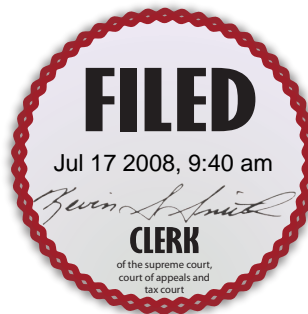


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

CHRISTOPHER ARBUCKLE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 29A02-0712-CR-1038

APPEAL FROM THE HAMILTON CIRCUIT COURT
The Honorable Judith S. Proffitt, Judge
Cause No. 29C01-0612-FD-0260

July 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary¹

Christopher Arbuckle appeals his two-year sentence for Class D felony failure to return to lawful detention. Specifically, he contends that the trial court abused its discretion because the sentencing statement is inadequate to permit appellate review and fails to discuss several mitigating circumstances and that his sentence is inappropriate. Concluding that the trial court's oral sentencing statement is adequate to permit proper appellate review, that the trial court did not abuse its discretion in failing to consider several mitigators, and that Arbuckle's sentence is not inappropriate, we affirm.

Facts and Procedural History

In May 2000, the State charged Arbuckle with nine counts of sexual misconduct with a minor (two Class B felonies and seven Class C felonies), and, in February 2005, a jury found him guilty of eight counts.² The trial court sentenced Arbuckle to an aggregate term of ten years with six years executed and four years suspended to probation. Of those six years executed, Arbuckle was ordered to serve three years in the

¹ We note that Arbuckle included a copy of the presentence investigation report on white paper in his appendix. *See* Appellant's App. p. 29-38. We remind Arbuckle that Indiana Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Administrative Rule 9(G)(1)(b)(viii) states that "all pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access" and "confidential." The inclusion of the presentence investigation report printed on white paper in his appellant's appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part: "Every document filed in a case shall separately identify documents that are excluded from public access pursuant to Admin. R. 9(G)(1) as follows: (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked 'Not for Public Access' or 'Confidential.'"

² Though mentioned by neither party, this Court reversed Arbuckle's conviction and four-year sentence for Count VIII on direct appeal, leaving Arbuckle with seven convictions. *See Arbuckle v. State*, No. 29A04-0505-CR-258 (Ind. Ct. App. May 19, 2006).

Department of Correction followed by two years on work release through Hamilton County Community Corrections and one year on electronic monitoring.

In January 2006, Arbuckle began his work release through Hamilton County Community Corrections. He was granted seven hours daily to work at Donato's Pizza. On December 16, 2006, Arbuckle was eleven months and eleven days into his work release when he left the facility but did not go to work or return to the facility as scheduled. As a result, on December 21, 2006, the State charged Arbuckle with Class D felony failure to return to lawful detention.³

In July 2007, Arbuckle pled guilty to failure to return to lawful detention in an open plea with the parties free to argue sentencing at a later date. At the September 2007 sentencing hearing, Arbuckle made a lengthy statement to the court, in which he said that he was innocent of his sexual misconduct convictions, that he received two college degrees while he was in the DOC, that he was abused by other inmates while he was in the DOC and had to undergo counseling as a result, that he was twenty days short of finishing his work release when he violated it, that he learned only days before violating his work release that his wife was divorcing him, that he experienced a nervous breakdown, that his family was suffering greatly through all of this, and that he was facing a probation violation in the sexual misconduct with a minor case. At the conclusion of the sentencing hearing, the trial court identified as a mitigator that incarceration would create a hardship on Arbuckle's three dependents. The court identified as aggravators that Arbuckle violated a condition of probation in the sexual

³ Ind. Code § 35-44-3-5(c).

misconduct with a minor case and that he has a history of criminal activity, that is, his sexual misconduct with a minor convictions. The court then sentenced Arbuckle to an enhanced term of two years and ordered it to be served consecutive to any probation or additional sentence imposed in the sexual misconduct with a minor case. Arbuckle now appeals his sentence.

Discussion and Decision

Arbuckle raises two issues on appeal, which we reorder and restate as follows. First, he contends that the trial court abused its discretion because the sentencing statement is inadequate to permit appellate review and fails to discuss several mitigating circumstances. Second, he contends that his sentence is inappropriate.

