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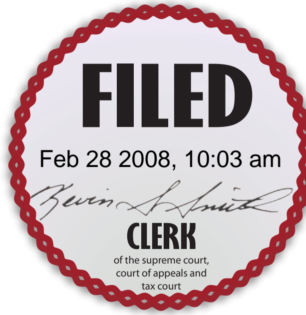

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IN THE
COURT OF APPEALS OF INDIANA

WILLIAM CAUDILL, Appellant-Defendant,	)	
vs.	)	No. 20A03-0708-CR-394
STATE OF INDIANA, Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George Biddlecome, Judge
Cause No.20A03-0708-CR-394

February 28, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a jury trial, William Caudill appeals his sentence for sexual misconduct with a minor, a Class B felony. On appeal, Caudill raises one issue, which we restate as whether Caudill's advisory sentence of ten years, with six years executed and four suspended, is inappropriate in light of the nature of the offense and his character. Concluding Caudill's sentence is not inappropriate, we affirm.

Facts and Procedural History

During the summer of 2005, twenty-three-year-old Caudill met fourteen-year-old A.G. through a friend and began hanging out with A.G. and a group of her friends and cousins. A.G. was living at her grandmother's home at the time, along with several of A.G.'s siblings and cousins. Caudill spent the night in A.G.'s bedroom on at least two occasions, and at some point A.G.'s grandmother told him he was not welcome to do so. On the final occasion in August 2005, Caudill had sexual intercourse with A.G.

The State charged Caudill with sexual misconduct with a minor, a Class B felony.[1] The jury found Caudill guilty. After accepting the jury's guilty verdict and entering a judgment of conviction, the trial court conducted a sentencing hearing. Following the sentencing hearing, the trial court entered an order that included the following findings:

> The Court finds that the following aggravating circumstances are present in this case.
> 1. The Defendant has suffered five previous misdemeanor convictions.
> 2. The Defendant has violated the terms of his probation on at least one occasion in the past.

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[1] The offense was charged as a Class B felony because Caudill was twenty-three years old. See Ind. Code § 35-42-4-9(a)(1).

> 3. The Defendant was on probation at the time he committed this offense as a result of a conviction in Anderson City Court, Anderson, Indiana.
>
> 4. The Defendant has failed to pay child support as previously ordered by a court of competent jurisdiction, and has accumulated a child support arrearage in the sum of $3,335.79, thus indicating to the Court a disdain by the Defendant for lawfully constituted orders of court.
>
> 5. The Defendant's continued use of illicit drugs while awaiting sentencing in this cause, again, indicates a disdain on the part of the Defendant for the laws of this state and his obligation to comply with those laws.
>
> The Court finds that the following mitigating circumstances are present in this case.
>
> 1. The Defendant has no prior felony conviction.
>
> 2. The Defendant suffers from several psychological ailments; however, the Court declines to accord substantial weight to this mitigator in light of the fact that the Defendant has been afforded the opportunity to secure treatment in the past, has begun treatment in the past, and has voluntarily failed to complete the treatment programs in which he was enrolled. As a consequence of the foregoing, the Court finds that the Defendant has not responsibly addressed his psychological difficulties. Moreover, the Court's decision to ascribe little weight to this mitigator is buttressed by the fact that the defendant has failed to demonstrate the existence of a nexus between his psychological difficulties and his criminal conduct.
>
> 3. The Defendant is a young man.

Appellant's Appendix at 42. Based on these findings, the trial court concluded that "the aggravators and mitigator[s] balance one another, thus justifying imposition of the advisory sentence." Id. Accordingly, the trial court sentenced Caudill to ten years, with six years executed and four years suspended to probation. Caudill now appeals.

Discussion and Decision

I. Standard of Review

This court has authority to revise a sentence "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." Ind. Appellate Rule 7(B). We may "revise sentences when certain broad conditions are satisfied," Neale v. State, 826 N.E.2d 635, 639

(Ind. 2005), and we recognize that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed," Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). In determining whether a sentence is inappropriate, we examine both the nature of the offense and the character of the offender. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When making this examination, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. However, "a defendant must persuade the appellate court that his or her sentence has met this inappropriateness standard of review." Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

II. Nature of the Offense and Character of the Offender

The trial court sentenced Caudill to ten years, with six years executed and four years suspended to probation. Thus, Caudill received the advisory sentence. See Ind. Code § 35-50-2-5 ("A person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years."); Weaver v. State, 845 N.E.2d 1066, 1072 n.4 (Ind. Ct. App. 2006) (explaining that a defendant's total sentence includes both the executed and suspended portion of the sentence).

