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IN THE
COURT OF APPEALS OF INDIANA

KEVIN BOESE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 17A03-0704-CR-180
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DEKALB SUPERIOR COURT
The Honorable Kevin P. Wallace, Judge
Cause No. 17D01-0603-FC-17

December 6, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Kevin Boese appeals the four-year sentence imposed by the trial court after he pleaded guilty to one count of sexual misconduct with a minor, a class C felony.

We remand for resentencing.

ISSUE[1]

Whether the trial court erred when it imposed the four-year sentence.

FACTS

On March 24, 2006, the State charged Boese with committing the offense of sexual misconduct with a minor, a class C felony. Specifically, the information alleged that between August 1 and September 15, 2005, Boese (born September 6, 1984) had sexual intercourse with J.P., who was born April 26, 1990.

On February 2, 2007, Boese tendered to the trial court his written plea agreement with the State. Therein, Boese agreed that "in consideration of the State . . . not enhanc[ing] the charge to the B felony level and agree[ing] to cap all executed time at 4 years," he "wish[ed] to plead guilty to the charge" of sexual misconduct with a minor, a class C felony. (App. 20). The agreement further stated that Boese was "giv[ing] up the right to a jury trial on any sentencing factors and consent[ing] to the judge determining the existence of any sentence factors within the judge's discretion." *Id.* At the hearing on that date, Boese admitted that he had had sexual intercourse with J.P. when he knew that she was fifteen years of age, and that at that time he was twenty years of age. Boese

[1] Because we find this issue dispositive, we do not reach Boese's argument that his sentence is inappropriate.

further admitted to the trial court that he had been on probation at that time. The trial court took the plea agreement under advisement and ordered a pre-sentence investigation ("PSI").[2]

At the outset of the sentencing hearing on March 19, 2007, the trial court stated that having received and reviewed the PSI, it accepted Boese's plea. Megan Smith testified that she had married Boese in October of 2005 and was pregnant with his child. She further testified that although Boese was unemployed, he was seeking employment. Further, Smith testified that Boese helped her around their home and with her three-year-old son, and that she would need his assistance after giving birth to their child. Finally, Smith testified that Boese's paternity of J.P.'s child had not been established, inasmuch as his counsel had told him "to wait to take the DNA until it was court-ordered," and that court-ordered testing was scheduled for the next week. (Tr. 20). Boese's counsel asked that any sentence imposed be suspended. The State argued that Boese should serve an executed sentence.

The trial court then stated as follows:

> Well, uh, ironically, sadly, uh, the, the victim's family was aware of some of the obstacles that Mr. Boese faced in his own family, and, uh, were allowing him the, a home, basically, and the opportunity to, to distance himself from some of the issues that were going on in his immediate

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[2] We bring to the attention of Boese's counsel that Indiana Appellate rule 9(J) requires that "documents 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) states that records "excluded from public access" and constituting "confidential" information include "[a]ll pre-sentence reports pursuant to Ind. Code § 35-38-1-13." *Id.* at (viii). Pursuant to Indiana Trial Rule 5(G), when documents are filed in a case but are excluded from public access by Administrative Rule 9(G)(1), they "shall be tendered on light green paper or have a light green coversheet attached to the document, marked 'Not for Public Access' or 'Confidential.'"

The PSI included in Boese's Appendix does not comply with the above.

> family, and Mr. Boese, to say the least, took advantage of that generosity. Took advantage of their fifteen year old daughter. And, uh, we now have a young mother who has had to drop out of high school, uh, because she has to take care of her child. It's really kind of sad when you think about it. The, uh, recommended sentence for a C felony is four years, and I think that that sentence is appropriate in this case. I'm going to order that the Defendant serve four years at the Indiana Department of Correction.

(Tr. 24).

DECISION

As Indiana's Supreme Court recently reiterated, "sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2006). Thus, so long as the sentence imposed is within the current statutory range, "it is subject to review only for abuse of discretion." *Id.* However, *Anglemyer* -- which was issued three months after Boese's sentencing -- further held that appellate review requires that the trial court specify its "reasons for imposing the sentence" in a statement of facts "peculiar to the particular defendant and the crime," with such facts being supported by the record. *Id.*

Anglemyer held that one way a trial court may abuse its discretion in sentencing is when the trial court gives "reasons for imposing sentence," but "the record does not support the reasons." *Id.* Boese argues that the trial court's "reasons" here must fail for lack of evidentiary support. He reminds us that paternity of J.P.'s child has not been established, thus rendering irrelevant any consideration of whether he supported the child, and he correctly asserts that the other references to the relationship of Boese and

J.P.'s family are based solely on hearsay statements found in the PSI.[3] However, we find that the trial court's statements at sentencing, as quoted above, are merely rhetorical comments and not a statement of its "reasons" for imposing the four-year term. Thus, we are left with only the contents of the final statements -- that the trial court thinks a four-year sentence "is appropriate in this case" and is imposing that sentence. (Tr. 24).

Anglemyer expressly held that "[o]ne way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all." 868 N.E.2d at 490. We find that here, without the benefit of *Anglemyer* to guide it, the trial court committed such an abuse of discretion. Therefore, we remand for the trial court to enter a sentencing statement.

Remanded.

MAY, J., and CRONE, J., concur.

[3] The PSI attributes the statements to J.P. and her father, but neither testified at the sentencing hearing.