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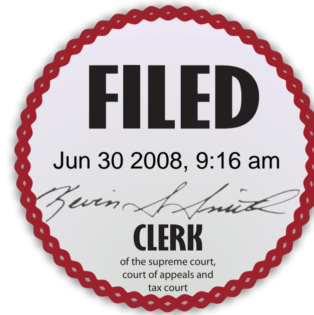

ATTORNEY FOR APPELLANT:

MICHAEL K. AUSBROOK
Bloomington, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JUSTIN F. ROEBEL
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ANIBAL SARAVIA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0712-CR-1030
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0506-FA-93972

June 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Anibal Saravia appeals the sentence imposed by the trial court following this court's remand for resentencing. We affirm.

Issue

The sole restated issue is whether the trial court, when resentencing Saravia, properly relied on aggravating circumstances not mentioned in the first sentencing order.

Facts

We described the facts of this case on Saravia's first appeal as follows:

> On June 2, 2005, fourteen-year-old M.W. told her neighbor and family friend, Robin Morgan, that her step-father, Saravia, had been having sexual intercourse with her. Morgan reported M.W.'s allegations to the police. Early the next morning, Saravia was taken to the police station and verbally informed of his Miranda rights. Saravia then gave a videotaped statement to the police in which he admitted having sexual intercourse with M.W.
>
> On June 6, 2005, Saravia was charged with three counts of Class A felony child molesting based on sexual intercourse that occurred in 2002, when M.W. was eleven, and one count of Class B felony sexual misconduct with a minor based on sexual intercourse that occurred in 2005, when M.W. was fourteen. On July 13, 2005, the charging information was amended to include a second count of Class B felony sexual misconduct with a minor based on another allegation of sexual intercourse occurring in 2005.
>
> Prior to trial, Saravia moved to suppress his statement to police. After a hearing, the trial court denied this motion. In July 2006, a jury found Saravia guilty as charged. At the August 2006 sentencing hearing, the trial court sentenced Saravia to twenty years on the Class A felony convictions and six years on the Class B felony convictions. The trial court ordered that two of the Class A felony sentences be served

> consecutively and that the remaining sentences be served concurrently for a total sentence of forty years. . . .

Saravia v. State, No. 49A02-0609-CR-796, slip op. pp. 2-3 (Ind. Ct. App. June 7, 2007), trans. denied.

Among Saravia's claims of error, he asserted that the trial court failed to support its decision to require two of the Class A felony sentences to be served consecutively. The trial court had stated:

> The Court's going to find as mitigating that he does have a minimal criminal history. He does have one, two, three, four prior arrests, but all of those were no files or dismissals and they were for alcohol-related incidents so the Court believes his minimal criminal history is mitigating. The court also will find that imprisonment—long-term imprisonment would impose a hardship on his dependants. And I agree with [the prosecutor], I think I can do some of these consecutive, so—because they were separate incidents and it wasn't an isolated incident.

Id. at pp. 9-10. We agreed that this statement was inadequate to justify consecutive sentences and held:

> [I]n the absence of an explanation that the aggravating circumstances outweighed the mitigating circumstances where such cannot be presumed based on the minimum sentences that Saravia received, we conclude that the trial court abused its discretion in sentencing Saravia to consecutive sentences. We reverse and remand for the trial court to resentence Saravia in a manner that comports with [Marcum v. State, 725 N.E.2d 852 (Ind. 2000)] and note that the sentence imposed on remand could be the same sentence we reverse herein if the court supports its sentence with appropriate findings.

Id. at pp. 11-12.

On remand, the trial court conducted a new sentencing hearing. Neither the State nor Saravia presented any new evidence, and the State presented no argument. At the conclusion of the hearing, the trial court stated:

> In explaining the Court's sentence, the Court is going to find as aggravating the fact that these were all separate incidents. . . . So the fact that this was an ongoing molestation—or five separate incidents, starting when the victim was 11 years old and continuing until she was 14. The Court believes that those separate incidents and the ongoing nature of those sexual intercourse—of the sexual intercourse were separate incidents. The Court believes that that is aggravating. The Court's also going to find that Mr. Saravia violated a position of trust. Specifically, the defendant in this case, was her stepfather during the times of these incidents. The Court will find as mitigating his criminal history. . . . The Court will also find that long term imprisonment would impose a hardship on his dependants [sic]. I've carefully weighed the aggravators against the mitigators and I believe that the aggravators outweigh the mitigators.

Tr. p. 9. Based on these findings, the trial court imposed the same sentence as before: twenty years for each Class A felony conviction, with two of those running consecutively and the third concurrently, and six years for each Class B felony conviction, all running concurrent with the Class A felony sentences, for an aggregate sentence of forty years. Saravia now appeals.