Caudill advances four reasons to support his argument that the nature of the offense renders his sentence inappropriate: 1) A.G. consented to having sexual intercourse with him; 2) there were not multiple instances of sexual intercourse; 3) A.G. "did not suffer[] any injury beyond that contemplated by the sexual misconduct with a minor charge"; and 4) A.G. was sexually promiscuous. Appellant's Brief at 4. Implicit in the first and fourth reasons is that

A.G. facilitated the crime. We rejected a similar argument in the context of whether the claimed circumstance of the victim's facilitation of the crime constituted a mitigating factor, Moon v. State, 823 N.E.2d 710, 718 (Ind. Ct. App. 2005), trans. denied, noting that accepting such an argument would disregard that the defendant "had full power to keep the sexual activity from taking place." We also note that our child sex crime laws and rules of evidence have rendered the child victim's consent and sexual activity largely irrelevant. See id. (noting "that a victim younger than sixteen cannot consent to sexual contact" and that "[t]his principle, which is at the heart of the prohibitions against child molesting and sexual misconduct with a minor, vitiates minor victims' ability to facilitate these crimes as well"); Ind. Evidence Rule 412(a) (stating, with exceptions, that evidence of a sex victim's past sexual conduct is inadmissible in prosecuting a sex crime). In light of these policies, we decline to consider the nature of the offense less severe based on A.G.'s consent and sexual promiscuity.

Nor do the second and third reasons render the nature of the offense less severe. That this was the first time Caudill committed sexual misconduct with a minor does not diminish the severity of the nature of the offense. Indeed, accepting such an argument would invite a variety of spurious claims; a defendant convicted of three robberies, for example, could argue the nature of the offenses were less severe because he did not commit four. Similarly, Caudill's claim that A.G. did not suffer more harm than is typical of a child sex crime victim overlooks that he received the advisory sentence. In classifying sexual misconduct with a minor as a Class B felony, our legislature presumably was aware of the harm caused by such

a crime. Cf. Davenport v. State, 689 N.E.2d 1226, 1232-33 (Ind. 1997) (noting that the "expected impact upon the family members and other acquaintances of the victim . . . is accounted for in the presumptive sentence for murder"), affirmed on other grounds on reh'g, 696 N.E.2d 870 (1998). Thus, because Caudill received the advisory sentence, his claim that A.G.'s suffering was typical of a sex crime victim does not support his argument that his sentence was not commensurate with the nature of the offense.

Regarding the character of the offender, Caudill argues that his sentence is inappropriate because he suffers from bipolar disorder. The record does indicate that Caudill has a significant history of mental illness, including several attempted suicides. However, the effect of a defendant's mental illness on sentencing depends, among other things, on whether and the extent to which there is "any nexus between the disorder or impairment and the commission of the crime." Ankey v. State, 825 N.E.2d 965, 973 (Ind. Ct. App. 2005), trans. denied. Here, the record does not indicate, and Caudill does not argue, that his mental illness played a role in his commission of the crime. Thus, we agree with the trial court's observation that Caudill "has failed to demonstrate the existence of a nexus between his psychological difficulties and his criminal conduct." Appellant's App. at 42.

Nor does our review of the record convince us that Caudill's character renders his sentence inappropriate. In this respect, we note, as the trial court did, that although Caudill has a prior criminal history consisting of five misdemeanor convictions and one juvenile adjudication, such history is not particularly troubling because none of Caudill's prior convictions is as substantial as the instant felony offense. See Prickett v. State, 856 N.E.2d

1203, 1209 (Ind. 2006) (explaining that the significance of a defendant's prior criminal history in determining whether to impose a sentence enhancement will vary "based on the gravity, nature and number of prior offenses as they relate to the current offense") (quoting Ruiz v. State, 818 N.E.2d 927, 929 (Ind. 2004)). At the same time, however, we also note, as the trial court did, that Caudill committed the instant offense while on probation and admitted to using marijuana while awaiting sentencing, both of which comment negatively on Caudill's character. Cf. Ind. Code § 35-38-1-7.1(a)(6) (recognizing that a defendant's recent violation of a condition of probation may constitute an aggravating factor); Roney, 872 N.E.2d at 207 (recognizing that the defendant's lack of criminal history was diminished because "he was not leading a law-abiding life"). Finally, we note that Caudill's youth does not comment favorably on his character. Our supreme court has cautioned that youth is not always an effective way to gauge a defendant's character because "[t]here are both relatively old offenders who seem clueless and relatively young ones who appear hardened and purposeful." Monegan v. State, 756 N.E.2d 499, 506 (Ind. 2001). Although we hesitate to describe Caudill as "hardened and purposeful," neither do we think that a person who has accumulated five misdemeanor convictions by the age of twenty-three can be characterized as naive.

The burden was on Caudill to establish that his advisory sentence is inappropriate based on the nature of the offense and his character. After due consideration of the trial court's sentencing decision, we are convinced Caudill has not carried this burden. Therefore, we conclude Caudill's sentence is not inappropriate.

Conclusion

Caudill's sentence is not inappropriate in light of the nature of the offense and character of the offender.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.