I. Sentencing Statement and Mitigators

Arbuckle first appears to argue that the trial court abused its discretion because its sentencing statement is inadequate to permit appellate review. Indiana trial courts imposing sentences for felony offenses are required to enter sentencing statements. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). Such statements “must include a reasonably detailed recitation of the trial court’s reasons for imposing a particular sentence.” *Id.* Adequate sentencing statements serve the primary purposes of guarding against arbitrary and capricious sentencing and providing an adequate basis for appellate review. *Id.* at 489 (citing *Dumbky v. State*, 508 N.E.2d 1274, 1278 (Ind. 1987)). They also serve the additional goals of “contribut[ing] significantly to the rationality and consistency of sentences” and “help[ing] both the defendant and the public understand why a particular sentence was imposed.” *Id.*

(quoting *Abercrombie v. State*, 275 Ind. 407, 417 N.E.2d 316, 319 (1981)). On appeal, we consider both written and oral sentencing statements. *McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007).

Although the trial court's written sentencing statement provides only that "[the] Court finds that the aggravating and mitigating circumstance[s] contained in the PSI are appropriate and states the reasons for imposing the following sentence," Appellant's App. p. 51, the trial court's oral sentencing statement is a reasonably detailed recitation of the trial court's reasons for imposing the sentence. That is, the court orally identified two aggravators, Arbuckle's criminal history and violation of probation, and one mitigator, the hardship of incarceration on his three dependents. The trial court's oral sentencing statement is adequate to permit proper appellate review.

Arbuckle next argues that the trial court abused its discretion by failing to consider several mitigators listed in Indiana Code § 35-38-1-7.1(b). An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Anglemyer*, 868 N.E.2d at 493. "If the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist." *Id.* (quotation omitted).

Arbuckle first asserts that the trial court should have considered as a mitigator that no one was injured and no other crimes were committed while he was away from lawful detention. However, because Arbuckle was, in essence, in a fish bowl being watched, the trial court did not abuse its discretion by failing to consider this as a mitigator.

Arbuckle next asserts that the trial court should have considered as a mitigator that the events are unlikely to recur because it is extremely doubtful that he will be given another chance at a community corrections program. Given Arbuckle's probation violation in the sexual misconduct with a minor case, the trial court did not abuse its discretion in failing to consider this as a mitigator.

Though not rising to the level of a defense, Arbuckle next asserts that the trial court should have taken into consideration his state of mind. Specifically, Arbuckle highlights that his wife had recently filed for divorce and he had recently started taking Prozac. Because Arbuckle's state of mind is not an excuse to commit a new crime, the trial court did not abuse its discretion in failing to consider this as a mitigator.

Arbuckle next asserts that the trial court failed to consider that he is likely to respond affirmatively to probation or short-term imprisonment because he was twenty days shy of completing his work release. Given Arbuckle's violation of probation in the sexual misconduct with a minor case, the trial court did not abuse its discretion by failing to consider this as a mitigator.

Finally, Arbuckle asserts that the trial court should have considered as a mitigator that his character and attitude—as reflected by the fact that he obtained two college degrees while in the DOC and received counseling—indicate that he is unlikely to commit another crime. However, Arbuckle received his degrees while in the DOC and received a shorter sentence as a result, underwent counseling, and still committed another crime after being released from the DOC. The trial court did not abuse its discretion in

failing to consider as a mitigator Arbuckle's character and attitude. The trial court did not abuse its discretion in sentencing Arbuckle to two years.⁴

II. Inappropriate Sentence

Arbuckle also contends that his two-year sentence is inappropriate. Although a trial court may have acted within its lawful discretion in imposing a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences 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.” *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491). The defendant has the burden of persuading us that his sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

Arbuckle, who has seven convictions for sexual misconduct with a minor, was given a chance at freedom and to be reunited with his family by being able to serve part of his ten-year sentence through Hamilton County Community Corrections. Nevertheless, only twenty days short of completing his work release, Arbuckle—risking everything—left the facility but did not go to work or return to the facility as scheduled. Simply put, Arbuckle blew his chance. Though Arbuckle has some redeeming character traits, these are overshadowed by his sexual misconduct with a minor convictions and his

⁴ Arbuckle also argues that the trial court abused its discretion in not weighing the aggravators and mitigators. However, our Supreme Court stated in *Anglemyer* that trial courts no longer have any obligation to weigh aggravating and mitigating factors against each other when imposing sentences. *Anglemyer*, 868 N.E.2d at 491. Accordingly, trial courts cannot now be said to have abused their discretion in failing to properly weigh such factors. *Id.*

failure to abide by the terms of his sentence in that case. As such, Arbuckle has failed to persuade us that his slightly enhanced sentence of two years, which is still less than the maximum sentence of three years, is inappropriate.

Affirmed.

MAY, J., and MATHIAS, J., concur.