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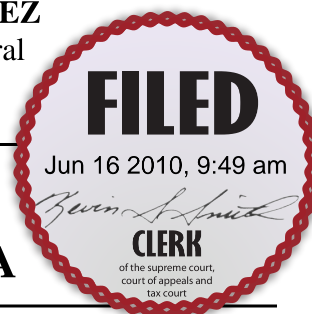

IN THE COURT OF APPEALS OF INDIANA

JAMES A. BARBER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A02-0909-CR-916
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Daniel J. Pfleging, Judge
Cause No. 29D02-0805-FA-52

June 16, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

James A. Barber pled guilty to two counts of child molestation[1] and two counts of sexual misconduct with a minor.[2] The trial court imposed an aggregate sentence of 110 years. Barber appeals that sentence, and we restate his issues as:

1. whether the trial court used the wrong sentencing scheme to determine his sentences for the two counts of child molesting;
2. whether the trial court abused its discretion when determining his sentence for sexual misconduct with a minor; and
3. whether the trial court abused its discretion when ordering the sentences served consecutively.

We affirm.

FACTS AND PROCEDURAL HISTORY

Between May 31, 2004, and May 14, 2007, Barber repeatedly molested D.G., a girl who was 12 years old at the time of the first incident.[3] Barber forced D.G. to engage in sexual intercourse and oral sex, and he threatened to kill her family if she reported the abuse. Barber also used his cell phone to photograph D.G. while she was nude and while she was wearing lingerie that Barber purchased.

In mid-May 2007, D.G. reported the abuse to a relative and threatened suicide. Her family had her hospitalized for 72 hours to prevent suicide. Shortly thereafter, Barber was

[1] Ind. Code § 35-42-4-3(a)(1).
[2] Ind. Code § 35-42-4-9(a)(1).
[3] D.G. testified the abuse happened daily, while Barber said it occurred weekly.

arrested and charged with eight counts of Class A felony child molesting; eight counts of Class B felony sexual misconduct with a minor; and one count of Class B felony rape.[4]

On July 17, 2009, Barber pled guilty to two counts of child molesting and two counts of sexual misconduct with a minor. In exchange, the State dismissed the remaining counts. Sentencing was left to the discretion of the trial court. On September 11, 2009, the court sentenced Barber to forty years for each count of child molesting and fifteen years for each count of sexual misconduct with a minor, with all sentences to be served consecutively. The aggregate sentence was 110 years.

DISCUSSION AND DECISION

Prior to the 2005, Indiana used "presumptive" sentences, standard sentences prescribed by the legislature for a given crime. *Harris v. State*, 897 N.E.2d 927 (Ind. 2008). A presumptive sentence was the starting point and a sentencing court had limited discretion to enhance a sentence to reflect aggravating circumstances or to reduce a sentence to reflect mitigating circumstances. *Id*. The trial court was required to identify significant aggravating and mitigating circumstances, give a reason why each circumstance is classified as aggravating or mitigating, and demonstrate balancing of those circumstances. *See Gregory v. State*, 604 N.E.2d 1240, 1241 (Ind. Ct. App. 1992). Following *Blakely v. Washington*, 542 U.S. 296 (2004) *reh'g. denied*, our Indiana Supreme Court held this presumptive sentencing scheme unconstitutional. *Smylie v. State*, 823 N.E.2d 679, 685 (Ind. 2005).

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[4] Ind. Code § 35-42-4-1.

In response, our Indiana General Assembly amended the sentencing statutes in 2005 by replacing fixed presumptive terms in favor of "advisory" sentences for each offense. Pursuant thereto, a court could impose any sentence within the statutory range set for the crime, "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind.Code § 35-38-1-7.1(d) (2005). Under this scheme, when a trial court imposes a sentence, it must provide a statement including reasons or circumstances for imposing a particular sentence if aggravating or mitigating circumstances are found. *Harris*, 897 N.E.2d at 928. The date on which a crime is committed determines the sentencing scheme the trial court must apply, because the sentencing statute in effect at the time a crime is committed governs the sentence for that crime. *Id.* at 928-29.

