed to be interviewed that day but later called the department and rescheduled the interview for the following day. Detective Shaw interviewed Kunkle at the police department on January 31, 2007. Kunkle initially denied having sex with N.H but admitted that he knew her and that she had been to his apartment. Kunkle claimed

that N.H. had been the sexual aggressor and that he had rejected her advances. Detective Shaw then read Kunkle his Miranda rights but told him that he was nevertheless not under arrest nor would he be arrested that day. Kunkle signed a waiver of his rights and chose to continue with the interview. Thereafter, Kunkle admitted that he had performed oral sex on N.H. but maintained that his erectile dysfunction made it impossible for him to have sexual intercourse with her.

With regard to S.M., Kunkle told Detective Shaw that he had attempted to have sex with her on two occasions, but again claimed that his sexual impotence made it impossible for him to have sexual intercourse with the girl. Kunkle eventually admitted to having "maintained sex with [S.M.] for five or ten minutes." Ex. Vol., State's Ex. 5. Kunkle also admitted that he had smoked marijuana with S.M. Kunkle told Detective Shaw that he liked young girls because older women avoided him because of a rumor that he had AIDS. After the interview was over, Detective Shaw did not arrest Kunkle, and told him that he would present the case to the prosecutor's office for review. Kunkle then left the police station.

On February 21, 2007, the State filed a four-count information charging Kunkle as follows: Count I, Class B felony sexual misconduct with a minor for performing deviate sexual conduct with N.H.; Count II, Class B felony sexual misconduct with a minor for having sexual intercourse with N.H.; Count III, Class B felony sexual misconduct with a minor for having sexual intercourse with S.M.; and Count IV, Class A misdemeanor contributing to the delinquency of a minor for smoking marijuana with S.M.

By the time he was charged, Kunkle had already fled to Tennessee to avoid being arrested on an unrelated marijuana charge. Kunkle was finally arrested on July 29, 2007. After a series of delays that we will describe in more detail below, Kunkle filed a motion for discharge on November 12, 2008, in which he claimed that the State had failed to bring him to trial within one year as required by Criminal Rule 4(C). After a December 22, 2008 hearing on the matter, the trial court denied the motion for discharge. A jury trial was eventually held on March 3, 2009. After the State's case-in-chief, the State moved to dismiss Count III, which the trial court granted. The jury found Kunkle guilty of Count I and Count IV, but acquitted him of Count II.

At a sentencing hearing held on March 30, 2009, the trial court found Kunkle's prior criminal history to be an aggravating factor and found no mitigating factors. On Count I, the trial court sentenced Kunkle to eighteen years with two years suspended, and on Count IV, the court sentenced Kunkle to one year to be served concurrently with the sentence imposed on Count I. Kunkle filed a motion to correct error on April 24, 2009, which the trial court denied on May 4, 2009. Kunkle filed a notice of appeal on May 12, 2009.

I. Criminal Rule 4(C)

Kunkle first claims that the trial court erred in denying his motion for discharge because the State failed to bring him to trial within one year as required by Indiana Criminal Rule 4(C), which provides in relevant part:

> No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of

> his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar.

This rule places an affirmative duty on the State to bring a defendant to trial within one year, and the defendant is under no obligation to remind either the State or the trial court of the State's duty. Gibson v. State, 910 N.E.2d 263, 266 (Ind. Ct. App. 2009). Any delay attributable to the defendant extends the one-year time limit. Id. Although a defendant has no duty to object to the setting of a belated trial date if the setting occurs after the year has expired, a defendant waives the right to be brought to trial within one year by failing to raise a timely objection if the trial court, acting during the one-year period, schedules the trial beyond the limit. Id. at 267. Our review of the trial court's ruling on a Criminal Rule 4(C) motion is *de novo*. Baumgartner v. State, 891 N.E.2d 1131, 1133 (Ind. Ct. App. 2008).

Here, Kunkle was charged on February 21, 2007, but he was not arrested until July 29, 2007, and it is from this latter date that the time limit calculation of Criminal Rule 4(C) is made. See Baumgartner, 891 N.E.2d at 1134 (noting that one-year time limit of Criminal Rule 4(C) commences with the date of arrest or the filing of charges, whichever is later); Crim. R. 4(C) (providing that one-year time period is calculated "from the date the criminal charge against such defendant is filed, or from the date of his arrest on such

charge, *whichever is later*[.]" (emphasis added)).[2] Kunkle's trial was initially scheduled for November 19, 2007, well within one year of the date Kunkle was arrested.

