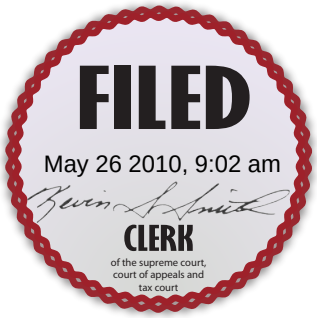

ATTORNEY FOR APPELLANT:

DONALD C. SWANSON, JR.
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ZACHARY J. STOCK
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

MARCOS ESPINOSA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 30A01-1002-CR-67
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HANCOCK CIRCUIT COURT
The Honorable Richard D. Culver, Judge
Cause No. 30C01-0303-FB-117

May 26, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Marcos Espinosa ("Espinosa") pleaded guilty to Class B felony sexual misconduct with a minor and was sentenced to sixteen years incarceration. Espinosa appeals and claims that his sentence is inappropriate. We affirm.

Facts and Procedural History

During the summer of 1999, Espinosa, who was then twenty-one years old, worked at a summer camp for Boy Scouts. There, he met T.D., who was then thirteen years old. T.D. suffers from cerebral palsy and other physical disabilities and relies on wheelchairs and walkers. T.D. was an active student and athlete and eventually became an Eagle Scout.

In the summer of 2000, Espinosa befriended T.D. and his family, and even stayed at T.D.'s house as an overnight guest. Espinosa claimed that T.D. was like the younger brother he never had. In early 2001, T.D.'s parents allowed Espinosa to watch T.D. at their home. While T.D.'s parents were away, Espinosa performed fellatio on T.D. and also took pictures of the boy masturbating. In all, there were three incidents where Espinosa took nude pictures of T.D. and performed oral sex on him. After these incidents, T.D. became withdrawn and depressed. Because of his depression and migraine headaches, T.D. began to be treated with various medications. T.D. eventually withdrew from school and never graduated. At the time of sentencing, he was twenty-four years old and lived with his parents, but aspired to earn his G.E.D.

On May 22, 2002, the State charged Espinosa with Class B felony sexual misconduct with a minor and Class C felony child exploitation. Espinosa was also charged with several sexual offenses in Michigan. And although the incidents with T.D.

in Indiana occurred before the Michigan offenses, Espinosa was tried, convicted and sentenced in Michigan before he could be tried in Indiana.

After Espinosa was released on parole in Michigan, he returned to Indiana and on October 19, 2009, pleaded guilty to both charges without the benefit of a plea agreement. At a sentencing hearing held on November 24, 2009, the trial court accepted Espinosa's plea. The trial court found as aggravating factors that Espinosa abused a position of trust and that Espinosa abused a disabled child. The trial court found as mitigating that Espinosa had made every attempt to return to Indiana and face these pending charges and that he pleaded guilty. Still, the trial court sentenced Espinosa to a term of sixteen years incarceration.[1] Espinosa now appeals.

Discussion and Decision

Espinosa claims that his sentence is inappropriate. Even when the trial court has acted within its lawful discretion in determining a sentence, the Indiana Constitution authorizes independent appellate review and revision of a sentence imposed by the trial court. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218. This appellate authority is implemented through Appellate Rule 7(B), which provides that the "Court may revise a 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." Anglemyer, 868 N.E.2d at 491. "It is on this basis alone that a criminal defendant may

[1] In the trial court's sentencing order, the court entered judgment and sentence on the count of Class B felony sexual misconduct with a minor but not the count of Class C felony child exploitation.

now challenge his or her sentence where the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence that is supported by the record, and the reasons are not improper as a matter of law, but has imposed a sentence with which the defendant takes issue." Id. 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, it is the defendant's burden to persuade us that the sentence imposed by the trial court is inappropriate. Anglemyer, 868 N.E.2d at 494.

Espinosa argues that the nature of his crime does "not justify or support an aggravated or executed sentence." Appellant's Br. p. 9. In support of his argument, Espinosa claims that there was no evidence that T.D. was physically harmed or threatened. Regardless, Espinosa did ingratiate himself with T.D.'s family, even going so far as saying that he considered T.D. to be like a brother. Espinosa misled T.D.'s family to trust him with the care of their physically disabled son, then obscenely abused this trust by performing sexual acts on the teenage boy. Despite his physical difficulties, T.D. had, prior to Espinosa's abuse, been an active student and athlete. After the abuse, T.D. became depressed and withdrawn and eventually dropped out of school, at least in part because of the depression resulting from Espinosa's abuse. Espinosa's sentence is justified by the nature of the offense.

Regarding the character of the offender, we acknowledge that Espinosa pleaded guilty, thus sparing his victim the trauma of testifying at a trail. It also appeared that Espinosa had strong support from his family. Moreover, at the time he committed the instant offense, Espinosa had no real criminal history. However, we cannot ignore the fact that Espinosa was convicted in Michigan of multiple counts of criminal sexual conduct, child sexual abuse activity, and "computer/internet/communicating with a victim," for which he received concurrent sentences of five to twenty years. Pre-Sentence Investigation Report p. 3. Thus, Espinosa's behavior in the present case was not an isolated incident.

Under these facts and circumstances of this case, and giving due consideration to the trial court's sentencing discretion, we cannot say that Espinosa has met his burden of demonstrating that his sentence is inappropriate in light of the nature of the offense and the character of the offender.[2]

Affirmed.

RILEY, J., and BRADFORD, J., concur

[2] In arguing that his sentence is inappropriate, Espinosa also claims that the trial court ignored certain mitigating factors and failed to give proper weight to other mitigating factors. If the trial court does not find the existence of a mitigating factor, the trial court is not obligated to explain why it has found that the factor does not exist. Anglemyer, 868 N.E.2d at 493. Moreover, under the current "advisory" sentencing scheme, a trial court has no obligation to weigh aggravating or mitigating factors when imposing sentence, and the relative weight or value assigned to these factors is thus not subject to appellate review for an abuse of discretion. Id. at 491. Regardless, Espinosa's claim that his young age at the time of the crimes should have been considered as a mitigating factor is unavailing. Indeed, the fact that Espinosa committed multiple sex crimes at a young age does not bode well for his future.