1. Child Molesting Sentences

Barber argues the trial court erroneously enhanced his sentences for child molestation by relying on aggravators found by the court in violation of *Blakely v. Washington*, 542 U.S. 296 (2004), *reh'g denied*. Both of Barber's child molesting offenses were committed before Indiana adopted a new sentencing structure to comply with *Blakely,* so the presumptive sentencing scheme applies. The trial court was therefore obliged to sentence Barber under the presumptive statutory scheme. *See Smith v. State*, 675 N.E.2d 693, 695 (Ind. 1996) (sentencing statute in effect at the time of the crime governs sentencing).

That scheme provided a thirty-year presumptive sentence for a Class A felony, which could be increased to a maximum of fifty years based on aggravators or decreased to twenty

years based on mitigators.[5] However, after *Blakely*, courts sentencing under this scheme were constrained:

> Under *Blakely*, a court can enhance a sentence beyond the presumptive term based only on those facts that are established in one of the following ways: (1) as a fact of prior conviction; (2) by a jury beyond a reasonable doubt; (3) when admitted by the defendant; and (4) in the course of a guilty plea where the defendant has . . . consented to judicial fact finding.

Williams v. State, 895 N.E.2d 377, 381 (Ind. Ct. App. 2008).

When sentencing Barber, the court found five aggravators: Barber threatened the victim, the victim suffered greater harm than that inherently caused by the crime, Barber abused a position of trust when committing the crimes, Barber has a criminal history, and Barber was on probation when he committed these crimes. The court found two mitigators: Barber's guilty plea[6] and his remorse for his crimes. The court enhanced Barber's sentence for each count of child molesting by ten years based on its weighing of those aggravating and mitigating factors.

Two of those aggravating factors -- that Barber threatened the victim and the victim suffered greater harm than that inherently caused by the crime -- are impermissible under *Blakely*, as those facts were neither found by a jury nor admitted by Barber.[7] When some aggravators are impermissible, we will "remand for resentencing unless we can say with confidence that the trial court would have imposed the same sentence if it considered only the

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[5] Ind. Code § 35-50-2-4 (2004).

[6] Barber asserts the trial court did not give adequate weight to his guilty plea. A plea is not necessarily a significant mitigator where the defendant has benefitted from the plea. *Sensback v. State*, 720 N.E.2d 1160, 1164-1165 (Ind. 1999). In exchange for Barber's plea, the State dismissed thirteen counts -- six Class A felonies and seven Class B felonies. That was a substantial benefit. *See*, *e.g.*, *Powell v. State*, 895 N.E.2d 1259, 1263 (Ind. Ct. App. 2008) (dropping two Class A felony counts is a "substantial benefit"), *trans. denied.*

proper aggravators." *Robertson v. State*, 871 N.E.2d 280, 287 (Ind. 2007). Barber's court considered three other aggravating factors – Barber's abuse of a position of trust, his prior criminal offenses, and his probation violation.[8] In light of the mitigators and aggravators it could properly consider, we are confident the court would have imposed the same sentences for child molestation. *See*, *e.g.*, *id*. ("Given that Robertson had one prior conviction and one probation violation that occurred within two years of his offense, we conclude that the trial court would have imposed the same sentence based solely on these permissible aggravating factors. The trial court did not err in enhancing Robertson's sentence.")

Therefore, we need not reverse the trial court's sentence enhancements for child molestation.

2. Sentences for Sexual Misconduct with a Minor

Barber's convictions for these crimes were based on acts that occurred after our legislature adopted the advisory sentencing scheme. Therefore, when reviewing these sentences, we apply the standard announced in *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *reh'g granted on other grounds,* 875 N.E.2d 218 (Ind. 2007). A trial court abuses its discretion if its 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 drawn therefrom." *Id*. at 490. The sentence for Class B felony sexual misconduct with a minor is imprisonment between six and twenty years, with an advisory sentence of ten years. Ind. Code § 35-50-2-5 (2005). The court sentenced Barber to fifteen years for each Class B felony.

