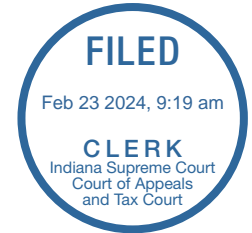


MEMORANDUM DECISION

Pursuant to [Ind. Appellate Rule 65\(D\)](#), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



IN THE
Court of Appeals of Indiana

Harold Reed,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

February 23, 2024
Court of Appeals Case No.
23A-CR-2370
Appeal from the Wells Circuit Court
The Honorable Kenton W. Kiracofe, Judge
Trial Court Cause No.
90C01-2107-F3-4

Memorandum Decision by Judge Mathias
Judges Tavitas and Weissmann concur.

Mathias, Judge.

[1] Harold Reed pleaded guilty in Wells Circuit Court to two counts of Level 4 felony child molesting. The trial court ordered Reed to serve consecutive terms of ten years for each conviction, for an aggregate twenty-year sentence. He appeals and raises three issues, which we consolidate into the following two:

I. Whether the trial court committed fundamental error when it presided over Reed's guilty plea and sentencing hearing after Reed was charged with intimidation for threatening to kill the trial court judge; and,

II. Whether Reed's aggregate twenty-year sentence is inappropriate in light of the nature of Reed's offenses and his character.

[2] We affirm.

Facts and Procedural History

[3] After Reed's wife was tragically killed in a car accident, his neighbors allowed Reed to live with them. The family had three children, and Reed would occasionally watch the children while the parents were working or otherwise away from home. Between the dates of September 7, 2020, and May 12, 2021, Reed molested the two oldest children, who were six and four years old. Reed touched the children with the intent to satisfy his sexual desires and made the children perform sexual acts on each other.

[4] On July 21, 2021, the State charged Reed with two counts of Level 3 felony vicarious sexual conduct, two counts of Level 4 felony child molesting, and one

count of Level 6 felony dissemination of matter harmful to minors.¹ While the charges were pending, Reed called the Wells Circuit Court and spoke to the bailiff. During the call, Reed stated that he was going to kill Judge Kiracofe.² *See Appellant's App. p. 159.*

[5] On August 7, 2023, Reed agreed to plead guilty to the two Level 4 felony child molesting charges, and the State agreed to dismiss the remaining charges. Reed also agreed that his sentences for the child molesting convictions would run consecutive to each other but left the length of those sentences to the trial court's discretion.

[6] At the October 3, 2023, sentencing hearing, the State presented evidence of Reed's criminal history, which included a prior child molesting conviction, and numerous violations of parole and pre-trial release. The children's mother testified about the relationship between Reed and her family and the many issues the children continue to deal with resulting from the molestations, including PTSD, insomnia, and nightmares. Reed presented evidence of his difficult childhood and adult life, and his poor physical and mental health.

[7] The trial court considered Reed's criminal history, prior violations of community supervision, and that he was in a position of trust with the children

¹ Reed's competency to stand trial was raised shortly after the State filed the charges. The trial court initially determined that Reed was not competent to stand trial. Reed received treatment at a mental health facility, and the court later determined that his competency to stand trial had been restored.

² A special prosecutor filed a Level 5 felony intimidation charge against Reed. Judge Kiracofe recused himself from that case and a special judge assumed jurisdiction over the case.

as aggravating circumstances. The court weighed these circumstances against the mitigating circumstances, *i.e.*, Reed’s difficult childhood and adult life, his health issues, and cognitive abilities. The court imposed consecutive ten-year sentences for each Level 4 felony child molesting conviction, for an aggregate sentence of twenty years.

[8] Reed now appeals.

I. The Trial Judge Appropriately Presided Over Reed’s Plea Hearing and Sentencing

[9] Reed claims the trial court committed fundamental error when it presided over his guilty plea hearing and sentencing hearing. “Fundamental error is an extremely narrow exception to the waiver rule where the defendant faces the heavy burden of showing that the alleged errors are so prejudicial to the defendant’s rights as to make a fair trial impossible.” *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014). To establish fundamental error, the defendant must show that the alleged error constituted a clearly blatant violation of basic and elementary principles of due process and presented an undeniable and substantial potential for harm. *Id.*

[10] In addressing Reed’s claims, we observe that there is a presumption that the trial court knows and follows the applicable law. *Tharpe v. State*, 955 N.E.2d 836, 842 (Ind. Ct. App. 2011), *trans. denied*. Moreover, the law presumes that a judge is “unbiased and unprejudiced.” *Garland v. State*, 788 N.E.2d 425, 433 (Ind. 2003). To rebut that presumption, a defendant must establish from the

judge’s conduct actual bias and prejudice against the defendant that places him in jeopardy. *Smith v. State*, 770 N.E.2d 818, 823 (Ind. 2002).

[11] Reed argues that Judge Kiracofe must have held “some prejudice, bias, fear, or partiality, against Reed” because the judge was the victim of the intimidation charge. Appellant’s Br. at 19. He also claims that the judge “could not possibly remain an impartial judicial officer in this case and would inherently be biased, prejudiced or partial against Reed[.]” *Id.* Finally, Reed claims that Judge Kiracofe’s failure to recuse himself constitutes fundamental error because the judge “violated Reed’s right to a fair trial and an impartial judicial officer[.]”³ *Id.* at 20.

