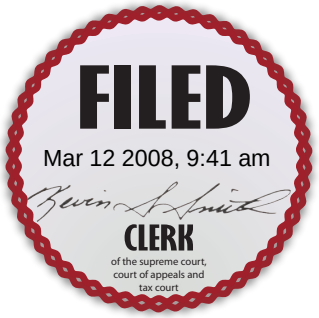

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IN THE
COURT OF APPEALS OF INDIANA

DONALD PERKINS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 03A01-0707-CR-305
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause No.03D01-0604-FA-682

March 12, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a guilty plea, Donald Perkins appeals his forty-five-year sentence for child molesting, a Class A felony. Perkins raises two issues, which we expand and restate as: (1) whether Perkins's sentence violates the Indiana Constitution's provision indicating that our penal system is based on reformation and not vindictive justice; (2) whether the trial court abused its discretion in finding mitigating and aggravating circumstances; and (3) whether his sentence is inappropriate given the nature of the offense and his character. Concluding that to the extent the trial court abused its discretion, such error was harmless, and that Perkins's sentence is neither unconstitutional nor inappropriate, we affirm.

Facts and Procedural History

On March 13, 2006, a man working on a survey crew found a videotape alongside a road. The man took the tape home to view, and discovered that it depicted an adult male, later determined to be Perkins, engaged in numerous sexual acts with a young child, later determined to be his four-year-old daughter (the "Victim"). The tape depicts two incidents. During the first incident, Perkins and the Victim are both naked and the Victim is touching and fondling Perkins's penis. During the second incident, the Victim sat on Perkins's lap while both were naked and again touched and fondled Perkins's penis.

On April 17, 2006, the State charged Perkins with child molesting, a Class A felony, two counts of child molesting, Class C felonies, two counts of child exploitation, Class C felonies, and performing sexual conduct in the presence of a minor, a Class D felony. On April 16, 2007, Perkins pled guilty to child molesting, a Class A felony, pursuant to a plea

agreement under which the State agreed to dismiss the remaining charges. The State further agreed to not show the videotape at the sentencing hearing, although it reserved the right to show five still photos captured from the videotape.

On June 12, 2007, the trial court held a sentencing hearing. At this hearing, Perkins testified that he had previously molested another one of his daughters, but that "the times it happened was, was minimal compared . . . to what could have been, it was minimal times," transcript at 75, had inappropriately touched a third daughter, but that this incident was "just a fluke," id. at 25, and referred to another incident with a minor that "all happened in about a minute and a half," id. at 26. In explaining its decision to sentence Perkins to forty-five years, the trial court made the following statement:

> I think it's easier to start with addressing what I would call possible mitigating factors[.] . . . Minimal criminal record . . . , and a criminal record is based upon arrests and convictions, not behavior. . . . In fact, the only criminal event that I can see is contributing back in nineteen eighty-two. Now that's what it says, contributing. My presumption is that that is contributing to the delinquency of a minor. The thing that concerns me about that is that may very well have been an effort to obtain sexual favors from a minor. Don't know, but certainly that possibility. So you do have a minimal criminal record based upon the arrests and convictions contained in the pre-sentence report. . . . The other fact is that you did plead guilty. You pled guilty to the higher of the offenses. And because of the plea, there has not been the requirement to have a trial in this matter. . . . Now against the minimal criminal record, is a long history of criminal behavior, molesting multiple persons over long periods of time, in a position of trust. You are an opportunistic molester. And that . . . more than offsets any mitigating fact that might be available through the minimal criminal record. . . . Frankly, I don't think the plea has anything to do with this because I think you probably didn't want a jury and me and probably some other people to see the videotape. . . . Now let's look at . . . the Indiana State Constitution. The Constitution says . . . the penal code shall be founded on the principles of reformation and not vindictive justice. . . . But when I assess the likelihood of your being reformed, I don't think it's gonna happen because you minimize your behavior in this specific instance, by blaming victims on two

