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IN THE COURT OF APPEALS OF INDIANA

DONALD G. KISTLER,	)	
Appellant-Defendant,	)	
vs.	)	No. 35A02-0602-CR-132
STATE OF INDIANA,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HUNTINGTON CIRCUIT COURT
The Honorable Mark A. McIntosh, Judge
Cause No. 35C01-0503-FA-27

November 28, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Donald G. Kistler appeals the sentence imposed upon his conviction for two counts of Child Molesting,[1] one as a class B felony and the other as a class C felony. The convictions were entered upon Kistler's guilty pleas. Kistler presents the following restated issues for review:

1. Did the court err in identifying aggravating and mitigating circumstances?

2. Was the sentence imposed appropriate in light of the nature of the offense and the character of the offender?

We affirm.

The facts favorable to the convictions are undisputed. Sometime in late 2003, Kistler was visiting the home of a friend who had two daughters. The older daughter, N.M., was less than fourteen years old at the time. Kistler went into N.M.'s room, where N.M. was playing with dolls, and closed the door. Kistler sat down beside N.M. and, through her clothing, fondled her chest and vagina. He then instructed N.M. not to tell anyone what had happened.

Early in the morning on March 16, 2005, Kistler was again visiting the same friend's house. He went in where N.M.'s younger sister, C.M., was lying down. Kistler lay down and got under the blanket that was covering ten-year-old C.M. Once under the blanket, Kistler placed his hand inside C.M.'s pajama bottoms and underwear and fondled her buttocks and vagina. He also inserted his finger into her anus. Both N.M.

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[1] Ind. Code Ann. § 35-42-4-3 (West, PREMISE through 2006 Second Regular Session).

and C.M. had previously been molested by their biological father, a fact that was known to Kistler.

On March 29, 2005, Kistler was charged with two counts of child molesting, one as a class A felony and one as a class C felony. He was also alleged to be an habitual offender. On November 1, 2005, Kistler and the State entered into a plea agreement whereby Kistler agreed to plead guilty to two counts of child molesting, as class B and C felonies, respectively, in exchange for the State's agreement to drop the habitual offender allegation and to reduce the class A felony count to a class B felony. Pursuant to the agreement, sentencing was left to the trial court's discretion. Further facts will be provided where relevant.

1.

Kistler contends the trial court erred in identifying aggravating and mitigating circumstances.

A person who pleads guilty via an open plea (i.e., one in which the issue of sentencing is left to the trial court's discretion) may contest the merits of a trial court's sentencing decision on direct appeal where the trial court has exercised sentencing discretion. *Collins v. State,* 817 N.E.2d 230 (Ind. 2004). Generally, sentencing determinations, including the finding of aggravating and mitigating factors, are within the trial court's discretion. *Cotto v. State,* 829 N.E.2d 520 (Ind. 2005). If the trial court relies upon aggravating or mitigating circumstances to impose an enhanced or reduced sentence, it must (1) identify all significant mitigating and aggravating circumstances, (2)

state specifically why each circumstance was determined to be mitigating or aggravating, and (3) articulate the court's evaluation and balancing of the circumstances. A trial court is not required to weigh or credit the mitigating factors in the manner suggested by the defendant. *Id.* When a trial court fails to find a mitigator that the record clearly supports a reasonable belief arises that the mitigator was improperly overlooked. *Id.*

Kistler contends the trial court erred in refusing to identify his guilty plea as a mitigating factor. Clearly, the trial court did not inadvertently overlook this mitigator. Instead, the court specifically rejected it, explaining, "The Court further finds that the plea of guilty is not of any value in determining lessening of the sentence in that a plea or a charge of habitual offender was dismissed and granted to the defendant a lesser period of time." *Transcript* at 81. "[A] guilty plea is not automatically a mitigating factor." *Green v. State*, 850 N.E.2d 977, 992 (Ind. Ct. App. 2006). A trial court need not find that a guilty plea as a mitigating circumstance where it determines the plea was more likely the result of pragmatism than an acceptance of responsibility and remorse. *See Davies v. State,* 758 N.E.2d 981 (Ind. Ct. App. 2001), *trans. denied*. In this respect, the evaluation of a guilty plea as a mitigator includes a consideration of another potential mitigating factor that Kistler contends the trial court overlooked, i.e., his remorse.

