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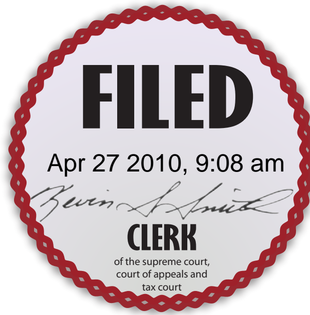


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# IN THE
# COURT OF APPEALS OF INDIANA

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| VERNELL BROCK,<br><br>Appellant-Defendant,<br><br>vs.<br><br>STATE OF INDIANA,<br><br>Appellee-Plaintiff. | ) | No. 71A03-0909-CR-406 |

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable J. Jerome Frese, Judge
Cause No. 71D03-9809-CF-411

**April 27, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

Vernell Brock appeals his sentence for child molesting as a class B felony.[1] Brock raises one issue, which we revise and restate as:

I. Whether the trial court abused its discretion in sentencing Brock; and

II. Whether Brock's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The relevant facts follow. Between July 1, 1996 and August 31, 1997, Brock, who was twenty-six years old at the time, had "a repeated relationship" with M.B., a child of twelve or thirteen and who was in the seventh grade for most of the time period. Sentencing Transcript at 16. Brock and M.B. "had sexual relationships probably fifteen to twenty times." Id. M.B. became pregnant and gave birth to a child on March 30, 1998, as a result of her relationship with Brock. On September 9, 1998, the State charged Brock with child molesting as a class A felony.

Brock initially appeared on May 12, 2004, and entered a plea of not guilty. On December 20, 2005, the State and Brock entered into a plea agreement in which Brock agreed to plead guilty to child molesting as a class A felony and the State agreed that "any executed sentence shall not exceed twenty (20) years." Appellant's Appendix at 32. The trial court took the plea agreement under advisement and ordered a presentence investigation report.

[1] Ind. Code § 35-42-4-3 (Supp. 1996) (subsequently amended by Pub. L. No. 31-1998, § 5 (eff. July 1, 1998); Pub. L. No. 216-2007, § 42 (eff. July 1, 2007)).

On June 13, 2006, a hearing was held in which the State amended its charge against Brock to the lesser included offense of child molesting as a class B felony.[2] At the sentencing hearing, the trial court accepted Brock's plea and identified as aggravating factors that M.B. was the "father of the friend of the victim,"[3] that M.B. was "only thirteen at the time," and that Brock was "contemplating a career in teaching which he had gone into . . . shortly thereafter," which the trial court found to be "pretty egregious." Sentencing Transcript at 17, 24-25. The trial court identified the fact that Brock did not have a criminal record and that he had "admitted his responsibility" as mitigators. Id. at 23.

The trial court sentenced Brock to twenty years in the Department of Correction with ten years suspended to probation. The trial court ordered as one of Brock's conditions of probation that he was "to serve five more years in the [Department of Correction] . . . ." Id. at 38. With regard to this condition of probation, the trial court told Brock that "as you get toward your finishing the ten years, which is five years real time, if you take every kind of counseling you can take . . . . you can cut your time . . . . if . . . you ask to modify the condition of five more years, it can be modified to community

[2] The State noted at the sentencing hearing that it decided to change the charge against Brock to child molesting as a class B felony at the behest of M.B., who "wanted it done this way" because Brock had taken an interest in having a relationship with the child and had been paying child support. Sentencing Transcript at 22.

[3] We note that, at the sentencing hearing, Brock stated that he met M.B. "[t]hrough an acquaintance that [he] had up here in South Bend at the time," and that the prosecutor then clarified that M.B. "was friends with a foster daughter of [Brock's] girlfriend." Sentencing Transcript at 17. There is nothing in the record indicating that Brock was the "father of the friend of the victim."

corrections . . . ." Id. at 28. On August 6, 2009, this court ordered the trial court to grant Brock permission to file a notice of appeal.

I.