> different levels. You're blaming one of your previous victims for causing the current victim to behave in ways that are simply unexplainable other than by your specifically teaching this child how to do this stuff. . . . And then you say well somebody was sick, and I was lonely, and I was going through a divorce, and I was depressed. I don't doubt that some of those things were taking place. It doesn't matter. . . . So what that goes to is you said yourself that to be rehabilitated, you must admit what you've done. You didn't do that today. . . . [Y]ou have not accepted responsibility. . . . Because you don't know why you did it. . . . So that's extremely aggravating and makes it so likely that you're gonna do this again. . . . This is a crime of violence as set for[th] in the Indiana Code and that is an aggravating factor. The age of the victim is an aggravating factor because the statute under which you were charged only requires that the child be under the age of fourteen. . . . When it drops below twelve and drops below four, I believe that aggravates the crime beyond the minimal amount to establish the crime itself. . . . It was repetitive. . . . Now some people will argue . . . that you're showing remorse here. . . . And I hear the words that you say. There is no remorse here. . . . And now I must balance [the factors]. It's not close. . . . [I]f I give the maximum sentence . . . I think that the Court of Appeals will send that back to me, we're gonna have another sentencing hearing. . . . I am not minimizing the pain that you have been through [n]or do I disagree with your request that he receives the maximum sentence. I think that would be entirely appropriate. . . . I am simply recognizing that one of the impacts that could occur if I give the maximum sentence under the circumstances of this case is we'd have to do it over. And so I don't think you folks want to do that.[1]

Id. at 85-98. The trial court also explained its decision to not suspend any portion of the sentence.

> I do not see any value of suspending any portion of that sentence. In part, because I recognize that the Department of Corrections has a program called, SOMM . . . which I think is sex offender something or other. . . . [I]t is a long term I believe evidence based practice to assist people to get better. . . . And that program is more effective than I believe anything that we would have locally available, if and when you are released from the Department of Corrections.

Id. at 98-99. Perkins now appeals.

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[1] It appears that the trial court was addressing the Victim's mother and sister, who both testified at the sentencing hearing.

Discussion and Decision

I. Indiana Constitution

Perkins first argues that his sentence violates Article I, Section 18, of the Indiana Constitution, which states, "The penal code shall be founded on the principles of reformation, and not of vindictive justice." The longstanding rule is that this section "applies only to the penal code as a whole, not to individual sentences." Henson v. State, 707 N.E.2d 792, 796 (Ind. 1999); cf. Driskill v. State, 7 Ind. 338, 1855 WL 3687 at *3 (1885) ("The eighteenth section of the bill of rights, when properly construed, requires the penal laws to be so framed as to protect society, and at the same time, as a system, to inculcate the principle of reform." (emphasis added)). Perkins's argument relating to this section of our constitution points to the specific circumstances of his case. Our supreme court has previously explained that "such particularized, individual applications are not reviewable under Article I, Section 18 because Section 18 applies to the penal code as a whole and does not protect fact-specific challenges." Ratliff v. Cohn, 693 N.E.2d 530, 542 (Ind. 1998) (emphasis in original); see also Baird v. State, 604 N.E.2d 1170, 1179 (Ind. 1992) (holding a trial court properly refused to instruct the jury on Section 18, as it "seems to be addressed to the lawmaking bodies"), cert. denied, 510 U.S. 893 (1993).

Although Perkins's argument based on Section 18 is not cognizable, we also point out that the trial court discussed Section 18 at length, and explained that it considered Perkins's reformation when declining to suspend any portion of the sentence as the trial court felt Perkins would receive better rehabilitative treatment in the Department of Correction.

We conclude Perkins's sentence is not unconstitutional under Article I, Section 18.

II. Propriety of the Trial Court's Sentencing Decision

A. Standard of Review

A trial court may impose any legal sentence "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). However, a trial court is still required to issue a sentencing statement when sentencing a defendant for a felony. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218. "If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." Id. The trial court may abuse its discretion if it omits "reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law." Id. at 490-91. We will conclude the trial court has abused its discretion if the 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." Hollin v. State, 877 N.E.2d 462, 464 (Ind. 2007) (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)).

B. Aggravating and Mitigating Circumstances

The Pre-Sentence Investigation Report indicates that "the defendant would be considered a low-moderate risk for recidivism for general crimes. In this officer's opinion, his risk for future sex crimes would increase if he were in an established relationship with an

adult who had minor children." Appellant's Appendix at 183. Perkins argues that the trial court abused its discretion in failing to find this assessment as a mitigating circumstance, and by instead finding as an aggravating circumstance that Perkins was likely to commit future sex crimes.

The purpose of a pre-sentence investigation is "to provide information to the court for use at individualized sentencing," Robeson v. State, 834 N.E.2d 723, 725 (Ind. Ct. App. 2005), trans. denied, and "to ensure the court has before it all relevant information about the defendant's background it needs to formulate an appropriate sentence," Hulfachor v. State, 813 N.E.2d 1204, 1207 (Ind. Ct. App. 2004). The trial court is not required to accept the findings or recommendations in the report, and instead is to conduct "its own evaluation of the evidence to determine the existence of mitigating factors." Timberlake v. State, 690 N.E.2d 243, 266 (Ind. 1997), cert. denied, 525 U.S. 1073 (1999); see also Kinkead v. State, 791 N.E.2d 243, 248 (Ind. Ct. App. 2003) (holding trial court did not abuse its discretion by declining to find a mitigating factor listed in the pre-sentence report), trans. denied. Here, the trial court explained at length its reasons for finding that Perkins was likely to commit further sex crimes, citing Perkins's lack of remorse and the fact that he had molested three minors prior to committing the misconduct with the Victim. We conclude the trial court acted within its discretion by finding this aggravating circumstance.

