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IN THE COURT OF APPEALS OF INDIANA

PHILLIP KEYSER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0804-CR-366
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION COUNTY SUPERIOR COURT
The Honorable Mark Stoner, Judge
Cause No. 49G06-0709-FA-197475

October 31, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Phillip Keyser appeals the sentence imposed by the trial court after Keyser pleaded guilty to four counts of Child Molesting,[1] a class A felony. Keyser argues that fifty-year sentence, with forty years executed and ten years suspended to probation, is inappropriate in light of the nature of the offenses and his character. Finding no error, we affirm.

FACTS

Dianne Turner is the mother of A.T. and another boy. Turner is a single parent and was enrolled in college in 2007. She entrusted ten-year-old A.T. and his brother to Keyser's care while she was attending classes. A.T. called fifty-year-old Keyser his "grandpa in Indiana" and the boys stayed at Keyser's house every Thursday night. Tr. p. 31. Between May 1, 2007, and September 15, 2007, Keyser performed oral sex and other sexually deviate acts on A.T.

On September 26, 2007, the State charged Keyser with ten counts of child molesting—seven counts as a class A felony and three counts as a class C felony. On February 28, 2008, Keyser pleaded guilty to four counts of class A felony child molesting in exchange for the State's agreement to dismiss the remaining charges. The plea agreement provided that the executed portion of Keyser's sentence could not exceed forty years but otherwise left the sentencing to the trial court's discretion. On March 17, 2008, the trial court held a sentencing hearing, finding Keyser's prior criminal history, which included a child molesting conviction and a sexual exploitation of a minor conviction, and Keyser's position of trust with A.T. as aggravating factors. The trial court found

[1] Ind. Code § 35-42-4-3(a)(1).

Keyser's guilty plea and the fact that Keyser was sexually abused as a child to be mitigating circumstances. Concluding that the aggravators outweighed the mitigators, the trial court imposed four concurrent terms of fifty years with ten years suspended to probation. Keyser now appeals.

DISCUSSION AND DECISION

Keyser's sole argument on appeal is that the sentence imposed by the trial court is inappropriate in light of the nature of the offenses and his character pursuant to Indiana Appellate Rule 7(B). In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

As for the nature of Keyser's offenses, he repeatedly molested ten-year-old A.T., a boy who was in his care and who thought of him as a grandpa. Keyser took advantage of the trust of A.T. and his mother, scarring the whole family. Despite weekly counseling, A.T. continues to experience behavioral problems such as bed-wetting. He testified that Keyser hurt "[his] body and [his] heart" and that he wants Keyser to go to jail. Tr. p. 31. Turner was forced to drop out of college because she no longer trusted anyone to watch her children. We do not find that the nature of these offenses aids Keyser's inappropriateness argument.

As for Keyser's character, his prior criminal history includes convictions for child molesting and sexual exploitation of minors. He pleaded guilty but reaped a substantial

benefit—the State dismissed six charges and agreed to a forty-year cap on the executed portion of Keyser's sentence.

Keyser argues that his age of fifty years should have been considered a mitigator, but we disagree. We do not believe that Keyser should be rewarded for reaching the age of fifty with "only" two prior convictions for sexual crimes that were perpetrated against children. We acknowledge, as did the trial court, that Keyser was also victimized as a child, but there are plenty of people who are sexually victimized as children but go on to lead law-abiding lives. As the trial court put it, Keyser "has turned around and the same harm that he suffered as a child he's inflicted on someone else." Tr. p. 42. Furthermore, Keyser's age strengthened the trust that A.T. placed in him, making him seem like a "grandpa." Given these facts, we do not find that Keyser's age strengthens his inappropriateness argument.

Keyser directs our attention to Francis v. State, 817 N.E.2d 235 (Ind. 2004), in which our Supreme Court revised the maximum fifty-year sentence that the defendant had received after pleading guilty to one count of class A felony child molesting to a presumptive thirty-year sentence. The Francis court, however, applied the old presumptive sentencing scheme that was still in effect at that time. Id. at 237. Thus, in reaching its result, the court considered and weighed aggravators and mitigators, finding that they were in equipoise. Id. at 238 (explicitly stating that "[w]e elect appellate reweighing here"). Inasmuch as, under the current sentencing scheme, "a trial court [cannot] now be said to have abused its discretion in failing to 'properly weigh'" aggravators and mitigators, Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007),

clarified on rehearing, 875 N.E.2d 218 (2007), we no longer engage in this kind of analysis as an appellate court. Furthermore, we note that unlike Francis, Keyser has two prior convictions for sexual crimes against children and that Keyser's plea agreement contained a cap on the executed portion of his sentence. Therefore, we do not believe that the result in Francis should affect our determination herein.

Given the nature of Keyser's offenses and his character, we do not find the sentence of four concurrent terms of fifty years, with forty years executed and ten suspended to probation, to be inappropriate.

The judgment of the trial court is affirmed.

MATHIAS, J., and BROWN, J., concur.