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IN THE COURT OF APPEALS OF INDIANA

TIMOTHY BREWER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A05-0808-CR-466
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable George A. Hopkins, Judge
Cause No. 34D04-0802-FB-42

December 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Timothy Brewer appeals the eight-year sentence imposed following his plea of guilty to child molesting, a Class C felony. On appeal, Brewer raises two issues, which we restate as: (1) whether Brewer's sentence violates the Sixth Amendment of the U.S. Constitution; and (2) whether Brewer's sentence is inappropriate in light of the nature of the offense and the character of the offender. Concluding that Brewer's sentence does not violate the Sixth Amendment and is not inappropriate, we affirm.

Facts and Procedural History[1]

Brewer lives with his mother and younger brother at his maternal grandmother's house. Brewer suffers from several mental and physical conditions, including: attention deficit-hyperactivity disorder ("ADHD"); dyslexia; hydrocephalus accompanied by seizures;[2] high blood pressure; and thyroid problems. Although nineteen years old at the time of the offense, Brewer was still in high school attending regular and special education classes as well as automotive vocational classes.

[1] Brewer's counsel is reminded that pursuant to Indiana Appellate Rule 46(A)(6), the statement of facts should be given in narrative form stated in the light most favorable to the judgment and should not be argumentative. Nicholson v. State, 768 N.E.2d 1043, 1045 n.2 (Ind. Ct. App. 2002). The statement of facts in Brewer's brief does not present a narrative summary of the molestation, attempting instead to gloss over it in a single sentence and imply that only one episode of molestation occurred when the evidence clearly does not support such an inference. Counsel's failure to provide an adequate statement of facts has made our review of this case much more difficult.

In addition, Brewer's counsel included in his appendix a copy of the presentence investigation report on white paper. 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)." Indiana Administrative Rule 9(G)(1)(b)(viii) states that "[a]ll pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access" and "confidential." Inclusion of the presentence investigation report printed on white paper in the appendix is inconsistent with Trial Rule 5(G), which requires documents excluded from public access to be filed on light green paper or have a light green coversheet attached to the document marked "Not for Public Access" or "Confidential." We remind counsel to follow these rules in future filings with this court.

[2] Hydrocephalus is a build-up of excess fluid in the brain, most often because of an obstruction preventing proper fluid drainage. Hydrocephalus – MayoClinic.com, http://www.mayoclinic.com/health/hydrocephalus/DS00393 (last visited December 15, 2008).

F.S. is Brewer's cousin.[3] On many occasions, F.S. visited Brewer and his family at Brewer's house and often stayed overnight. F.S. enjoyed spending time at Brewer's house. Beginning when F.S. was five years old and continuing until November of 2007 when F.S. was six years old, Brewer repeatedly molested F.S. Specifically, Brewer would engage in oral sex with F.S. and make F.S. engage in oral sex with him until he ejaculated in F.S.'s mouth. Brewer also placed his finger in F.S.'s anus and attempted to engage in anal sex with F.S. On one occasion, Brewer promised F.S. Halloween candy in return for F.S. performing oral sex on Brewer. When F.S. refused to perform oral sex on Brewer, Brewer would exclude F.S. from his room or tell him, "my room, my rules." Appellant's Appendix, at 19. Brewer also repeatedly told F.S. not to tell anyone about the molestation and threatened to shoot F.S. with a B.B. gun if he did tell anyone.

Prior to the molestation of F.S., Brewer exhibited other inappropriate sexual conduct. As a young child in kindergarten or first grade, Brewer exposed his genitals on a school bus. Brewer has also been accused of viewing pornography on school computers and sexually touching female students. Around age 14 or 15, Brewer was charged as a juvenile with what would be child molesting if committed by an adult; however, this case was dismissed before the juvenile court made any findings.

On February 14, 2008, the State charged Brewer with two counts of child molesting, both Class B felonies. On May 6, 2008, Brewer entered into a plea agreement whereby he agreed to plead guilty to a single count of child molesting, a Class C felony, in exchange for the State agreeing to dismiss the second child molesting count. The

[3] The record is unclear whether F.S. and Brewer are first or second cousins, but the record is clear that the two shared a relatively close relationship and saw each other often when F.S. would visit Brewer's house.

agreement left sentencing to the discretion of the trial court within the statutory range for a Class C felony.