In exchange for pleading guilty, Kistler realized a significant benefit in that one charge was reduced from an A to a B felony. This reduced the possible sentence that could be imposed by a range of between six and thirty years. The State also agreed to drop the habitual offender allegation, which could have subjected Kistler to a sentence

enhancement of between ten and thirty years. Moreover, Kistler's expressions of remorse were tepid at best. At the sentencing hearing, Kistler addressed the court and expressed his remorse as follows: "Well, uh, just uh, sorry for uh, both families that's involved with this and the courts and that's about it." *Transcript* at 50. During subsequent questioning, Kistler described his action as "just playing around," *id*. at 56, and "just a pinch." *Id*. at 55. He flatly denied inserting his fingers into C.M.'s anus. Finally, he downplayed the severity of his actions by comparison, viz., "I didn't do nothing like their dad did, and nothing like that." *Id*. In view of the benefit he received by virtue of pleading guilty, and his failure to take full responsibility for his actions, we cannot find that the trial court abused its discretion by choosing not to give mitigating weight to his purportedly remorseful statements and his guilty plea.

Kistler contends the trial court erred in failing to find hardship on his family as a mitigating factor. Our Supreme Court has stated, "[m]any persons convicted of serious crimes have one or more children and, absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship." *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999). The Indiana Supreme Court has noted this mitigator may properly be assigned no weight when the defendant fails to show why incarceration for a particular term will cause more hardship than incarceration for a shorter term. *See*, *e.g.*, *Abel v. State*, 773 N.E.2d 276 (Ind. 2002). Kistler failed to provide any such evidence. Therefore, the trial court did not err in failing to find this as a mitigating circumstance.

The trial court identified three aggravating circumstances as the basis for imposing the maximum sentence. Kistler contends none of the three is a valid aggravating circumstance. The first aggravator found by the trial court was that there were multiple victims. Kistler contends this was improper because "each count involved only one victim. … Thus, for each individual crime there was only one victim." *Appellant's Brief* at 7. Ergo, Kistler contends, without citing authority, the fact there were multiple victims can be used only to justify consecutive sentences, but not to aggravate the sentence for each count. We can find no authority for this proposition. In fact, we find cases indicating the opposite is true. *See*, *e.g.*, *Altes v. State,* 822 N.E.2d 1116 (Ind. Ct. App. 2005) (multiple victims was a valid aggravating circumstance where the defendant was convicted of multiple counts of child molesting, with separate counts for each victim), *trans. denied*. The trial court did not err in citing multiple victims as an aggravating circumstance.

Kistler contends the trial court erred in finding that his criminal history was a valid aggravating circumstance. Kistler does not deny that he has a history of criminal convictions, which includes several convictions for driving while intoxicated, two of those (in 1993 and again in 2001) as class D felonies, a 1995 conviction for battery, and a 2002 conviction for domestic battery. Instead, he contends such convictions (particularly, alcohol-related offenses) are only "marginally significant" aggravators in relation to class C and B felony child molesting convictions. *Appellant's Brief* at 7 (citing *Ruiz v. State*, 818 N.E.2d 927 (Ind. 2004)). That may sometimes be the case, but

Ruiz did not announce a rule to the effect that alcohol-related offenses are never more than marginally significant as aggravators when sentencing for felony child molestation convictions. Rather, the "[s]ignificance [of prior convictions] varies based on the gravity, nature and number of prior offenses as they relate to the current offense." *Ruiz v. State*, 818 N.E.2d at 929 (quoting *Wooley v. State*, 716 N.E.2d 919, 929 (Ind. 1999)).

Kistler's criminal history included several alcohol-related offenses, two of which were felonies. Kistler also has two prior battery convictions, one of which was domestic battery. The record does not reflect any details of the two battery convictions, either as to the underlying facts or the classification of the offense. We know, however, that the victim of Kistler's domestic battery must have been either a spouse, someone living with him as if his spouse, or the mother of his child. *See* Ind. Code Ann. § 35-42-2-1.3(a) (West, PREMISE through 2006 Second Regular Session). Thus, the domestic battery conviction was similar to the child molesting convictions in that it displayed Kistler's propensity for abusive treatment of someone in his life who is vulnerable. We conclude that the number, nature, and gravity of the prior convictions in relation to the child molesting convictions support the trial court's determination that Kistler's criminal history is an aggravating circumstance.

