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IN THE
COURT OF APPEALS OF INDIANA

TIMOTHY SHELTON,

Appellant-Defendant,

vs. — No. 48A02-0603-CR-221

STATE OF INDIANA,

Appellee-Plaintiff.

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0508-FB-371

December 4, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Timothy Shelton appeals his sentence after being convicted of Sexual Misconduct with a Minor as a Class B felony and Contributing to the Delinquency of a Minor as a Class C felony. Shelton's twelve-year sentence with eight years executed and four years suspended to probation for sexual misconduct with a minor is not inappropriate. However, because Shelton's conviction for contributing to the delinquency of a minor as a Class C felony constitutes fundamental error, we remand this cause with instructions for the trial court to reduce the judgment of conviction to a Class A misdemeanor and to reduce the sentence on that count from six years to one year, to be served concurrently with Shelton's sentence for sexual misconduct with a minor.

Facts and Procedural History

On August 14, 2005, twenty-two-year-old Shelton provided alcohol for and had sexual intercourse with fourteen-year-old C.C. The State charged Shelton with Count I, Sexual Misconduct with a Minor as a Class B felony,[1] and Count II, Contributing to the Delinquency of a Minor as a Class C felony.[2] Shelton entered into a plea agreement whereby he pled guilty as charged and sentencing was left to the discretion of the trial court, except that the executed portion of that sentence was to be capped at ten years.

In the presentence investigation report, the probation department identified two aggravating circumstances, namely, Shelton's criminal history and the fact that Shelton was on probation when he committed the instant offenses. The probation department also cited the fact that Shelton pled guilty as a mitigating circumstance, noting that Shelton

[1] Ind. Code § 35-42-4-9(a)(1).

[2] Ind. Code § 35-46-1-8(b)(2).

had saved the State the time and cost of a trial. The probation department recommended a sentence of twelve years on Count I and a sentence of six years on Count II, with the two sentences to be served concurrently for a total sentence of twelve years. Of those twelve years, the probation department recommended that eight years be executed and that four years be suspended to probation. The trial court fully adopted the recommendations of the probation department. Shelton now appeals.

Discussion and Decision

Shelton's sole argument on appeal is that his sentence is inappropriate because the trial court failed to recognize his plea of guilty as a mitigating circumstance.[3] We may revise a defendant's sentence if we find that it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). After due consideration of the trial court's decision, we cannot say that Shelton's sentence is inappropriate.

As an initial matter, we noted above that the probation department did identify Shelton's guilty plea as a mitigating circumstance in the presentence investigation report. Furthermore, the trial court fully adopted the probation department's recommendations in sentencing Shelton. Thus, it could be *inferred* that the trial court considered Shelton's guilty plea as a mitigating circumstance. However, we are loathe to rest our review of sentencing decisions on inferences, and the better practice is for the trial court itself to

[3] Shelton begins the Argument section of his brief by anticipating an argument by the State that he waived any challenge to the appropriateness of his sentence by entering a plea agreement that capped his sentence. Panels of this Court have held as much, but the Indiana Supreme Court recently rejected those holdings, instead concluding that a defendant does not waive a challenge to the appropriateness of his sentence simply by agreeing to a certain cap or range in a plea agreement. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

identify all significant aggravating and mitigating circumstances. As such, we will proceed as if the trial court did not find Shelton's guilty plea to be a significant mitigating circumstance.

A plea of guilty does not constitute a significant mitigating circumstance where the defendant receives a substantial benefit in exchange for pleading guilty. *Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), *trans. denied*; *see also Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999). Here, Shelton received a substantial benefit in exchange for pleading guilty. Shelton faced a maximum sentence of twenty years for sexual misconduct with a minor as a Class B felony, *see* Ind. Code § 35-50-2-5, but the State agreed to cap the executed portion of his sentence at ten years. Because Shelton received a substantial benefit in exchange for pleading guilty, the trial court was not required to consider his guilty plea as a significant mitigating factor. Therefore, the trial court's failure to do so does not make Shelton's sentence inappropriate.

