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FILED
Jun 30 2008, 10:02 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE COURT OF APPEALS OF INDIANA

CHRISTOPHER J. HOVIOUS,)
Appellant-Defendant,)
vs.) No. 79A05-0712-CR-689
STATE OF INDIANA,)
Appellee-Plaintiff.)

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0612-FC-75

June 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Christopher J. Hovious appeals his sentences for his four convictions for Child Solicitation, as Class C felonies.[1] We revise and remand.

Issues

Hovious raises two issues on appeal

I. Whether the trial court abused its discretion in recognizing an improper aggravating circumstance; and

II. Whether his sentences are inappropriate.

Facts and Procedural History

On October 3, 12, 24, and 31 of 2006, Hovious, a twenty-five-year old man, participated in a chat room on the Internet and initiated discussions suggesting sexual acts with a person he believed to be a thirteen-year-old girl, "CeCe." "CeCe" was actually an undercover police officer. In the final chat session, Hovious arranged to meet with "CeCe" at her apartment in Lafayette. When Hovious knocked on the apartment door, he was greeted by two detectives and was arrested.

On September 28, 2007, Hovious pled guilty to four counts of Child Solicitation, as Class C felonies, pursuant to a plea agreement. In exchange, the State agreed to dismiss the charge of Attempted Child Molesting, as a Class A felony.[2] The plea agreement left the sentence to the discretion of the trial court.

At the conclusion of the sentencing hearing, the trial court found a single aggravator,

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[1] Ind. Code § 35-42-4-6.

Hovious's teenage alcohol and marijuana use, as admitted in the Pre-Sentence Report. The trial court found mitigators of Hovious's guilty plea, good employment record, relatively low LSIR score indicating a low possibility of recidivism, family and community support, lack of criminal convictions, and two children although Hovious was in arrears in child support. Although it did not consider the single aggravator to be significant, the trial court concluded that the aggravator outweighed the mitigators. The trial court sentenced Hovious to two and one-half years on each count, all to be served consecutively, with seven years suspended to probation and the last year of the executed sentence to be served on house arrest.

Hovious now appeals.

Discussion and Decision

I. Validity of Aggravator

First, Hovious contends that the trial court abused its discretion by basing his sentences on an improper aggravator. Sentencing decisions rest within the discretion of the trial court. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). As long as the sentence is within the statutory range, it is subject to review only for an abuse of discretion. Id. An abuse of discretion occurs when 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." Id. (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)). In Anglemyer, our Supreme Court noted examples of ways in which a trial court abuses its discretion:

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[2] Ind. Code §§ 35-42-4-3 and 35-41-5-1.

> One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that explains reasons for imposing a sentence-including a finding of aggravating and mitigating factors if any-but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Under those circumstances, remand for resentencing may be the appropriate remedy 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.

Id. at 490-91. However, under the new advisory statutory scheme, the relative weight or value assignable to reasons properly found, or to those that should have been found, is not subject to review for abuse of discretion. Id. at 491.

Essentially, Hovious asserts that the aggravator of admitted underage consumption of alcohol and short period of marijuana usage is not a proper aggravator because none of this admitted activity was reduced to a conviction or even charged. For the purpose of compiling the Pre-Sentence Investigation Report, Hovious admitted to having "first consumed alcohol at the age of 18, and last consumed in September, 2007. He denied any past addiction to or regular use of alcohol." Pre-Sentence Report at 5. Hovious also reported using marijuana for a month when he was eighteen, but denied any other drug use.

A trial court may consider uncharged crimes as a part of a defendant's criminal history. Willoughby v. State, 552 N.E.2d 462, 470 (Ind. 1990). The historical fact that a defendant has committed a crime, such that it may then be properly found to constitute the aggravator of a criminal history, may be established upon evidence that the defendant has been convicted of another crime, upon his own admission of guilt of another crime, or upon evidence that the defendant committed another crime which is properly admitted at trial

under an exception to the general prohibition against evidence of prior bad acts. Tunstill v. State, 568 N.E.2d 539, 544 (Ind. 1991). Here, via the Pre-Sentence Report Hovious admitted to past criminal conduct for which he had not been charged. Hovious did not dispute the accuracy of the report. If a defendant confirms the accuracy of a pre-sentence report when given an opportunity to contest it, such a confirmation amounts to an admission of information contained in the report. Carmona v. State, 827 N.E.2d 588, 596-97 (Ind. Ct. App. 2005). Therefore, the trial court did not abuse its discretion in using this admission from the pre-sentence report to find an aggravator of Hovious's criminal history.