On November 15, 2007, four days before his scheduled trial, Kunkle filed a motion for discovery and requested a continuance of the trial date, which the trial court granted, rescheduling Kunkle's trial for March 3, 2008. On appeal, Kunkle argues that this delay should be included in calculating the time limit because his continuance was based, at least in part, on the fact that he had also filed a motion seeking discovery from the State, which had yet to provide discovery materials to the defense. See Marshall v. State, 759 N.E.2d 665, 669 (Ind. Ct. App. 2001) (noting that a defendant is usually responsible for any delay caused by his request for a continuance but that a defendant cannot be charged with a delay if the defendant's request for a continuance is based on the State's failure to comply with discovery).

On March 3, 2008, the date of the scheduled trial, the State filed a motion to continue due to court congestion. Specifically, the State claimed that it had insufficient time to prepare for Kunkle's trial because it had not been timely notified of a continuance that had been granted in another case. Although it is not entirely clear from the State's motion, it appears that another case had been scheduled for a trial on March 3, 2008, and when that case was continued on February 29, 2008, the State was unprepared to try Kunkle on March 3. The trial court granted the State's motion and rescheduled Kunkle's trial for June 9, 2008.

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[2] Kunkle's claim that the one-year time limit began to run on the date he was charged is thus simply incorrect. See Baumgartner, 891 N.E.2d at 1134; Crim. R. 4(C).

On appeal, Kunkle claims that the State's motion for continuance was improper and untimely. Kunkle acknowledges that Criminal Rule 4(C) provides that a delay in bringing the defendant to trial will not count toward the one-year time limit if "there was not sufficient time to try him during such period because of congestion of the court calendar." However, in such situations Criminal Rule 4(C) provides that "the prosecuting attorney shall file a timely motion for continuance as under subdivision (A) of this rule." Criminal Rule 4(A) provides that, in cases of continuance due to court congestion, the prosecuting attorney should move for a continuance "not later than ten (10) days prior to the date set for trial, or if such motion is filed less than ten (10) days prior to trial, the prosecuting attorney shall show additionally that the delay in filing the motion was not the fault of the prosecutor."

Here, the State clearly did not move for a continuance ten days prior to trial. Kunkle argues that the State's motion to continue did not show how the delay in filing the motion was not the fault of the prosecutor. Kunkle claims that the granting of a continuance in the other case cannot justify a delay in his trial because, if the continuance in the other case had not been granted, then that case, not his, would have been tried on March 3, 2008. Thus, according to Kunkle, the State had no intention to try him on March 3, 2008 and should have sought to continue his case due to congestion at least ten days prior to his scheduled trial date.

On June 9, 2008, the trial court, due to court calendar congestion, reset the trial date to September 15, 2008. When reviewing on appeal a continuance based on a finding of congestion, we will afford the trial court's explanations reasonable deference, and a

defendant must establish that the finding of congestion is clearly erroneous. Vaden v. State, 712 N.E.2d 522, 525 (Ind. Ct. App. 1999), trans. denied. Kunkle nevertheless claims that the trial court's continuance should not act to delay the one-year time period because the continuance was unnecessary in that the continuance was based on the scheduling of another case which ultimately did not go to trial.

Once the correct starting date is determined under Criminal Rule 4(C), even if we were to agree with Kunkle, he would not prevail. In fact, if we accept Kunkle's claim that these delays did not act to toll the one-year time limit of Criminal Rule 4(C), then we must conclude that he waived his right to be tried within the one-year time limit. See Gibson, 910 N.E.2d at 267 (a defendant waives the right to be brought to trial within one year by failing to raise a timely objection if the trial court, acting during the one-year period, schedules the trial beyond the limit).

If, as Kunkle contends, the delay caused by his motion to continue, the State's motion to continue, and the trial court's congestion order did not act to toll the one-year time limit, then the State had until July 29, 2008 to bring him to trial. The trial court's congestion order was issued on June 9, 2008—within the one-year time limit. But the trial court then reset the trial date to September 15, 2008—beyond the one-year limit. In other words, according to Kunkle's own argument, the trial court, acting within the one-year limit, scheduled the trial beyond the one-year limit. And there is no indication that Kunkle raised any objection to this trial date. We therefore conclude that he waived his right to be brought to trial within one year. See Gibson, 910 N.E.2d at 267; Baumgartner, 891 N.E.2d at 1135. The trial court did not err in denying Kunkle's motion for discharge.