On June 23, 2008, the trial court held a change of plea and sentencing hearing. At the sentencing hearing, Brewer testified to his remorse as follows: "I'm very sorry this happened and I didn't mean for none of this to happen," transcript at 54; "I'm sorry that the things happened the way they did," id. at 57; "I did not intend for any of this to happen, I would give anything not to hurt any of my family again, including [F.S.] … Please forgive me for what I've done to the family," id. at 58. When asked by the trial court what lesson he had learned from his incarceration prior to the hearing, Brewer replied, "That I will never do this again and that I miss my family so much and I miss playing cards with them, I cry every night to be with them . . . ." id. at 55.

The trial court accepted the plea agreement, found Brewer guilty of child molesting, a Class C felony, and sentenced him to eight years executed with the Department of Correction. Prior to announcing the sentence, the trial court gave this sentencing statement:

> I find that in this matter the following aggravating circumstances are present. First of all, the defendant was in a position of trust and a family relationship with the victim and from what I can understand the victim enjoyed being with the defendant. I think the defendant took advantage of that relationship. I also find there was some evidence that the defendant threatened to harm the victim. I don't think it's an aggravating circumstance that the victim was less than 12, although I think that could be argued. Under the statute, the crime involves people under the age of 14. A separate statute talks about aggravation being under the age of 12. I'm not going to consider that one way or another. To me it's an interesting argument.
>
> Mitigating circumstances I find that the defendant has no prior history as an adult, any juvenile matters which I tend to disregard, would be mitigating. While it is true that he is entering a plea and that is a mitigating

> circumstance, it is a plea to a lesser offense and it's also a plea in which another charge is being dismissed. As far as I'm concerned, the aggravating factors outweigh the mitigating factors.
>
> The probation department makes an interesting recommendation. My concerns about that are while I understand that the defendant has some challenges in his life, both physical and perhaps mental, I don't think they are as bleak as what one might think. I also have a great deal of concern that if the probation department's recommendations are followed, it depends upon the defendant's support groups to cooperate and to be involved and it bothers me that there's a history here of acting out that has been apparent to both the school personnel and the family and yet over time the two support groups that might be involved have, from what I can tell, done very little if anything to try to get help for this young man. I wish in a way that I could believe that the recommendation of probation department [sic] would work. I don't think for a variety of reasons that it would. I wish that I had other alternatives but I don't, so I'm going to sentence the defendant to 8 years Indiana Department of Corrections [sic], order that, all of that, be executed . . . . [U]pon his release from prison he register as a sex offender."

Tr. at 62-64 (paragraph structure added for clarity). Brewer now appeals.

Discussion and Decision

I. Standard of Review

Where, as here, a plea agreement leaves the issue of sentencing solely to the trial court, the trial court has discretion in determining the specific number of years to which the defendant is sentenced. See Childress v. State, 848 N.E.2d 1073, 1078 (Ind. 2006). We review a trial court's sentencing decision for an abuse of discretion, which occurs only when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218.

II. Violation of the Sixth Amendment

Brewer first argues that the trial court impermissibly considered aggravating factors in imposing a sentence above the presumptive sentence. Initially, we point out that Brewer's discussion of his sentence does not reflect the current state of the law. Prior to 2005, Indiana utilized a sentencing scheme that included a fixed term presumptive sentence within a range of possible sentences for each class of felonies. Anglemyer, 868 N.E.2d at 485. In order to depart from the presumptive sentence, a trial court had to find aggravating or mitigating circumstances deemed adequate to justify adding or subtracting years. Id. at 486. In light of the Supreme Court's opinions in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004), our supreme court held that the presumptive sentencing scheme ran afoul of the Sixth Amendment. See Smylie v. State, 823 N.E.2d 679, 685 (Ind. 2005). In response, the legislature created a new sentencing scheme. Anglemyer, 868 N.E.2d at 487. The legislature "left intact the lower and upper limits for each class of felony offenses, but eliminated fixed presumptive terms in favor of [discretionary] 'advisory sentences.'" Id. at 487-88.

Under the post-amendment sentencing scheme, a trial court may impose "any sentence that is: (1) authorized by statute … regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). Blakely has no application to the current advisory sentencing scheme. Miller v. State, 884 N.E.2d 922, 926 (Ind. Ct. App. 2008). Because the trial court sentenced Brewer long after the advisory sentencing scheme took effect on April 25, 2005, and because the trial

court sentenced Brewer within the statutory range for a Class C felony, his sentence does not violate the Sixth Amendment.