Hovious also argues that the aggravator is improper because the criminal conduct was remote in time to the current offenses. The significance of a defendant's criminal history for the purposes of imposing sentence varies based on the gravity, nature and number of prior offenses as they relate to the current offenses. Combs v. State, 851 N.E.2d 1053, 1062 (Ind. Ct. App. 2006), trans. denied. In addition, the chronological remoteness of the prior criminal history should be considered. Buchanan v. State, 767 N.E.2d 967, 972 (Ind. 2002). However, the significance of a defendant's criminal history is ultimately the weight the trial court assigns this circumstance as an aggravator. Thus, Hovious essentially asks that we review the relative weight assigned by the trial court to his criminal history. Such review is not permissible.

As the trial court found one aggravating circumstance, imposing consecutive sentences was within its discretion. See Ortiz v. State, 766 N.E.2d 370, 377 (Ind. 2002) ("In order to impose consecutive sentences, the trial court must find at least one aggravating

circumstance.”). We conclude the trial court did not abuse its discretion in sentencing Hovious.

II. Appropriateness of Sentence

Hovious also contends that the sentences imposed by the trial court are inappropriate under Indiana Appellate Rule 7(B). Our Supreme Court recently reviewed the standard by which appellate courts independently review criminal sentences:

> 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 through Indiana Appellate Rule 7(B), which provides that a court 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. The burden is on the defendant to persuade us that his sentence is inappropriate.

Reid v. State, 876 N.E.2d 1114, 1116 (Ind. 2007) (internal quotation and citations omitted). Hovious’s challenged sentences are for Class C felonies. The range of possible sentences for a Class C felony is between a minimum of two years and a maximum of eight years with an advisory sentence of four years. The trial court sentenced Hovious to two and one-half years for each conviction and ordered the sentences to be served consecutively. The trial court suspended seven years to probation.

As for the nature of the offenses, Hovious initiated four separate sexually explicit conversations via the Internet suggesting deviate sexual conduct and sexual intercourse with “CeCe,” who Hovious believed to be a thirteen-year-old girl. Actually, “CeCe” was an undercover police officer. These four conversations occurred over the time span of one month. During the last conversation, Hovious suggested that he travel to Lafayette to meet

"CeCe" and have sex with her either at her home or a hotel.

As for the character of the offender, Hovious pled guilty to the four offenses in exchange for the State dismissing the Class A felony charge for Attempted Child Molesting. At the sentencing hearing, Hovious repeatedly took responsibility for his actions and was remorseful for his poor choices. Hovious has no criminal convictions and has a good employment history, currently working as an apprentice electrician. Hovious completed a Level of Service Inventory, which is utilized to indicate the likelihood of an individual committing an offense in the future. The results indicated that there is an 11.7% chance that Hovious will re-offend within one year if no services were offered to him, placing him in the Low Risk/Needs category.

Hovious is divorced and has two children for whom he pays child support, although he has failed to pay any since May 23, 2007. Although the schedule varies by week, Hovious's two children are in his care almost every other day. Additionally, Hovious has strong family and community support as evidenced by fifteen letters submitted to the trial court.

During his interview for the Pre-Sentence Report, Hovious admitted that he had consumed alcohol starting when he was eighteen and used marijuana for a month. Although it is an admission of past criminal conduct, this admission in part reflects positively on Hovious's character by his candor to the court. Furthermore, this admitted conduct occurred seven years prior to the current offenses and is not similar in nature to the current offenses. See Combs, 851 N.E.2d at 1062 (The significance of a defendant's criminal history for the purposes of imposing sentence varies based on the gravity, nature and number of prior

offenses as they relate to the current offenses.).

Based on the nature of the offenses and the character of the offender, we are persuaded that Hovious's sentences are inappropriate. The circumstances are best described as an episode of criminal conduct within a relatively short period of time involving the same victim. Although Hovious has a criminal history, it has very little significance in that it is remote in time and not similar to the current offenses. Furthermore, Hovious pled guilty, expressed remorse, has a low indication for re-offending, has strong family and community support, and incarceration would impose a hardship on his children. We therefore revise Hovious's sentences by ordering two of the sentences to be served concurrently to the other two. This results in an aggregate sentence of five years. We also order that three of these years be suspended to probation, half of which should be supervised probation and the other half unsupervised.

Conclusion

We conclude that the trial court did not abuse its discretion in sentencing Hovious. However, we are persuaded that Hovious's sentences are inappropriate. We direct the trial court to enter the revised sentence in accordance with this opinion.

Revised and remanded.

FRIEDLANDER, J., and KIRSCH, J., concur.