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IN THE COURT OF APPEALS OF INDIANA

DONALD L. NUGENT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 47A01-0605-CR-191
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAWRENCE CIRCUIT COURT
The Honorable Richard D. McIntyre, Sr., Judge
Cause No. 47C01-0305-FA-198

December 27, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Donald Nugent appeals his sentence for child molesting as a class A felony.[1] Nugent raises two issues, which we revise and restate as:

I. Whether the trial court abused its discretion by imposing an enhanced sentence; and

II. Whether Nugent's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The relevant facts follow. In 2002 or 2003, Nugent lived with his girlfriend and her three children, J.B., age 10, A.B., age 9, and C.H., age three. Nugent showed A.B. his penis. Three or four months later, Nugent showed A.B. his penis again. One month later, A.B. performed oral sex on Nugent. Three weeks later, A.B. again performed oral sex on Nugent. One month later, Nugent rubbed his penis on A.B.'s vagina. For four months, Nugent did not engage in sexual activity with A.B. because they were never alone. Later Nugent performed oral sex on A.B., and A.B. performed oral sex on Nugent.

On May 1, 2003, the State charged Nugent with two counts of child molesting as class A felonies. On August 24, 2004, Nugent pleaded guilty to one count of child molesting as a class A felony, and the other count was dismissed. The trial court found no mitigators and Nugent's prior criminal history and his violation of a position of trust as aggravators. The trial court sentenced Nugent to forty-five years in the Indiana Department of Correction and suspended ten years.

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[1] Ind. Code § 35-42-4-3 (2004).

I.

The first issue is whether the trial court abused its discretion by imposing an enhanced sentence. Sentencing decisions rest within the discretion of the trial court and are reviewed on appeal only for an abuse of discretion. Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002). An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Pierce v. State, 705 N.E.2d 173, 175 (Ind. 1998). In order for a trial court to impose an enhanced or consecutive sentence, it must: (1) identify the significant aggravating factors and mitigating factors; (2) relate the specific facts and reasons that the court found to those aggravators and mitigators; and (3) demonstrate that the court has balanced the aggravators with the mitigators. Veal v. State, 784 N.E.2d 490, 494 (Ind. 2003).

We frequently hold that a single aggravating circumstance may be sufficient to support the imposition of an enhanced sentence. Deane v. State, 759 N.E.2d 201, 205 (Ind. 2001); see also Battles v. State, 688 N.E.2d 1230, 1235 (Ind. 1997) (holding that "a criminal history suffices by itself to support an enhanced sentence"). Even when a trial court improperly applies an aggravator, a sentence enhancement may be upheld if other valid aggravators exist. Pickens v. State, 767 N.E.2d 530, 535 (Ind. 2002). "[W]e will remand for resentencing if we cannot say with confidence that the trial court would have imposed the same sentence if it considered the proper aggravating and mitigating circumstances." Id. The Indiana Supreme Court has held that this "does not mean that any single aggravator will suffice in all situations." Deane, 759 N.E.2d at 205. For

example, a "non-violent misdemeanor ten years in the past . . . would hardly warrant adding ten or twenty years to the standard sentence." Id.

Nugent argues that the trial court: (A) failed to consider certain mitigators; and (B) improperly considered certain aggravators.

A. Mitigators

1. Guilty Plea

We first consider Nugent's proposed mitigator that he pleaded guilty. The trial court did not specifically identify Nugent's guilty plea as a mitigating factor. The Indiana Supreme Court has recognized that a guilty plea is a significant mitigating circumstance in some circumstances. Trueblood v. State, 715 N.E.2d 1242, 1257 (Ind. 1999), reh'g denied, cert. denied, 531 U.S. 858, 121 S. Ct. 143 (2000). Where the State reaps a substantial benefit from the defendant's act of pleading guilty, the defendant deserves to have a substantial benefit returned. Sensback v. State, 720 N.E.2d 1160, 1164 (Ind. 1999). However, a guilty plea is not automatically a significant mitigating factor. Id. at 1165.

For example, in Sensback, the defendant argued that her guilty plea showed "acceptance of responsibility." Id. at 1164. However, the State argued that she received her benefit due in that the State dropped the robbery and auto theft counts in exchange for her guilty plea to the felony murder charge. Id. at 1165. The Indiana Supreme Court agreed with the State that the defendant "received benefits for her plea adequate to permit

the trial court to conclude that her plea did not constitute a significant mitigating factor." Id.