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[7] The State does not argue Barber consented to judicial fact-finding.

A. Aggravating Factors

We review the finding of aggravating circumstances for abuse of discretion. *Anglemyer*, 868 N.E.2d at 490. It is an abuse of discretion to find aggravators that are not supported by the record or are improper as a matter of law. *Id*. at 490-91.

The trial court found D.G. suffered harm in excess of that typically occurring in minors who experience sexual molestation or misconduct, and the record supports that aggravator. A trial court may consider the impact of a crime on the victim as an aggravating circumstance where that impact is distinct and exceeds that normally associated with the crime. *Simmons v. State*, 746 N.E.2d 81, 91 (Ind. Ct. App. 2001), *trans. denied*. The trial court noted D.G. had suicidal thoughts for which she had to be hospitalized and she continues to exhibit behavioral changes. While we have found behavioral and personality changes necessitating therapy to be typical in sexual abuse victims, *see*, *e.g.*, *id.* (holding bad dreams and seeing counselor for many years are typical for child sex abuse victims), we find no abuse of discretion in the finding D.G.'s need to be hospitalized to prevent suicide went beyond what a victim of sexual abuse normally experiences. Thus we find no abuse of discretion in this aggravator.

B. Mitigating Factors

Barber argues the court did not give adequate weight to his guilty plea. Because trial courts no longer have an obligation to "weigh" aggravating and mitigating factors when imposing a sentence, a trial court cannot now be said to have abused its discretion in failing

[8] Barber does not challenge these aggravators.

to "properly weigh" such factors. *Anglemyer,* 868 N.E.2d at 491.

3. Consecutive Sentences

Based on *Harris v. State*, 897 N.E.2d 927 (Ind. 2008), Barber argues the trial court abused its discretion when ordering his four sentences served consecutively. Our Supreme Court revised Harris' sentence, holding the trial court abused its discretion because it did not "explain why the aggravating circumstances warranted consecutive as opposed to enhanced concurrent sentences." *Id.* at 929. Here, however, the court stated in the record multiple reasons for ruling that Barber's sentences be served consecutively:

> "In determining whether the terms of imprison [sic] shall be served concurrently or consecutively, the Court is to consider the aggravating circumstances that I have already set out. Looking at any episode of conduct based upon the testimony of either of the Defendant and this victim we have seven months, a minimum of once a week…[w]e may have one victim and we many have one act of similar acts set out in each of the counts, but this is an episode of conduct…[t]he fact that there was one victim in this cause does not place me in the position where I think I am going to give this Defendant any credit because he just had one victim but hundreds of acts. Having set out those reasons for my sentencing."

(Tr. at 129-130.)

Because the trial court explained why Barber's sentences should be served consecutively, *Harris* does not control, and Barber has not demonstrated an abuse of discretion. Our Supreme Court has recognized that "additional criminal activity directed to the same victim should not be free of consequences." *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). Additionally, we note that "[a] single aggravating factor is sufficient to justify the imposition of consecutive sentences." *Forgey v. State*, 886 N.E.2d 16, 23 (Ind. Ct. App. 2008).

To the extent Barber cites *Harris* to suggest he is entitled to relief under Appellate Rule 7(B), we disagree. We may revise a sentence if, "after due consideration of the trial court's decision," we determine the sentence is inappropriate in light of both the nature of the offense and the character of the offender. *Williams v. State*, 891 N.E. 2d 621, 633 (Ind. Ct. App. 2008) (citing Ind. Appellate Rule 7(B)). One reason our Supreme Court found Harris' sentences should not be served consecutively was the fact that his prior offenses, theft and various traffic violations, were not related to the child molesting for which he was being sentenced. In contrast, Barber had been convicted of domestic battery on multiple occasions. Like Barber's molestation of D.G., domestic battery involves the use of force against a person. Those batteries had been against D.G.'s mother, which makes the crimes much more related than Harris' child molesting was to his traffic violations, for example.

Because Barber has not demonstrated error, we affirm.

Affirmed.

BAILEY, J., and BARNES, J., concur.