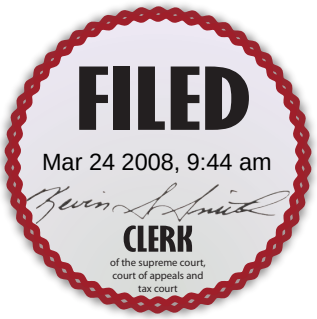

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IN THE
COURT OF APPEALS OF INDIANA

DANIEL CARMICHAEL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0708-CR-742
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable John Boyce, Judge Pro Tempore
Cause No.49G01-0706-FC-98666

March 24, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a guilty plea, Daniel Carmichael appeals his six-year sentence for child exploitation, a Class C felony. Carmichael raises two issues, which we restate as whether the trial court abused its discretion in sentencing Carmichael and whether Carmichael's sentence is inappropriate given the nature of the offense and his character. Concluding that the trial court did not abuse its discretion and that the sentence is not inappropriate, we affirm.

Facts and Procedural History

At Carmichael's guilty plea hearing, he admitted that:

> On May 29th of 2007, Detective Kurt Spidey of the Indianapolis Metropolitan Police Department was contacted by patrolman Eric Kenny regarding a child pornography investigation. Detective Spidey became aware that [T.H.] was in a relationship with a man named Daniel Carmichael . . . here in Indianapolis. Detective Spidey learned that a laptop computer had been purchased in Kentucky by Mr. Carmichael and [T.H.] and during the time of ownership of the laptop Mr. Carmichael had downloaded images that were lacking in artistic and scientific value, images specifically of young prepubescent females in different states of nudity and undressed, and Detective Spidey interviewed Mr. Carmichael, and Mr. Carmichael confirmed that indeed that it was his laptop, it was purchased brand new. . . . [A]ll photographs were contained in a file marked Dan's file or Dan Carmichael's file. He downloaded these images and videos from a website and stored them on his computer for sexual gratification purposes.

Transcript at 12-13. On June 5, 2007, the State charged Carmichael with child exploitation,[1] a Class C felony, and possession of child pornography, a Class D felony. On July 3, 2007,

[1] It appears that Carmichael was charged under the portion of the child exploitation statute that criminalizes the act of "mak[ing] available to another person a computer, knowing that the computer's fixed drive or peripheral device contains matter that depicts or describes sexual conduct by a child less than eighteen (18) years of age." Ind. Code § 35-42-4-4(b)(3). We are troubled that the factual basis identified above appears to be insufficient to establish that Carmichael made his computer available to another person. However, Carmichael has raised no argument as to the sufficiency of the factual basis, and we recognize that "[a] person who pleads guilty is not permitted to challenge the propriety of that conviction on direct appeal," Collins v. State, 817 N.E.2d 230, 231 (Ind. 2004).

Carmichael and the State entered into a plea agreement under which Carmichael agreed to plead guilty to child exploitation, and the State agreed to dismiss the possession charge. Additionally, the parties agreed that the total sentence would not exceed six years. Also on July 3, the trial court held a guilty plea hearing and accepted the guilty plea. On July 24 and July 31, 2007, the trial court held a sentencing hearing. On August 3, 2007, the trial court issued a sentencing order, in which it found the following:

> MITIGATION:
> A. The defendant accepted responsibility for his actions and pleaded guilty, saving the Court and the State of Indiana the time and expense of trial.
> B. The defendant has a dependent child and an obligation to assist the child's mother to rear the child. A period of lengthy, institutional incarceration is likely to create a hardship on innocent family members.
> AGGRAVATION
> A. The defendant has a significant adult criminal history, including more than 20 counts of issuing fraudulent, or otherwise bad, checks and seven (7) felony convictions. Most of the crimes committed by the defendant involved breaches of trust. Additionally, during his various pre-sentence investigation interviews the defendant provided significantly different accounts of his personal, military and educational history, which conflict with one another and which are unsupported by his official records, which the Court finds to be evidence of his untruthfulness. This history of untruthfulness, together with his history of breaches of trust, is an aggravator because it suggests he is unlikely to comply with Court imposed obligations and is unlikely to have the capacity to honestly participate in any Court imposed alternatives to incarceration.

Appellant's Appendix at 29-30. The trial court found that the aggravators outweighed the mitigators, and sentenced Carmichael to six years executed in the Indiana Department of Correction. Carmichael now appeals.

Discussion and Decision

I. Abuse of Discretion

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)).

Carmichael argues that the trial court abused its discretion as it "overemphasized the weight of the aggravating factor of Carmichael's prior criminal record." Appellant's Brief at 8. However, as our supreme court has explained, we do not review the weight given to an aggravating circumstance for an abuse of discretion. See Anglemyer, 868 N.E.2d at 491 ("Because the trial court no longer has any obligation to 'weigh' aggravating and mitigating factors against each other . . . a trial court can not now be said to have abused its discretion in

failing to 'properly weigh' such factors.").