Perkins next argues the trial court abused its discretion by declining to suspend a portion of Perkins's sentence to probation, "since his criminal history clearly shows he had never been on probation and clearly would be a candidate for supervision outside of prison."

Appellant's Brief at 6. This argument does not challenge the finding of mitigating or aggravating circumstances, and instead goes to the weight afforded to such circumstances. Such an argument is not cognizable, as the trial court "can not now be said to have abused its discretion in failing to 'properly weigh' such factors." Anglemyer, 868 N.E.2d at 491.

Perkins next argues that the trial court abused its discretion by referring to "literature" indicating that Perkins is a pedophile. See Tr. at 92-93 (trial court stating, "[T]he literature is pretty clear that you are a pedofile [sic]."). Perkins first argues that this reference violates Indiana Rule of Evidence 102. However, the rules of evidence do not apply to sentencing proceedings. Ind. Evid. Rule 101(c)(2). Perkins next argues that this reference violated his rights under the Sixth Amendment to the United States Constitution by preventing him from confronting the witnesses against him. "A sentencing hearing, however, is not a 'criminal prosection' within the meaning of the Sixth Amendment because its sole purpose is to determine only the appropriate punishment for the offense, not the accused's guilt." United States v. Francis, 39 F.3d 803, 810 (7th Cir. 1994); see also Debro v. State, 821 N.E.2d 367, 374 (Ind. 2005) (quoting Francis and citing cases from the First, Third, Fourth, Sixth, Eighth, Ninth, and Tenth Circuits reaching the same conclusion).[2] Perkins has cited no authority or developed any other cogent argument as to how this offhand reference by the trial court constituted an abuse of discretion, see Ind. Appellate Rule (A)(8)(a), and we find no need to

[2] Our supreme court in Debro specifically declined to determine whether the Indiana Constitution "affords a defendant a right of confrontation in a sentencing hearing." 821 N.E.2d at 374. Perkins makes no argument that it does, so we need not address this point either. See Greeno v. State, 861 N.E.2d 1232, 1233 n.1 (Ind. Ct. App. 2007) (holding that the defendant waived any argument under the Indiana Constitution by failing to provide separate analysis).

further discuss the comment, which appears to be no more than the trial court's assessment of the evidence before it.

Perkins next argues that the trial court "should have taken into account his minimal criminal history." Appellant's Br. at 8. Perkins apparently overlooks the trial court's numerous references to Perkins's minimal criminal history, and its specific reference to such history in explaining why it chose to give Perkins a sentence below the maximum. To the extent Perkins argues the trial court failed to give sufficient weight to this mitigating circumstance, we do not review the weight given to a mitigating circumstance for an abuse of discretion. See Anglemyer, 868 N.E.2d at 491.

Perkins next argues that the trial court abused its discretion by speculating that Perkins's previous conviction for "contributing" may have involved soliciting sexual favors from a minor. We agree that it is not entirely appropriate for a trial court to speculate as to a conviction's underlying facts when such facts are not identified in the record. Cf. id., 868 N.E.2d at 490-91 (holding that a trial court abuses its discretion where the record does not support its finding of aggravating and mitigating circumstances); Roney v. State, 872 N.E.2d 192, 199 (Ind. Ct. App. 2007) (holding that the trial court abused its discretion by finding as an aggravating circumstance that the defendant used drugs while on "good behavior" where no evidence in the record supported this finding), trans. denied. However, the trial court made only a passing reference to this possibility, and clearly stated that it did not know the underlying facts of the conviction. Most importantly, the trial court found Perkins's minimal criminal history to be a mitigating circumstance, and specifically referenced this factor when

explaining its decision to order less than a maximum sentence. Indeed, the trial court indicated its desire to order a maximum sentence, and ordered a sentence below the maximum based primarily on its recognition of the appellate courts' tendency to reverse maximum sentences, and its fear that reversal would force it to put the victims through another sentencing hearing. In sum, we conclude that to the extent the trial court considered an improper circumstance, such error was harmless as we can say with confidence that the trial court would have issued the same sentence had it not surmised as to the underlying facts of Perkins's conviction. See Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005) (indicating that an appellate court may affirm a sentence if a trial court's error was harmless); cf. Anglemyer, 868 N.E.2d at 491 (recognizing that remand will be appropriate "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record").

