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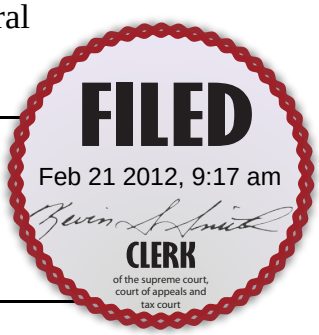

IN THE COURT OF APPEALS OF INDIANA

CHARLES DUNCAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 17A03-1110-CR-446
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DEKALB SUPERIOR COURT
The Honorable Monte L. Brown, Judge
Cause No. 17D02-1011-FA-27

February 21, 2012

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Charles Duncan (Duncan), appeals his sentence following a plea of guilty to child molestation as a Class A felony, Ind. Code § 35-42-4-3(a)(1).

We affirm.

ISSUE

Duncan raises one issue on appeal, which we restate as follows: Whether the trial court abused its discretion in sentencing him in excess of the presumptive sentence for child molestation as a Class A felony without a jury determination of aggravating factors.

FACTS AND PROCEDURAL HISTORY

On November 10, 2010, the State charged Duncan with two Counts of child molestation as Class A felonies, I.C. § 35-42-4-3(a)(1). On June 23, 2011, Duncan entered into a plea agreement with the State, in which he pled guilty to one Count of child molestation as a Class A felony in exchange for the State's agreement to dismiss the other Count of child molestation and five Counts in other causes. On September 29, 2011, the trial court held a sentencing hearing and sentenced Duncan to 45 years executed in the Department of Correction.

As aggravating factors, the trial court found that: (1) Duncan had been in a position of trust with his victim; (2) the victim had suffered significant emotional damage; (3) Duncan himself had been a victim of sexual abuse as a child and understood the emotional consequences for the victim; (4) the victim's extremely young age; and (5) Duncan's lack of remorse. As mitigating factors, the trial court noted: (1) Duncan's

"relatively *de minimus*" criminal history; and (2) Duncan's guilty plea. The trial court stated that it would give the guilty plea very little weight in light of the substantial evidence against him. (Transcript p. 60).

Duncan now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Duncan argues that the trial court inappropriately sentenced him because a jury did not find the existence of the aggravating factors beyond a reasonable doubt. In 1977, the Indiana Legislature adopted a sentencing scheme that included fixed term presumptive sentences, as well as upper and lower limits, for each Class of felonies. *Anglemyer v. State,* 868 N.E.2d 482, 485-86 (Ind. 2007), *clarified on reh'g,* 875 N.E.2d 218 (Ind. 2007). When a trial court deviated from the fixed presumptive sentence, it was required to "(1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance ha[d] been determined to be mitigating or aggravating; and (3) articulate the court's evaluation and balancing of circumstances." *Id.* at 486 (quoting *Prickett v. State,* 856 N.E.2d 1203, 1207 (Ind. 2006)).

In 2005, the legislature subsequently revised Indiana's sentencing statutes to provide for advisory sentences rather than presumptive sentences. *See id.* However, the prior presumptive scheme applies in this case, as Duncan committed his offenses in 2003, prior to the legislative revisions. *See Gutermuth v. State,* 868 N.E.2d 427, 431 n. 4 (Ind. 2007) (declaring that the sentencing statute in effect at the time a crime is committed governs the sentence for that crime). At the time of Duncan's offenses, the presumptive

sentence for child molesting as a Class A felony was thirty years, with not more than twenty years added for aggravating circumstances or not more than ten years subtracted for mitigating circumstances. *Monroe v. State*, 886 N.E.2d 578, 579 (Ind. 2008); I.C. § 35-50-2-4 (2004). As Duncan was sentenced to 45 years, his sentence was 15 years greater than the presumptive sentence.

In light of this aggravated sentence, Duncan argues that the trial court violated his *Blakely* rights. In *Blakely v. Washington*, 542 U.S. 296, 301, 124 S.Ct. 2531, 159 L.E.2d 403 (2004), the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The Supreme Court further explained that the relevant "statutory maximum" for *Blakely* purposes is "not the maximum sentence [the trial court] may impose after finding additional facts, but the maximum [it] may impose *without* any additional findings." *Id.* at 303-04. Under Indiana's former presumptive sentencing scheme, the "statutory maximum" for *Blakely* purposes was the presumptive sentence because the felony sentencing statutes allowed an upward departure from that sentence only upon the finding of aggravating circumstances. *Smylie v. State*, 823 N.E.2d 679, 684 (Ind. 2005), *cert. denied*, 546 U.S. 976, 126 S.Ct. 545, 163 L.E.2d 459 (2005).

Here, the jury did not determine the existence of the aggravating factors listed by the trial court beyond a reasonable doubt because Duncan pled guilty pursuant to a plea agreement. The State argues, though, that the trial court did not violate Duncan's *Blakely*

rights because Duncan waived them in his plea agreement. Alternatively, the State asserts that Duncan waived his claim because he did not object to the trial court's determination of aggravating factors at his sentencing hearing. We agree with the State that Duncan waived his *Blakely* rights in his plea agreement.

In *Trusley v. State*, 829 N.E.2d 923, 925 (Ind. 2005), the supreme court noted that a trial court may enhance a sentence based on facts established in the course of a guilty plea without violating a defendant's *Blakely* rights where the defendant has waived those rights and consented to judicial factfinding. Here, the plea agreement between the State and Duncan stipulated that "the defendant hereby waives the right to a jury trial on *all issues* and consents to the judge determining the facts. The defendant also agrees this waiver shall apply to any future sentence imposed following the revocation of probation." (Appellant's App. p. 46) (emphasis added). Further, before the trial court accepted the plea agreement, it asked Duncan: "Do you understand [that] by pleading guilty the court will proceed with a judgment or conviction and sentence you without a trial?" and Duncan responded "Yes." (Tr. p. 8). Then, the trial court asked: "And do you understand that if I were to find aggravating or enhancement circumstances[,] I have the legal right to increase that [presumptive sentence] by up to an additional twenty [] years and that if I were to find mitigating or reduction circumstances[,] I could lower the [presumptive sentence] by up to ten [] years . . . ?" Duncan responded "Yes, Your Honor." (Tr. pp. 8-9).

Based on this exchange, we determine that Duncan knowingly and voluntarily consented to judicial factfinding with respect to his sentence. His plea agreement specified that his consent extended to "all issues," and Duncan stated that he understood that the trial court would sentence him without a trial. (Tr. p. 8). Accordingly, we conclude that the trial court did not violate Duncan's *Blakely* rights and did not abuse its discretion in sentencing him.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion in sentencing Duncan above the presumptive sentence for Class A felony child molestation because Duncan waived his right to a jury determination of aggravating factors.

Affirmed.

FRIEDLANDER, J. and MATHIAS, J. concur