Carmichael also argues that the trial court "erred in its evaluation and characterization of the honesty factor in determining his placement to serve his sentence." Appellant's Br. at 8. We interpret Carmichael's argument to be that the trial court abused its discretion by finding an aggravating circumstance not supported by the record. See Anglemyer, 868 N.E.2d at 490 (recognizing that a trial court abuses its discretion if it identifies reasons for the defendant's sentence, but "the record does not support the reasons").

Our review of the record indicates that the trial court's observation as to Carmichael's history of dishonesty has support. Initially, Carmichael's criminal history contains many crimes involving dishonesty, deception, or breach of trust. Carmichael has convictions in South Carolina for possession of a stolen vehicle,[2] two counts of forgery, fourteen counts of writing fraudulent checks,[3] shoplifting, and breach of trust.[4] Carmichael has convictions in New York of theft of services, seven counts of issuing bad checks, and felony grand larceny. These convictions clearly provide support for the trial court's observation regarding Carmichael's lack of honesty.[5] Further, a review of the pre-sentence report provides support for the trial court's observation that Carmichael has provided different accounts of his

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[2] Carmichael was convicted of this crime as a felony. See S.C. Code § 16-21-80.

[3] It is not clear from the record as to the classification of these convictions. In South Carolina, drawing or uttering fraudulent checks is either a Class C misdemeanor or a Class E felony. See S.C. Code §§ 16-1-90(E), 16-1-100(C).

[4] It is not clear from the record whether this conviction was a felony or misdemeanor. See S.C. Code § 16-13-230(B).

[5] Carmichael also has convictions in South Carolina of trespassing, driving with a suspended license, and operating an uninsured vehicle.

personal past to various pre-sentence investigators. Carmichael told the present investigator that his parents and all three of his siblings died in a plane crash on Christmas Eve, 1998. However, according to a pre-sentence report completed on June 3, 2004, in connection with a conviction in New York, his siblings died in a plane crash in 1996, his father died in a car accident in 1996, and his mother died on Christmas Day, 1997. See Pre-Sentence Report at 11-12. Next, Carmichael told the current investigator that he attended Pensacola Christian College and earned a Baccalaureate Degree in Biblical Studies / Youth Ministry in 1986, a Masters of Divinity in 1990, and a Doctorate of Divinity in 1992. He told the New York pre-sentence investigator that he earned his BA in 1991, his MA in 1993, and a P.H.D. in Christian Education Administration in 1999. Further, the current investigator contacted the college, which reported that Carmichael had been admitted on September 3, 1985, and withdrew from all nine courses in which he enrolled. See id. at 12-13. Finally, Carmichael told the current investigator that he enlisted in the United States Army in March 1986 and "received a Chapter 13 - General Discharge" in October 1988, and reported "having attained a rank of E-1 at the time of his discharge." Id. at 14.[6] He told the New York investigator that he enlisted in the Army in 1984, received a medical discharge in 1988, and was a Captain at the time of his discharge. Id.

The circumstances found by the trial court were supported by the record. To the extent that Carmichael argues the trial court gave too much weight to these circumstances, this argument is no longer cognizable.

II. Appropriateness of Carmichael's Sentence

[6] It should be noted that "E-1" is a pay level, and not a "rank."

A. Standard of Review

"Although a trial court may have acted within its lawful discretion in determining 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 v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. The burden is on the defendant to demonstrate that his sentence is inappropriate. Childress, 848 N.E.2d at 1080.

B. Character of the Offender

We recognize that Carmichael pled guilty, thereby commenting favorably on his character. However, he received a benefit in return for his plea as his exposure to prison time

for child exploitation was reduced by two years and another felony charge was dropped. Cf. 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 significant evidence of Carmichael's guilt, namely the physical evidence of his computer with child pornography stored on it, and his confession. The strength of this evidence against Carmichael 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.

Also, as discussed above, the various inconsistencies in the pre-sentence report reflect Carmichael's dishonesty. Cf. Reyes v. State, 848 N.E.2d 1081, 1083 (Ind. 2006) (considering the defendant's dishonest character in concluding that his sentence was not inappropriate).

Most importantly, however, is Carmichael's significant criminal history as outlined above. Although we recognize that this offense is Carmichael's first sex crime related to children, the sheer number of Carmichael's previous offenses, and the fact that his most recent offense was committed only two years before the instant offense comments negatively on his character. See Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006) (recognizing that the weight of a defendant's criminal history "is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's

culpability" (emphasis added)).

We conclude nothing about Carmichael's character renders a six-year sentence inappropriate.