III. Rule 7(B) Analysis

Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence if, after due consideration of the trial court's decision, we find that the sentence "is inappropriate in light of the nature of the offense and the character of the offender." Anglemyer, 868 N.E.2d at 490. When making this decision, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 196 (Ind. Ct. App. 2007), trans. denied; cf. McMahon v. State, 856 N.E.2d 743, 750 (Ind. Ct. App. 2006) ("[I]nappropriateness review should not be limited … to a simple rundown of the aggravating and mitigating circumstances found the by the trial court."). However, the defendant bears the burden to "persuade the appellate court that his … sentence has met this inappropriate standard of review." Childress, 848 N.E.2d at 1080.

The trial court sentenced Brewer to eight years, the statutory maximum for a Class C felony. See Ind. Code § 35-50-2-6(a). Brewer, citing previous cases of this court, argues that the maximum possible sentence should be reserved for the very worst offenses and offenders. See, e.g., Westmoreland v. State, 787 N.E.2d 1005, 1010 (Ind. Ct. App. 2003). However, this court has also observed that:

> If we were to take this language literally, we would reserve the maximum punishment only for the single most heinous offense … We should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character.

Roney, 872 N.E.2d at 207 (quoting Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), trans. denied).

A. Nature of the Offense

Brewer had a close, family relationship with F.S. F.S. liked Brewer and enjoyed spending time with him. F.S. often stayed the night at Brewer's house, and on several occasions, F.S. was left alone with Brewer. In addition, F.S. would often play in Brewer's room, where the molestation occurred, and Brewer would threaten to exclude F.S. from his room if F.S. refused to perform oral sex on Brewer. Thus, Brewer enjoyed a position of trust with respect to F.S. and violated that position of trust when he molested F.S.

Further, Brewer did not molest F.S. on only one occasion; rather, Brewer molested F.S. repeatedly over a period of time. Brewer told F.S. not to tell anyone about the molestation and threatened to harm F.S. if he did tell. Additionally, F.S. was only five to six years old at the time of the molestation. All of these facts make the molestation particularly heinous and merit a statutory-maximum sentence of eight years.

B. Character of the Offender

A review of Brewer's life displays a pattern of inappropriate sexual conduct. As early as kindergarten or first grade, Brewer exposed his genitals on a school bus. While at school, Brewer viewed pornography on school computers, made inappropriate sexual remarks, and touched female students in a sexual manner. In addition, Brewer was previously charged as a juvenile with the molestation of a three- or four-year-old girl. Brewer was also recently suspended from school for fighting.

More troubling than his history of inappropriate conduct, however, is his failure to fully comprehend the wrongfulness of his molestation of F.S. Although Brewer made several expressions of remorse, only one mentioned F.S., and only indirectly: "I would give anything not to hurt any of my family again, including [F.S.]" Tr. at 58. When asked by the trial court what he had learned so far from his incarceration, Brewer replied not that he had learned his acts were wrong, but that he had learned how much he missed his family. Although Brewer did plead guilty to the crime, we are mindful that he did so in return for the substantial benefit of pleading guilty to a lesser included offense and the dismissal of a second Class B felony charge.

Brewer's argument regarding his character focuses primarily on his physical and mental challenges. While we are sympathetic to the many difficulties that Brewer experiences, the record does not demonstrate, nor has Brewer argued, how any of these difficulties makes Brewer unable to control his behavior or to understand that molesting F.S. was wrong. On the contrary, that Brewer repeatedly told F.S. not to tell anyone about the molestation demonstrates his capacity to understand that it was wrong. As a result, Brewer's character also merits a statutory-maximum sentence of eight years.

Brewer argues, however, that the trial court should have adopted the recommendation of the probation department that he receive a combination of incarceration and probation with mandatory counseling. "The location where a sentence is to be served is an appropriate focus for application of our review and revise authority." King v. State, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008). However, it will be quite difficult for a defendant to prevail on a claim that the placement of his sentence is

inappropriate. Id. The focus of our review under Indiana Appellate Rule 7(B) is not whether another sentence is more appropriate, but rather whether the sentence imposed is inappropriate. Id. at 268 (emphasis original).

The trial court indicated in its sentencing statement that it had considered the recommendation of the probation department but determined that it would not be successful because Brewer did not have sufficient support resources to assist him. While Brewer may be correct that the sentence recommended by the probation department would also be appropriate, this does not change the fact that the sentence imposed by the trial court is not inappropriate.

Conclusion

Brewer's sentence is within the statutory range for a Class C felony and, therefore, does not violate the Sixth Amendment. Further, Brewer's sentence is not inappropriate in light of the nature of the offense and his character.

Affirmed.

CRONE, J., and BROWN, J., concur.