Here, Nugent received significant benefits from his guilty plea. In exchange for his guilty plea, the second count of child molesting as a class A felony was dismissed. Thus, rather than facing a maximum sentence of one hundred years, Nugent faced a maximum sentence of fifty years. See Ind. Code § 35-50-2-4 (2004).[2] Further, in the plea agreement the State agreed to recommend that the executed portion of Nugent's sentence be capped at forty years. Thus, Nugent received a significant benefit from his guilty plea, and the trial court did not abuse its discretion by not identifying Nugent's guilty plea as a mitigating factor. See Sensback, 720 N.E.2d at 1164-1165.

2. Remorse

Nugent appears to argue that the trial court abused its discretion by failing to consider his remorse as a mitigator. A trial court's determination of a defendant's remorse is similar to a determination of credibility. Pickens v. State, 767 N.E.2d 530, 534-535 (Ind. 2002). Without evidence of some impermissible consideration by the court, we accept its determination of credibility. Id. The trial court is in the best position to judge the sincerity of a defendant's remorseful statements. Stout v. State, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005), trans. denied. Nugent does not allege any impermissible considerations. Although Nugent expressed remorse, it was up to the trial court to

[2] Subsequently amended by Pub. L. No. 71-2005, § 7 (emerg. eff. April 25, 2005).

determine whether that remorse was genuine and significant. We cannot say his remorse is both significant and clearly supported by the record. The trial court did not abuse its discretion by failing to consider Nugent's alleged remorse to be a mitigating factor. See, e.g., id. (holding that the trial court did not err in refusing to find the defendant's alleged remorse to be a mitigating factor).

B. Aggravators

1. Position of Trust

Nugent argues that the trial court's reliance on the fact that he violated his position of trust as an aggravating circumstance was improper under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), reh'g denied.[3] In Blakely, the United States Supreme Court held that facts supporting an enhanced sentence must be admitted by the defendant or found by a jury. Blakely, 542 U.S. at 303-304, 124 S. Ct. at 2537; Cotto v. State, 829 N.E.2d 520, 527 n.2 (Ind. 2005). In Smylie v. State, the Indiana Supreme Court held that Blakely was applicable to Indiana's sentencing scheme and required that "the sort of facts envisioned by Blakely as necessitating a jury finding must be found by a jury under Indiana's existing sentencing laws." Smylie v. State, 823 N.E.2d 679, 686 (Ind. 2005), cert. denied, 126 S. Ct. 545 (2005). The Indiana Supreme Court recently noted that "Blakely and the later case United States v. Booker[, 543 U.S. 220, 125 S. Ct. 738, 756

[3] The State does not argue and we need not determine whether Blakely is applicable because, even assuming that Blakely is applicable, we conclude that Nugent waived his right to a jury trial on this aggravating circumstance. See Gutermuth v. State, 848 N.E.2d 716, 726-727 (Ind. Ct. App. 2006)

(2005),] indicate that there are at least four ways that meet the procedural requirements of the Sixth Amendment in which such facts can be found and used by a court in enhancing a sentence." Mask v. State, 829 N.E.2d 932, 936 (Ind. 2005).

> [A]n aggravating circumstance is proper for Blakely purposes when it is: 1) a fact of prior conviction; 2) found by a jury beyond a reasonable doubt; 3) admitted to by a defendant; or 4) stipulated to by the defendant, or found by a judge after the defendant consents to judicial fact-finding, during the course of a guilty plea in which the defendant has waived his Apprendi rights.

Id. at 936-937 (citing Trusley v. State, 829 N.E.2d 923, 925 (Ind. 2005)).

Nugent argues that he waived some, but not all, of his rights by signing a document entitled "Acknowledgement of Rights," which states in part:

> I understand I have the right to a jury trial as to any sentencing factors that may be used to increase my sentence on any count, sentencing enhancement, or allegation, to the upper or maximum term provided by law. I hereby give up the right to a jury trial on any sentencing factors within the judge's discretion as allowed by existing statutes and Rules of Court.