The court found that Kistler's knowledge that the victims had previously been molested by their father was an aggravating circumstance. Kistler argues this aggravator was improper because there was no showing that his molestation offenses were related to what happened to the victims at the hands of their father. He explains, "There was no

evidence presented to show the nature of the victims' prior abuse. There was also no evidence presented as to what Kistler knew of the victims' prior abuse by their father, other than some abuse occurred." *Appellant's Brief* at 8-9. Kistler's argument seems to be in part that there is no evidence that the prior crimes were similar to the instant crime, and in part that he did not know the details of the prior crimes.

As to the first contention, we cannot agree that, to qualify as an aggravator, there must be a close identity between the prior molestation of these victims by their father and the ones committed by Kistler. It is enough that the girls had been previously victimized, and thus were especially vulnerable. Similarly, this aggravator is not dependent upon Kistler knowing the details of the prior molestation. The important fact is that he knew his victims had been molested before. He admitted this at the sentencing hearing. Moreover, he evinced at least enough knowledge of the prior molestation to offer the opinion that the molestations committed by the father were more severe than those he committed. The trial court did not err in finding this as an aggravating circumstance.

2.

Kistler contends the sentence imposed was inappropriate in light of the nature of the offense and the character of the offender.

Pursuant to Indiana Appellate Rule 7(B), we may revise a sentence authorized by statute if, after considering the trial court's decision, we find that the sentence imposed is inappropriate in light of the nature of the offense and the character of the offender. With respect to the nature of the offense, the presumptive sentence is the starting point the

Legislature has selected as an appropriate sentence for the crime committed.[2] *Weiss v. State,* 848 N.E.2d 1070 (Ind. 2006). The presumptive sentence for a class B felony is ten years, with a maximum sentence of twenty years. *See* I.C. § 35-50-2-5 (West, PREMISE through 2006 Second Regular Session). The presumptive sentence for a class C felony is four years, with a maximum sentence of eight years. *See* I.C. § 35-50-2-6. Here, the trial court enhanced both presumptive terms to the maximum authorized by statute, or twenty and eight years, respectively. The court also determined that the sentences should be served consecutively, for a total executed sentence of twenty-eight years.

As discussed above, the trial court identified three aggravating circumstances: (1) Kistler's criminal history; (2) the fact that there were multiple victims; and (3) the fact that Kistler knew the victims had previously suffered sexual abuse at the hands of another. With respect to Kistler's criminal history, although the record is not entirely clear on the point, it appears that Kistler has approximately nine previous convictions, most of which are alcohol-related. The non-alcohol-related convictions, two in number, appear to be misdemeanor battery offenses. A criminal history with this number of

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[2] After the date Kistler committed theses offenses, the Legislature amended Indiana's sentencing statutes to provide for "advisory sentences" rather than "presumptive sentences." *See* Pub.L. No. 71-2005, § 5 (codified at Ind. Code Ann. § 35-50-2-1.3 (West, PREMISE through 2006 Second Regular Session). Under the new scheme, a trial court may impose any sentence that is authorized by statute and permissible under the Indiana Constitution "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Pub.L. No. 71-2005, § 3 (codified at Ind. Code Ann. § 35-38-1-7.1(d) (West, PREMISE through 2006 Second Regular Session)). The new scheme does not apply, however, to cases in which the offense was committed before the effective date of the amended statute, i.e., April 25, 2005. *Creekmore v. State*, 853 N.E.2d 523 (Ind. Ct. App. 2006), *trans. filed; but see White v. State,* 849 N.E.2d 735 (Ind. Ct. App. 2006), *trans denied*.

offenses is troubling and is of low-to-medium weight. We also assign low to medium weight to the remaining aggravators.

In view of the fact that there are no significant mitigating circumstances, the aggravating circumstances obviously outweigh the mitigating circumstances. Therefore, enhancement is appropriate. The nature of the molestation offenses committed by Kistler, thoroughly discussed above, and what they reveal of his character, warrant imposition of the maximum sentence for the offenses of which he was convicted. In so holding, we are mindful that the offenses to which Kistler pled guilty are less than the acts he committed would have supported, and do not include a habitual offender enhancement, for which it appears he was eligible. We note this in order to underscore the proper focus in the appellate review of the appropriateness of a criminal sentence. We do not undertake to compare the defendant's sentence with the sentences of others convicted of the same offense. Rather, we examine the nature of the correlation between the defendant and the acts he committed on the one hand, and the penalty imposed therefor, on the other. In this case, the correlation is apt. Therefore, we affirm the twenty-eight-year sentence imposed by the trial court.

Judgment affirmed.

BARNES, J., and MATHIAS, J., concur.