[12] Reed has not cited any examples from the judge’s conduct that would establish actual bias or prejudice against Reed. And we have found none from our review of the record. During the plea hearing, the trial court properly advised Reed of his rights and the effect of waiving those rights. And the court considered all evidence admitted at the sentencing hearing and pronounced Reed’s sentence after thoughtfully considering the evidence and arguments presented. *See* Tr. pp.

³ In support of his argument that Judge Kiracofe was required to recuse himself from this case, Reed cites exclusively to the Indiana Code of Judicial Conduct. But in a criminal case, a party who seeks to overcome the presumption of judicial impartiality must move for a change of judge under Rule 12 of the Indiana Rules of Criminal Procedure (*see now* Rule 2.4 effective January 1, 2024), which Reed did not do here. *See Mathews v. State*, 64 N.E.3d 1250, 1253 (Ind. Ct. App. 2016), *trans. denied*. Moreover, the Code of Judicial Conduct does not supply a freestanding mechanism for relief independent of a properly brought Criminal Rule 12 (*see now* Rule 2.4 effective January 1, 2024) motion. *Id.* at 1255 (“It is undeniable that the Code fixes a judge’s obligations. We hold, however, that those obligations do not create freestanding rights of enforcement in private parties.”).

141-42 (expressing sympathy to Reed for his difficult childhood and adult life and his health issues). For these reasons, Reed has not established that he was denied the right to a fair trial, and, therefore, we are not persuaded that the trial court committed fundamental error when it failed to recuse itself from presiding over Reed’s guilty plea hearing and sentencing. *See e.g., Yager v. State*, 437 N.E.2d 454, 462 (Ind. 1982) (observing that a strained relationship between a judge and a criminal defendant is not a reason for the judge to disqualify himself or herself).

II. Inappropriate Sentence

[13] Reed also argues that his twenty-year aggregate sentence is inappropriate in light of the nature of his offenses and his character. Under [Indiana Appellate Rule 7\(B\)](#), we may modify a sentence that we find is “inappropriate in light of the nature of the offense and the character of the offender.” Making this determination “turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case.” *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). Sentence modification under [Rule 7\(B\)](#), however, is reserved for “a rare and exceptional case.” *Livingston v. State*, 113 N.E.3d 611, 612 (Ind. 2018) (per curiam). Reed bears the burden to show that his sentence is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh’g* 875 N.E.2d 218.

- [14] When conducting this review, we generally defer to the sentence imposed by the trial court. *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). Our role is to “leaven the outliers,” not to achieve what may be perceived as the “correct” result. *Id.* Thus, deference to the trial court’s sentence will prevail unless the defendant persuades us the sentence is inappropriate by producing compelling evidence portraying in a positive light the nature of the offense—such as showing restraint or a lack of brutality—and the defendant’s character—such as showing substantial virtuous traits or persistent examples of positive attributes. *Robinson v. State*, 91 N.E.3d 574, 577 (Ind. 2018); *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).
- [15] Reed was convicted of two counts of Level 4 felony child molesting. Under [Indiana Code section 35-50-2-5.5](#), the trial court may impose a sentence between two and twelve years, with the advisory sentence being six years. Reed’s ten-year sentence for each conviction is less than the maximum sentence. In his plea agreement, Reed agreed to serve his sentences for each conviction consecutive to each other.
- [16] Reed molested a four-year-old and a six-year-old child. The children’s parents allowed Reed to live with them after his wife died. Reed took care of the children and the family trusted Reed. Reed took advantage of that trust and molested the children on several occasions. As a result, the children suffer from PTSD, anger issues, insomnia, and nightmares.

[17] Reed also has a significant criminal history, including a prior child molesting conviction. His remaining criminal history, including convictions for check deception and driving while suspended, is relatively minor. But Reed also violated his probation and pretrial release on several occasions. Reed has demonstrated his inability to lead a law-abiding life. And he preyed on young children violating the family's trust and his position of caring for the children.

[18] The trial court acknowledged and considered Reed's difficult childhood, including that he spent most of his childhood in foster care and group homes. Reed was also abused when he was a child. Reed's physical and mental health is poor, and Reed suffered the tragic death of his wife before he committed the offenses in this case.

[19] The trial court thoughtfully considered these circumstances when it imposed Reed's sentence. Reed has certainly suffered much in his life, but he also used that suffering to build a relationship with children whom he victimized. On appeal, Reed has not persuaded us that his twenty-year-aggregate sentence is inappropriate in light of the nature of his offenses and his character.

Conclusion

[20] The trial court did not commit fundamental error by failing to recuse itself after Reed threatened to kill Judge Kiracofe. And Reed's twenty-year aggregate

sentence is not inappropriate in light of the nature of the offenses and Reed's character.⁴ We therefore affirm Reed's convictions and sentence.

[21] Affirmed.

Tavitas, J., and Weissmann, J., concur.

ATTORNEY FOR APPELLANT

Justin R. Wall
Wall Legal Services
Huntington, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana
George P. Sherman
Supervising Deputy Attorney General
Indianapolis, Indiana

⁴ Reed also argues that there is a scrivener's error in the sentencing order that requires correction. But the sentencing order correctly states that Reed pleaded guilty to and was sentenced for Level 4 felony child molesting as charged in Counts III and IV. Appellant's App. pp. 55-56. We agree with the State that there is no reason to remand this case for correction of the scrivener's error on the first page of the sentencing order.