Appellant's Appendix at 33. Nugent argues that he waived his right to a jury trial "only on those sentencing factors 'allowed by existing statutes and Rules of Court'" and that "[b]ecause 'violation of a position of trust' is not found in the Indiana Code nor in the Indiana Rules of Court, Nugent's written waiver did not include waiving the right to have 'violation of a position of trust' charged in an information and proven to a jury beyond a reasonable doubt." Appellant's Brief at 8-9. The State argues that a sentencing court is

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(holding that Blakely applied to appellant's case because it was not final when Blakely was decided and

allowed to consider such a factor, and its authority to do so derives from existing statutes. We agree.

Ind. Code § 35-38-1-7.1 (2004)[4] provides:

* * * * *

> (b) The court may consider the following factors as aggravating circumstances or as favoring imposing consecutive terms of imprisonment:
>
> (1) The person has recently violated the conditions of any probation, parole, or pardon granted to the person.
> (2) The person has a history of criminal or delinquent activity.
>
> * * * * *
>
> (d) The criteria listed in subsections (b) and (c) do not limit the matters that the court may consider in determining the sentence.

Based on Ind. Code § 35-38-1-7.1, the trial court had discretion to consider the violation of a position of trust as an aggravator. Thus, Nugent's waiver of his right to a jury trial on any sentencing factor within the trial court's discretion as allowed by existing statutes applies to this aggravator. See, e.g., Williams v. State, 836 N.E.2d 441, 444 (Ind. Ct. App. 2005) (holding that defendant waived his right to have a jury determine the existence of any aggravating circumstance).

2. Criminal History

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recognizing that at least two other panels of this court have reached a different conclusion), trans. granted.

[4] Subsequently amended by Pub. L. No. 71-2005, § 3 (emerg. eff. April 25, 2005); Pub. L. No. 213-2005, § 3 (emerg. eff. May 11, 2005).

Nugent argues that his criminal history should carry little aggravating weight in sentencing for the instant offense. The significance of a criminal history "varies based on the gravity, nature and number of prior offenses as they relate to the current offense." Wooley v. State, 716 N.E.2d 919, 929 n. 4 (Ind. 1999), reh'g denied. The presentence investigation report reveals that Nugent has been convicted of fleeing police as a class A misdemeanor in 1980, conversion as a class A misdemeanor in 1980, and three counts of driving while suspended as class A misdemeanors in 1994, 1997, and 2004. The trial court stated that "while [Nugent] does have a criminal history, it has been mainly misdemeanor type issues," and "as I have stated his record, prior record is mainly misdemeanor type offenses." Transcript at 39. Thus, it does not appear that the trial court assigned this aggravating circumstance significant weight.

Even assuming the trial court erred in considering Nugent's criminal history, a single aggravating circumstance may be sufficient to support an enhanced sentence. Buzzard v. State, 712 N.E.2d 547, 554 (Ind. Ct. App. 1999), trans. denied. At least one other aggravating circumstance, the violation of the position of trust, exists. Nugent does not challenge this aggravator other than his Blakely challenge. Thus, we cannot say that the trial court abused its discretion. See, e.g., Garrett v. State, 714 N.E.2d 618, 623 (Ind. 1999) (holding that the trial court did not abuse its discretion because, even though the trial court erred in finding one improper aggravating circumstance, other valid aggravating circumstances remained); Hart v. State, 829 N.E.2d 541, 544 (Ind. Ct. App. 2005) ("Abusing a position of trust is, by itself, a valid aggravator which supports the

maximum enhancement of a sentence for child molesting."). In summary, given the lack of mitigators and Nugent's position of trust, we conclude that the trial court did not abuse its discretion in sentencing Nugent.

II.

The next issue is whether Nugent's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute 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."

Our review of the nature of the offense reveals that Nugent engaged in sexual acts with the nine-year-old daughter of his girlfriend. Our review of the character of the offender reveals that Nugent has convictions for fleeing the police, conversion, and three counts of driving while suspended. Nugent also abused his position of trust with the victim. It is also clear that Nugent engaged in sexual activity with the victim over an extended period of time and blamed the nine-year-old victim for initiating and encouraging some of the activity. After due consideration of the trial court's decision, we cannot say that the sentence is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Sallee v. State, 785 N.E.2d 645, 654 (Ind. Ct. App. 2003) (concluding that the defendant's sentence was not inappropriate), trans. denied, cert. denied, 540 U.S. 990, 124 S. Ct. 480 (2003).

For the foregoing reasons, we affirm Nugent's sentence for child molesting as a class A felony.

Affirmed.

KIRSCH, C. J. and MATHIAS, J. concur