The first issue is whether the trial court abused its discretion in sentencing Brock. The offense in this case was committed in 1996 or 1997, well before the April 25, 2005 revisions to Indiana's sentencing statutes were passed by the legislature. The Indiana Supreme Court has held that we apply the sentencing scheme in effect at the time of the defendant's offense. See Robertson v. State, 871 N.E.2d 280, 286 (Ind. 2007) ("Although Robertson was sentenced after the amendments to Indiana's sentencing scheme, his offense occurred before the amendments were effective so the pre-Blakely sentencing scheme applies to Robertson's sentence."); Gutermuth v. State, 868 N.E.2d 427, 432 n.4 (Ind. 2007). Consequently, the pre-April 25, 2005 presumptive sentencing scheme applies to Brock's child molesting conviction.

Under the pre-April 25, 2005 sentencing statutes, sentencing decisions rest within the discretion of the trial court and are reviewed on appeal only for an abuse of discretion. Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002). An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances" before the court. Pierce v. State, 705 N.E.2d 173, 175 (Ind. 1998). In order for a trial court to impose an enhanced sentence, it must: (1) identify the significant aggravating factors and mitigating factors; (2) relate the specific facts and reasons that the court found to those aggravators and mitigators; and (3) demonstrate that the court

has balanced the aggravators with the mitigators. Veal v. State, 784 N.E.2d 490, 494 (Ind. 2003).

Brock argues that the trial court abused its discretion when it "focused on the age difference between the two as a fact not in favor of [Brock],"and argues that "[s]ince the age of the victim established a material element of the offense, this fact cannot be used to enhance [Brock's] sentence." Appellant's Brief at 6. Brock also argues that "the significant aggravating factors of causing pregnancy is countered by [Brock's] genuine demonstration of remorse and complete lack of criminal history." Id. at 7. Brock argues that because the aggravating and mitigating circumstances balance out, "a ten (10) year sentence [is] appropriate." Id.

In Plummer v. State, 851 N.E.2d 387, 391 (Ind. Ct. App. 2006), we held that "[a]lthough a trial court may not use a material element of the offense as an aggravating circumstance, it may find the nature and circumstances of the offense to be an aggravating circumstance." When a sentence is enhanced based upon the nature and circumstances of the crime, however, "the trial court must detail why the defendant deserves an enhanced sentence under the particular circumstances." Id.

Here, the trial court stated that M.B. was "in seventh grade or just finished seventh grade. And he's twenty-six and he's in fact contemplating and in fact does go into a teaching sort of career after that. I think that's pretty egregious." Sentencing Transcript at 24. Also, although not expressly articulated during the recitation of aggravators and mitigators, the trial court was clearly impacted by the serial nature of the molestations as

part of the nature and circumstances of the crime in finding Brock's decision to pursue a position as a middle school basketball coach "pretty egregious." Id. During the sentencing hearing, the following colloquy occurred:

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| [Prosecutor]: | [W]hat I also see is a man who had a repeated relationship with this child at thirteen. I think in the police report [M.B.] said that they had sexual relationships probably fifteen to twenty times. He was the middle school basketball coach at the time that this was going on. |
| THE COURT: | Is this all true? |
| [Brock]: | I don't believe so, your Honor. |
| THE COURT: | Were you the coach? |
| [Brock]: | Well, yes, but that was – what, I started the following season. |
| [Brock's Counsel]: | You didn't coach her? |
| [Brock]: | No, but I wasn't coaching at the time that all this was happening. I started teaching – |
| THE COURT: | Were you teaching? |
| [Brock]: | No, not at that time either. I – |
| THE COURT: | How did you meet her? |
| [Brock]: | Through an acquaintance that I had up here in South Bend at the time. |
| [Prosecutor:] | She was friends with a foster daughter of Mr. Brock's girlfriend. So it was over at their house. |
| THE COURT: | Is that true? |

[Brock]: Yes, sir. My – the basketball –

THE COURT: But you had sex with her more than once?

[Brock]: Yes, sir. And that was – I guess what I'm trying to say is this was over the summer.

THE COURT: Yeah.

[Brock]: I didn't start teaching until the fall.

* * * * *

THE COURT: Okay. How old were you at the time?

[Brock]: 26 I guess. I –

THE COURT: You were 26. She was 13. And you in the old-fashioned sense in the way they say these things you seduced her; is that true?

[Brock]: Yeah, I would say that.

Id. at 16-18. The nature and circumstances of the crime, including that Brock sought out and was to begin a teaching career at a middle school, after having just ended sexual encounters with a seventh-grader which occurred over the course of over a year, and which ended only after the seventh-grader became pregnant, encompass more than the elements of the crime and are significant aggravators.