Finally, we address, *sua sponte*, the legality of Shelton's conviction for contributing to the delinquency of a minor as a Class C felony. It has been clearly established that Indiana's appellate courts can recognize fundamental error even though it was not raised on direct appeal "if the error is blatant and appears clearly on the face of the record." *Haggard v. State*, 445 N.E.2d 969, 971 (Ind. 1983). Such is the case here.

At the guilty plea hearing, Shelton's attorney stated:

> In the charging information, contributing to the delinquency of a minor is identified as a class C felony, and I don't think it can be a class C felony, I think it's a class A misdemeanor, I'm not sure. But the allegation is that there was alcohol provided to a minor. Last time I looked at it, it was not a felony. So that may be a misprint.

Tr. p. 15-16. When asked to respond, the prosecuting attorney said, "Can I have just a moment, cause I remember being concerned about that in this case too and I looked it up and I do think we have it charged right, but. Let me double check." *Id.* at 16. Later, the trial judge asked the prosecuting attorney, "Did you determine on the count II, yet?" and the prosecuting attorney replied:

> Yes, sir, it's a C felony. Contributing is a C felony if the defendant is over the age of twenty-one (21) and he knowingly furnishes an alcoholic beverage to a person less than eighteen (18) years of age and he knew or [reasonably] should've known that the alcoholic beverage—or the person that he gave it to was less than eighteen (18) years of age.

Id. at 19. There was no further mention of this dispute at the trial court level. There should have been.

The version of the contributing statute in effect when Shelton was charged, convicted, and sentenced provided that the offense is a Class C felony if:

> (A) the person committing the offense is at least twenty-one (21) years of age and knowingly or intentionally furnishes:
> (i) an alcoholic beverage to a person less than eighteen (18) years of age in violation of IC 7.1-5-7-8 when the person committing the offense knew or reasonably should have known that the person furnished the alcoholic beverage was less than eighteen (18) years of age; or
> (ii) a controlled substance (as defined in IC 35-48-1-9) or a drug (as defined in IC 9-13-2-49.1) in violation of Indiana law; *and*
> (B) *the consumption, ingestion, or use of the alcoholic beverage, controlled substance or drug is the proximate cause of the death of any person[.]*

Indiana Code § 35-46-1-8(b)(1) (2005) (emphasis added). The prosecuting attorney suggested that a defendant at least twenty-one years of age commits Class C felony contributing to the delinquency of a minor by merely furnishing alcohol to a person less than eighteen years of age. The trial judge and Shelton's defense attorney accepted this

and moved on. But the statute clearly requires more for a Class C felony. Subsection (B) also requires that (1) the minor consume the alcohol and (2) the consumption of the alcohol is the proximate cause of the death of any person. There is no indication in the record before us that there has been a death related to this case.[4] As such, Shelton's act, furnishing alcohol to a minor, constituted the more basic offense, covered by Indiana Code § 35-46-1-8(a): "A person at least eighteen (18) years of age who knowingly or intentionally encourages, aids, induces, or causes a person less than eighteen (18) years of age to commit an act of delinquency (as defined by IC 31-37-1 or IC 31-37-2) commits contributing to delinquency, *a Class A misdemeanor*." (emphasis added).

We have already determined that Shelton's twelve-year sentence with eight years executed and four years suspended to probation for sexual misconduct with a minor as a Class B felony is not inappropriate. The trial court ordered that sentence to run concurrently to Shelton's six-year sentence for contributing to the delinquency of a minor. In light of the above, we remand this cause with instructions to the trial court to reduce Shelton's judgment of conviction for contributing to the delinquency of a minor from a Class C felony to a Class A misdemeanor and to reduce Shelton's sentence on this charge from six years to one year, with that sentence to run concurrently to Shelton's sentence for sexual misconduct with a minor. We otherwise affirm Shelton's sentence.

Affirmed and remanded.

BAKER, J., and CRONE, J., concur.

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[4] Indiana Code § 35-46-1-8(b)(2) provides that contributing to the delinquency of a minor can also be a Class C felony if the person committing the offense knowingly or intentionally encourages, aids, induces, or causes the minor to commit one of several drug-related felonies. There was no such allegation in this case.