III. Appropriateness of Perkins's Sentence

A. Standard of Review

"Although a trial court may have acted within its lawful discretion in determing a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution 'authorize independent appellate review and revision of a sentence imposed by the trial court.'" Anglemyer, 868 N.E.2d at 491 (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)). When reviewing a sentence imposed by the trial court, we "may revise a sentence authorized by statute 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 have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). When determining whether a sentence is inappropriate, 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). We must examine both the nature of the offense and the defendant's character. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When conducting this inquiry, we may look to any factors appearing in the record. Roney, 872 N.E.2d at 206. The burden is on the defendant to demonstrate that his sentence is inappropriate. Childress, 848 N.E.2d at 1080.

B. Nature of the Offense

Perkins formulates no argument relating to the nature of his offense. Our review of the record indicates that Perkins committed multiple sexual acts with his four-year-old daughter while before a video camera. The young age of the victim, see Sullivan v. State, 836 N.E.2d 1031, 1035 (Ind. Ct. App. 2005) (trial court properly found aggravating circumstance where the trial court recognized that victim's age was element of child molesting, but fact that victim was eight years old made the crime "more heinous"), the fact that the victim was Perkins's daughter, see Hart v. State, 829 N.E.2d 541, 544 (Ind. Ct. App. 2005) ("Abusing a position of trust is, by itself, a valid aggravator which supports the maximum enhancement of a sentence for child molesting."), and the fact that Perkins committed multiple sexual acts on more than one occasion, see Ind. Code § 35-38-1-7.1(a)(1) (permitting a trial court to consider as an aggravating circumstance that the harm caused was

significant and greater than that necessary to establish the elements of the offense), all render Perkins's offense more heinous than a typical offense of child molesting. In sum, we have little trouble concluding that the nature of the offense does not render a forty-five-year sentence inappropriate.

C. Character of the Offender

In arguing that his character renders a forty-five-year sentence inappropriate, Perkins relies primarily on his minimal criminal history. However, Perkins admitted to having molested three victims prior to his daughter. He clearly was not leading a law-abiding life. See Roney, 872 N.E.2d at 207 (defendant had been using illegal drugs throughout his life); Bostick v. State, 804 N.E.2d 218, 225 (Ind. Ct. App. 2004) (defendant had a substance abuse problem and had been involved in a sexual relationship with a fifteen-year-old); cf. Hines v. State, 856 N.E.2d 1275, 1281-82 (Ind. Ct. App. 2006) (holding that trial court could consider defendant's admission that he had molested a child in addition to the victim when sentencing defendant for child molesting), trans. denied.

Further, as the trial court found, Perkins has shown little remorse for his actions. At the sentencing hearing, Perkins stated, "I've been in [jail] with murderers, rapists, people you just don't want to be in with. And I, I don't belong with them." Tr. at 16. When Perkins's attorney asked him, "But you understand you created a significant emotional trauma with this child?", Perkins responded, "Uh I, I did not know that. She did not act any different." Id. at 21. Perkins also repeatedly explained the Victim's behavior by claiming that the Victim had seen adult videos while in someone else's care. These statements indicate that Perkins does

not comprehend or take responsibility for the immense harm caused by his actions. We accept the trial court's determination that Perkins is not truly remorseful for his actions, see Stout v. State, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005) ("[W]ithout evidence of some impermissible consideration by the trial court, a reviewing court will accept its determination as to remorse."), trans. denied, and find that this lack of remorse comments negatively on his character, cf. Shafer v. State, 856 N.E.2d 752, 758 (Ind. Ct. App. 2006) (recognizing that a trial court may find a defendant's lack of remorse to be an aggravating factor), trans. denied.

We recognize that Perkins pled guilty, but point out that he received a significant benefit in return for this plea. See Fields v. State, 852 N.E.2d 1030, 1034 (Ind. Ct. App. 2006) (noting that the defendant "received a significant benefit from the plea, and therefore it does not reflect as favorably upon his character as it might otherwise"), trans. denied. Further, the State possessed a videotape depicting Perkins committing the criminal acts. The strength of this evidence against Perkins also reduces the weight of his guilty plea by suggesting that the plea may have been more of a strategic decision than a true expression of remorse and acceptance of responsibility. See Scott v. State, 840 N.E.2d 376, 383 (Ind. Ct. App. 2006), trans. denied.

In sum, we conclude that nothing about Perkins's character renders a forty-five-year sentence inappropriate.

Conclusion

We conclude the trial court's sentence does not violate the Indiana Constitution. We further conclude that any abuse of discretion the trial court committed in finding aggravating

and mitigating circumstances was harmless. Finally, we conclude Perkins's sentence is not inappropriate.

Affirmed.

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