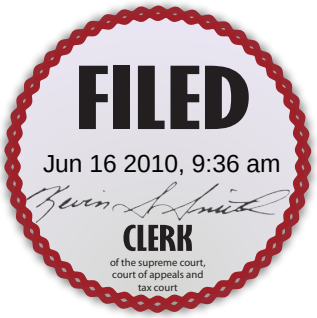

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IN THE
COURT OF APPEALS OF INDIANA

ROCKY D. BEAVERS, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-1002-CR-96
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0902-FA-004

JUNE 16, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

GARRARD, Senior Judge

Rocky Beavers was charged with one count of child molesting, a Class A felony, and one count of incest, a Class B felony. He entered a plea agreement wherein he agreed to plead guilty to the incest count and the state would dismiss the child molesting count. On his guilty plea, the court sentenced him to serve an executed sentence of eighteen years.

He contends the court abused its discretion in finding certain aggravating factors at sentencing and that his sentence is inappropriate considering the nature of the offense and character of the offender.

At the outset we note that when one or more aggravating circumstances found by the trial court are invalid, we must decide whether the remaining circumstance(s) support the sentence imposed. Where we find irregularity in the sentencing decision, we have the option to (a) remand to the trial court for a clarification or new sentencing determination, (b) affirm the sentence if the error is harmless, or (c) reweigh the proper aggravating and mitigating circumstances independently at the appellate level. *Cotto v. State,* 829 N.E.2d 520, 525 (Ind. 2005).

Beavers challenges three of the aggravators found by the trial court.[1] First, the court found that the harm, injury, loss and damage to the victim was significant and greater than the elements necessary to prove the offense.

Generally, the harm the victim or family suffers from an offense is accounted for in the advisory sentence. *Simmons v. State,* 746 N.E.2d 81, 91 (Ind. Ct. App. 2001),

[1] In addition to the three, the court found Beavers' history of criminal/delinquent behavior and his position of trust to the child victim were also aggravating circumstances.

trans. denied. Thus, to validly use victim impact to enhance a sentence, the court must explain why the impact in the present case exceeds that which would normally be associated with the crime. *Id.*

I.C. § 35-46-1-3 defines incest as "a person eighteen (18) years of age or older who engages in sexual intercourse or deviate sexual conduct with another person, when the person knows that the other person is related to the person biologically as a parent, child, etc…However, the offense is a Class B felony if the other person is less than sixteen (16) years of age."

The victim in the present case was Beavers' five-year-old daughter. The child's mother testified the little girl has had nightmares about the experience for two years.

We believe the court did articulate why the impact in this case exceeded that which might normally be expected in an incest case when it expressed that incest may be committed by siblings (or others in the statutory list) who are willing participants. Taking advantage of a small child clearly exceeds what might normally be anticipated as the consequence of the offense. Accordingly, we find no error in the designation of this aggravator.

Beavers contends it was an abuse of discretion for the court to consider that he benefitted from the reduced charges and this constituted an aggravation.

He correctly argues that where the court accepts a plea agreement under which the state agrees to dismiss charges, it may not then find as an aggravating circumstance that

the defendant benefitted from the charges being dismissed. *Roney v. State*, 872 N.E.2d 192, 201 (Ind. Ct. App. 2007), *trans. denied*.

On the other hand, when a defendant pleads guilty, as a general proposition, he is entitled to have some mitigating weight extended to the guilty plea. *Cotto, id.* An exception to this general proposition may be found, however, where the defendant secures a substantial benefit from the plea, such as the reduction in the charges he faces. *Anglemyer v. State*, 875 N.E.2d 218, 221 (Ind. 2007).

In Beavers' case, the court found the reduced charges to be an aggravator and further found the fact that Beavers pled guilty to be a mitigating factor. In its oral statement the court said the plea was "offset" by the reduction in the charge. In other words, the court was merely determining that these factors cancelled each other out. If there was error in doing so in this fashion, it was clearly harmless. See *Anglemyer*.

Finally, Beavers contends it was error to find the victim's age to be an aggravating factor. Citing *Kien v. State,* 782 N.E.2d 398, 414 (Ind. Ct. App. 2003), *trans. denied*, he urges that when the age of the victim constitutes a material element of the offense, then the victim's age may not also constitute an aggravating circumstance to support an enhanced sentence.

That same case, however, proceeded to recognize that the age of the victim might be a proper aggravating circumstance when the victim was of tender years. *Id.*at 414. See also, *Stewart v. State,* 531 N.E.2d 1146, 1150 (Ind. 1988).

I.C. § 35-46-1-3 elevates the incest offense to a Class B felony where the victim is less than sixteen (16) years of age. Here the court did consider the particularized circumstances of the material elements of the offense when it stated that the victim was "too young to share any blame and not to be blamed for what happened to her." While the court did not use the express phrase "tender years," a five-year-old girl is clearly a child of "tender years." The court did not err in finding the tender age of the victim to be an aggravating factor.

The sentence imposed was within the statutory range. It follows from the foregoing that no abuse of discretion has been shown. *Anglemyer v. State* 868 N.E.2d 482, 490 (Ind. 2007).

Beavers also argues that we should find his sentence to be inappropriate in light of the nature of the offense and the character of the offender as permitted under Ind. Appellate Rule 7(B). It is well settled that Beavers bears the burden of establishing the sentence to be inappropriate and that substantial deference should be given to the trial court's sentencing determination. *See, e.g., Anglemyer; Brattain v. State,* 891 N.E.2d 1055 (Ind. Ct. App. 2008).

Beavers' sentence of eighteen years was more than the advisory sentence of ten years but less than the maximum sentence of twenty years for a Class B felony.

Referring to the nature of the offense, we note that Beavers was in a position of special trust to the victim, his daughter, and that she was a child of very tender years.

Regarding the character of the offender, we note that Beavers was found to have a history of criminal or delinquent behavior, which included the sexual abuse of a ten-year-old boy. He, also, had falsely accused his older brother of molesting him when he was younger.

We conclude that Beavers has failed to establish that, considering the nature of the offense and character of the offender, the trial court erred in imposing a sentence of eighteen years.

Affirmed.

DARDEN, J., and BARNES, J., concur.