Analysis

Saravia contends the trial court on remand was not permitted to consider or rely upon any aggravating circumstances that it had not mentioned in its original sentencing statement. We disagree. We first note that as a general proposition, when an appellate court finds an irregularity in sentencing and remands for a new sentencing order, the trial

court has three options: (1) it can issue a new sentencing order without taking any further action; (2) it can order additional briefing on the sentencing issue and issue a new sentencing order without holding a hearing; or (3) it can hold a new sentencing hearing at which additional factual submissions either may or may not be allowed and issue a new sentencing order based on the presentation of the parties. Taylor v. State, 840 N.E.2d 324, 342 (Ind. 2006) (quoting O'Connell v. State, 742 N.E.2d 943, 953 (Ind. 2001)). This language strongly suggests that when an appellate court remands a case for resentencing, the trial court is not strictly limited to reliance on aggravators and mitigators that it mentioned as part of the original sentencing order. Certainly, there is no such express limitation.

The State notes that in Neff v. State, 849 N.E.2d 556, 561 (Ind. 2006), a case that involved aggravators that were found invalid under Blakely v. Washington, our supreme court stated:

> Although it is fair to remand for re-sentencing when an appellate court invalidates an aggravator because the underlying fact was not proven to the standard set in Blakely, we see little grounds for providing the State with the opportunity to prove new aggravators that had not previously been presented before the trial court. Consequently, the State should not be afforded a second bite at the apple by being permitted to attempt to prove new aggravators beyond those initially presented to, and found by, the trial court.

Arguably, this language is not entirely consistent with Taylor and O'Connell. Neff, however, was concerned specifically with aggravators that were found invalid under Blakely. Additionally, we read Neff, to the extent it can be applied to cases that do not involve Blakely concerns, to apply only in situations where aggravators are invalidated

on appeal and as prohibiting the State on remand from introducing new evidence of aggravators not introduced during the first sentencing hearing.

Here, we did not invalidate any aggravators in our first opinion. We simply held that the sentencing statement was inadequate to explain the imposition of consecutive sentences. Also, on remand the State presented no evidence of "new" aggravators and, in fact, made no argument to the trial court. Instead, the trial court simply rephrased its earlier sentencing order and relied on facts presented during trial or the original sentencing hearing. We conclude Neff is inapplicable here and did not prohibit the trial court from relying on aggravating circumstances not specifically mentioned in the first sentencing order.

Saravia also contends that pursuant to Marcum v. State, 725 N.E.2d 852 (Ind. 2000), the trial court on remand was required to impose concurrent sentences because it had not originally expressly found any aggravating circumstances. In Marcum, the trial court had specifically found that the aggravating and mitigating circumstances were in balance but ordered that the defendant's sentences for murder, conspiracy, and two counts of auto theft be served consecutively. Our supreme court held, "because the trial court found the aggravating and mitigating circumstances to be in balance, there is no basis on which to impose consecutive terms. Accordingly, this case is remanded to the trial court with direction to impose concurrent sentences on all counts." Marcum, 725 N.E.2d at 864.

In this case, however, the trial court did not expressly find that the aggravators and mitigators balanced. Instead, the basis for our remand was that the trial court's reasoning

for imposing consecutive sentences was unclear. Thus, Marcum is not directly applicable. When we said that Saravia had to be sentenced "in a manner that comports with Marcum," we simply were advising that consecutive sentences could not be imposed unless the trial court found that the aggravating circumstances outweighed the mitigating circumstances. Saravia, slip op. p. 11. We did not mean that concurrent sentences had to be imposed. If we did, we would not have remanded to the trial court for further proceedings but would have adjusted the sentence ourselves.

Indeed, we expressly advised the trial court that it was possible to impose precisely the same sentence as before, "if the court supports its sentence with appropriate findings." Id. at p. 12. Essentially, this statement amounts to the law of the case. "The doctrine of the law of the case is a discretionary tool by which appellate courts decline to revisit legal issues already determined on appeal in the same case and on substantially the same facts." Cutter v. State, 725 N.E.2d 401, 405 (Ind. 2000). The purpose of the doctrine is to promote finality and judicial economy. Id. The law of the case doctrine is not as strict as res judicata and it does not prevent us from revisiting a prior decision of ours in all circumstances, but we are reluctant to do so in the absence of extraordinary circumstances. State v. Lewis, 543 N.E.2d 1116, 1118 (Ind. 1989). There are no such circumstances here, particularly given our holdings that trial courts are not absolutely prohibited from finding "new" aggravating circumstances when an appellate court remands for resentencing, and that Marcum did not require the imposition of concurrent sentences.

Saravia does not take issue with the sufficiency of the sentencing statement as supporting the sentence imposed or the factual support for or legal permissibility of the aggravators noted by the trial court, aside from alleged improper reliance on "new" aggravators. In any event, we agree with the State that the first aggravator mentioned in the trial court's new sentencing order—that there were multiple offenses that occurred over several years—is simply a more detailed version of the trial court's observation in the first sentencing order that there were separate instances of molestation, and which is now expressly denoted as an aggravating circumstance. As for the second "new" aggravator—that Saravia enjoyed a position of trust over the victim as her step-father—there is no contention that this is inaccurate. The trial court properly sentenced Saravia on remand.

Conclusion

The trial court was not prohibited on remand from relying on aggravating circumstances not mentioned in the original sentencing order. The new order is sufficient to justify consecutive sentences. We affirm.

Affirmed.

CRONE, J., and BRADFORD, J., concur.