II. Appellate Rule 7(B)

As set forth above, the trial court sentenced Kunkle to an aggregate term of eighteen years, with two years suspended. Kunkle claims that this sentence is inappropriate. Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence otherwise 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." Although we have the power to review and revise sentences, "[t]he principal role of appellate 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). On appeal, the defendant bears the burden of persuading us that the sentence imposed by the trial court is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). This is a burden that Kunkle has not met.

As to the nature of the offense, Kunkle performed oral sex on a fourteen-year-old girl and told her to keep the incident between them secret. When confronted with his behavior, Kunkle denied any sexual contact, but soon admitted that he had "licked" N.H. Kunkle also attempted to shift the blame for the incident on his young victim, claiming, "She wanted it more than I did," and telling Detective Shaw that N.H. "attacked" him. Ex. Vol., State's Ex. 5. Kunkle then sent text messages to S.M. telling her not to believe N.H. because of her "seizures."

With regard to the character of the offender, we note that this was not Kunkle's first conviction. Kunkle has two prior felony convictions, including a burglary conviction when he was eighteen years old and a 2002 conviction for Class D felony possession of marijuana. Kunkle also had five prior misdemeanor convictions, which include two convictions for possession of marijuana, two for battery, and one for disorderly conduct. Although Kunkle's criminal history is not among the worst we have encountered, Kunkle has not led a law-abiding life. Under these facts and circumstances, Kunkle has not met his burden of establishing that the trial court's sentence was inappropriate.

III. Sex Offender Registry

The trial court ordered Kunkle to register as a sex offender for life. Kunkle claims that the trial court exceeded its statutory authority in so doing, and the State concedes the error.

Pursuant to Indiana Code section 11-8-8-19(a), a "sex offender" is required to register until ten years after he is released from prison, placed on parole or probation, or placed in a community corrections program, whichever occurs last. Here, Kunkle is a "sex offender" because he was convicted of Class B felony sexual misconduct with a minor. Ind. Code § 11-8-8-4.5(a)(8).

In contrast, those defined as "sexually violent predators" must register for life. Kunkle claims that he is not a "sexually violent predator" as that term is defined by statute. Indiana Code section 11-8-8-6 provides, "As used in this chapter, 'sexually violent predator' has the meaning set forth in IC 35-38-1-7.5." Under Indiana Code

section 35-38-1-7.5(b) a person may also qualify as a "sexually violent predator" if he has been convicted of certain listed offenses. The State concedes that Kunkle has not been convicted of any of the listed offenses and cannot be considered to be a sexually violent predator under section 7.5(b).

However, pursuant to section 7.5(e), even if a person does not qualify as a sexually violent predator under section 7.5(b), the prosecuting attorney may move the trial court to conduct a hearing to determine whether the person qualifies as a sexually violent predator under section 7.5(a), which provides generally that a person qualifies as a sexually violent predator if he "suffers from a mental abnormality or personality disorder that makes the individual likely to repeatedly commit a sex offense (as defined in IC 11-8-8-5.2)."

If the trial court grants the prosecuting attorney's motion for a hearing to determine whether an individual is a sexually violent predator, the court must appoint two "psychologists or psychiatrists who have expertise in criminal behavioral disorders to evaluate the person and testify at the hearing." I.C. § 35-38-1-7.5(e). After conducting such a hearing, the trial court must determine whether the person qualifies as a sexually violent predator. Id.

Here, the State concedes that no such hearing was requested by the prosecuting attorney or conducted by the trial court, but argues that remand is appropriate to permit the State the opportunity to request such a hearing. We disagree. The State had the opportunity to request that the trial court hold an appropriate hearing and determine

whether Kunkle qualified as a sexually violent predator. It did not. And we decline to give the State a second chance to do what it failed to do in the first place.

We therefore reverse that portion of the trial court's sentencing order requiring Kunkle to register as a sex offender for life. Our holding does not affect Kunkle's status as a sex offender under Indiana Code section 11-8-8-4.5(a)(8) or the statutory requirement that he register as a sex offender for ten years under Indiana Code section 11-8-8-19(a).

Conclusion

The trial court did not err in denying Kunkle's motion for discharge because Kunkle waived his rights under Criminal Rule 4(C). Kunkle's aggregate sentence of eighteen years, with two years suspended, is not inappropriate in light of the nature of the offense and the character of the offender. The State did not prove that Kunkle is a sexually violent predator as defined by statute. Therefore, the trial court erred in ordering Kunkle to register for life as a sex offender. However, this error does not negate the requirement that Kunkle register as a sex offender pursuant to statute.

Affirmed in part and reversed in part.

BARNES, J., and BROWN, J., concur.