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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL K. MIDDAUGH, SR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0607-CR-337
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0509-FA-146

December 21, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Michael K. Middaugh, Sr. (Middaugh), appeals his sentence for child molesting, a Class A felony, Ind. Code § 35-42-4-3(a)(1).

We affirm.

ISSUE

Middaugh raises one issue on appeal, which we restate as: Whether the trial court properly sentenced Middaugh.

FACTS AND PROCEDURAL HISTORY

On September 26, 2005, Middaugh, thirty-five, kissed C.R., thirteen, touched and put his mouth on her breast, and inserted his fingers into her vagina while C.R. was naked. Middaugh stopped when C.R.'s mother came upstairs. At the time, Middaugh lived with C.R., her mother, her mother's boyfriend, and C.R.'s younger sister in a house located in Elkhart County, Indiana.

On September 30, 2005, the State filed an Information charging Middaugh with Count I, child molesting, a Class A felony. The Information was later amended to include Count II, habitual offender, a Class D felony, I.C § 35-50-2-8. Pursuant to a plea agreement, Middaugh pled guilty to Count I, child molesting, in exchange for the State dismissing Count II, habitual offender. Additionally, the plea agreement provided for a thirty-year cap on the executed portion of Middaugh's sentence. On March 30, 2006, the trial court sentenced Middaugh to a forty-five year sentence with fifteen years suspended and ten years of probation. The trial court found Middaugh's criminal history of four prior felony convictions, including neglect of a dependent and rape, three misdemeanor

convictions, and a pending charge of criminal sexual conduct in the first degree in the State of Michigan as aggravating factors, and recognized his acceptance of responsibility as "illusory at best," together with his acceptance of a plea agreement as mitigators. (Transcript p. 25).

Middaugh now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Middaugh claims the trial court inappropriately sentenced him. Specifically, he contends the instant offense is far from being among the worst and he is not among the most culpable offenders. The State argues that (1) Middaugh's criminal history is significant in both number and nature, (2) his admission to having sexual relations with a minor in Michigan resulting in her pregnancy at age fifteen, and (3) his awareness of an outstanding warrant for his arrest in conjunction with his psychosexual evaluation indicating a risk of re-offending, and danger to society completely validates the sentence imposed by the trial court. We agree.

Recently, in *McMahon v. State*, ___ N.E.2d ___, 2006 WL 3258325 (Ind. Ct. App. November 13, 2006), this court discussed in detail the recent developments of Indiana's sentencing laws. We concluded, in pertinent part, "a claim that a sentence arose from an abuse of discretion under our statutory guidelines is no longer viable" since "trial courts are allowed to impose *any* sentence authorized by statute *regardless* of the presence or absence of aggravating and mitigating circumstances." *Id.* at 4. However, we will continue to include "an assessment of the trial court's finding and weighing of aggravators and mitigators" in our independent review under Ind. Appellate R. 7(B). *Id.*

As such, "the burden falls to the defendant to persuade the appellate court that his or her sentence is inappropriate" given that our review is by no way limited "to a simple rundown of the aggravating and mitigating circumstances found by the trial court." *Id.* at 5-6. In reviewing Middaugh's sentence for appropriateness, we will review Middaugh's character and the nature of the offense pursuant to Ind. Appellate R. 7(B).

Middaugh contends his thirty year executed sentence is inappropriate because he pled guilty, cooperated with the police, suffered from a drug addiction, has a good work record, and was abused and molested himself. Middaugh is essentially arguing that the trial court did not recognize and afford proper weight to mitigating factors resulting in an inappropriate sentence. We do not find Middaugh's argument persuasive. To the contrary, we find the trial court's sentence to be appropriate. And although not required, we acknowledge the trial court's explanation of Middaugh's sentence based on the balancing of the aggravating and mitigating factors it recognized.

With respect to Middaugh's character, his criminal history of four felony and three misdemeanor convictions does not persuade us he is deserving of a reduced sentence. Rather, Middaugh's prior convictions for neglect of a minor and rape alone could make it appropriate to impose the maximum sentence. *See Bryant v. State*, 841 N.E.2d 1154, 1157 (Ind. 2006) (the significance of a criminal history "varies based on the gravity, nature and number of prior offenses as they relate to the current offense," especially if the current offense indicates a particular pattern of behavior). Middaugh's argument that he was abused as a child does not sway us to believe his sentence should be reduced either. Moreover, he was found by a psychologist to be in denial of his need for "pedophilic

arousal" and in the psychologist's professional opinion Middaugh will re-offend. (Appellant's App. p. 84). Further, a charge of criminal sexual misconduct in the first degree was pending in Michigan when the instant offense was committed. Thus, we find the trial court's sentence of thirty years appropriate in light of Middaugh's character.

In light of the nature of Middaugh's offense, we also find the trial court's sentence appropriate. Middaugh points to *Walker v. State*, 747 N.E.2d 536, 538 (Ind. 2001), for the proposition that the absence of physical injury makes an offense "some distance from being the worst offense." However, we can only surmise that taken in sum, the facts in *Walker* did not wholly necessitate the enhanced sentence imposed by that trial court. *See id.* In the instant case, we find that the lack of visual physical injuries do not come close to neutralizing the other components of this action: namely, (1) C.R. was thirteen, (2) the molestation took place in her own home, (3) while her mother was downstairs and unaware of what was happening in a bedroom upstairs, (4) together with Middaugh's character. Therefore, we find trial court properly sentenced Middaugh in light of the nature of the offense and Middaugh's character.

CONCLUSION

Based on the foregoing, we conclude the trial court properly sentenced Middaugh.

Affirmed.

KIRSCH, C.J., and FRIEDLANDER, J., concur.