The trial court also listed as an aggravating circumstance that Brock was the "father of the friend of the victim," but the record indicates that M.B. "was friends with a foster daughter of [Brock's] girlfriend." Id. at 17, 25. Brock does not argue that the trial court erred in finding that Brock was the "father of the friend of the victim" as an

aggravating circumstance. However, even if the trial court improperly applies an aggravator, a sentence enhancement may be upheld where there is another valid aggravating circumstance, Hatchett v. State, 740 N.E.2d 920, 929 (Ind. Ct. App. 2000), trans. denied, and a single aggravating factor may support the imposition of an enhanced sentence. Payton v. State, 818 N.E.2d 493, 496 (Ind. Ct. App. 2004).

Turning to the mitigating circumstances, the trial court identified two: the fact that Brock did not have a criminal record and that he has "admitted his responsibility." Sentencing Transcript at 23. As to the first, we have acknowledged that "[a] lack of criminal history is often given significant mitigating weight." McClendon v. State, 910 N.E.2d 826, 837 (Ind. Ct. App. 2009). Here, the trial court accorded Brock's lack of criminal history as a valid mitigator.

Second, although the trial court found the fact that Brock "admitted his responsibility," it qualified this mitigator because Brock "didn't do anything previously" to care for the child born to M.B. until the child was seven years old and Brock was being prosecuted on the child molesting offense. Sentencing Transcript at 23. The court noted that Brock indicated he did not help M.B. with the child "because of advice of prior counsel," but it also noted that it didn't "think that was compelling on [Brock]." Id.

Recognizing that the trial court need not give a mitigating factor the same weight as would the defendant, Smallwood, 773 N.E.2d at 263, we cannot say that the trial court abused its discretion in enhancing Brock's sentence based upon the nature and circumstances of the crime. See, e.g., Plummer, 851 N.E.2d at 391.

II.

The next issue is whether Brock's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Brock argues that the trial court "gave little weight to the sentencing comments of the three interested parties," and instead "relied on the relationship between [Brock] and the victim as the primary reason to increase the sentence above the advisory sentence of ten (10) years." Appellant's Brief at 5.

Our review of the nature of the offense reveals that Brock was twenty-six years old when he began having a sexual relationship with M.B., who was less than fourteen years old. Brock came into contact with M.B. because she was "friends with a foster daughter of [Brock's] girlfriend." Sentencing Transcript at 17. Brock had sex with M.B. "probably fifteen to twenty times" between July 1996 and August 1997. Id. at 16. M.B. gave birth to a child as a result of their relationship. Brock's conduct was sufficient to support a conviction for child molesting as a class A felony, and Brock initially pled guilty to that charge, but the State amended the charging information to the lesser included offense of child molesting as a class B felony at M.B.'s request.

Our review of the character of the offender reveals that this is Brock's first criminal conviction. Despite the fact that Brock knew about the child he had fathered "within a year" of its birth, Brock did not help to raise the child or pay any child support to M.B. until "August or September" of 2005 when the child was seven years old. Also, in the fall of 1997, soon after his encounters with M.B. ended, Brock began teaching and coaching at a middle school.

Under the circumstances and after due consideration of the trial court's decision, we cannot say that the twenty year sentence with ten years executed and ten years suspended to probation with a condition of probation that he serve five additional years is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Robbins v. State, 839 N.E.2d 1196, 1200-1201 (Ind. Ct. App. 2005) (holding that the defendant's sentence of twenty years each for two counts of child molesting as class B felonies, where defendant molested two children on multiple occasions and one victim gave birth to a child as a result of the relationship, was not inappropriate in light of the nature of the offense and the character of the offender despite the defendant's lack of criminal history); see also Marshall v. State, 893 N.E.2d 1170, 1172-1174, 1179-1180 (Ind. Ct. App. 2008) (holding in part that defendant's eighteen-year sentence for child molesting as a class B felony for regularly molesting a thirteen-year-old child was not inappropriate in light of the nature of the offense and the character of the offender).

For the foregoing reasons, we affirm Brock's sentence for child molesting as a class B felony.

Affirmed.

NAJAM, J., and VAIDIK, J., concur.