C. Nature of the Offense

As with most cases involving guilty pleas, we have limited information regarding the nature of the offense. However, from what we can glean from the record, Carmichael downloaded numerous pictures and videos containing child pornography on his computer, and then made this computer available to others. Although little in the record distinguishes this offense from other acts constituting child exploitation, we also find little that renders a six-year sentence inappropriate when considering Carmichael's character. We take considerable exception to Carmichael's claim that his offense was "a victimless crime." Appellant's Brief at 9. Carmichael apparently believes that because "he did not create the images [or] have contact with any person involved with doing so," appellant's br. at 9,[7] there was no victim. Because this claim demonstrates a fundamental failure to understand the harm caused by Carmichael's crime, we will take the opportunity to correct Carmichael's mistaken belief. Cf. United States v. Norris, 159 F.3d 926, 929 (5th Cir. 1998), cert. denied, 526 U.S. 1010 (1999) (describing the argument that receiving child pornography is a victimless crime as "an unrealistically narrow view of the scope of harms experienced by the child victims of the child pornography industry").

[7] Carmichael also claims that he "did not . . . make them available to anyone else." Id. However, an element of the offense is that Carmichael made these images available to T.H. See Ind. Code § Ind. Code § 35-42-4-4(b)(3); see also Appellant's App. at 17 (charging information indicating that Carmichael made his computer available to others).

Contrary to Carmichael's claim, we believe "[i]t goes without saying that possession of child pornography is not a victimless crime." United States v. Yuknavich, 419 F.3d 1302, 1310 (11th Cir. 2005). Those who view (and in Carmichael's case view and make available to others) child pornography harm the children depicted in three ways: 1) perpetuating the abuse initiated by the creator of the material; 2) invading the child's privacy; and 3) providing an economic motive for producers of child pornography. See Norris, 159 F.3d at 929-39.

The Ninth Circuit explained the difference between one who receives or views child pornography and one who uses drugs:[8] "The child pornographer simply cannot be analogized to the garden-variety drug user . . . who is, practically speaking, his own victim. The child pornographer victimizes not himself, but children." United States v. Boos, 127 F.3d 1207, 1210 (9th Cir. 1997) (emphasis in original), cert. denied, 522 U.S. 1066 (1998). Indeed, by receiving and storing child pornography and making this pornography available to others, Carmichael furthered the harm already caused to the children. See New York v. Ferber, 458 U.S. 747, 759 (1982) ("[T]he materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation."). Even a "'passive consumer who merely receives or possesses the images directly contributes to this continuing victimization." United States v. Sherman, 268 F.3d 539, 545 (7th Cir. 2001), cert. denied, 536 U.S. 963 (2002). Carmichael further harmed the victims by allowing others the ability to view the materials.

Second, "the recipient may be considered to be invading the privacy of the children depicted, directly victimizing these children." Norris, 159 F.3d at 930. As the Supreme Court has noted, "[a] child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography." Ferber, 458 U.S. at 759 n.10 (quoting Shoulvin, Preventing the Sexual Exploitation of Children: A Model Act, 17 WAKE FOREST L. REV. 535, 545 (1981)). Carmichael's acts of downloading, and then making available to others, images of child pornography violated the children's "individual interest in avoiding the disclosure of personal matters." Sherman, 268 F.3d at 546.

Finally, it seems clear that the child pornography industry would not exist in the absence of patrons such as Carmichael. See Boos, 127 F.3d at 1210 (recognizing that children were "'injured' (both physically and psychologically) as a result of [the defendant's] patronage of the porn industry"). Is Carmichael's offense less egregious than that of those who actually create or distribute these heinous materials? Possibly. However, without Carmichael and people of his ilk, those who create and distribute the materials would have no incentive to do so. See United States v. Tillmon, 195 F.3d 640, 644 (11th Cir. 1999) ("Although an argument can be made that the production of child pornography may be more immediately harmful to the child involved, the dissemination of that material certainly exacerbates that harm."); Norris, 159 F.3d at 930 (suggesting that it may be "impossible to determine whether child pornographers or consumers of child pornography were initially

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[8] We neither reject nor accept the Ninth Circuit's conclusion that possession of drugs may be considered a victimless crime.

responsible for the creation of the child pornography industry . . . . Neither could exist without the other."). Although Carmichael has victimized the children in a different manner than those who create the materials, he has victimized them nonetheless. Cf. Boos, 127 F.3d at 1211 n.1 (declining to draw a "fine-line distinction between the [harms caused by the] production of child pornography . . . and the distribution of that pornography" (emphasis in original)).

Carmichael received a six-year sentence for his offense. He has failed to persuade this court that such a sentence is inappropriate given his character, as evidenced by his lengthy criminal history and dishonesty, and the nature of his offense.

Conclusion

We conclude Carmichael's sentence is not inappropriate given his character and the nature of the offense.

Affirmed.

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