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IN THE
COURT OF APPEALS OF INDIANA

DEREK D.L.S HUTCHISON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0611-CR-1059
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis D. Carroll, Judge
Cause No. 48D01-0605-FB-118

November 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a plea of guilty but mentally ill, Derek Hutchison appeals his sentence for rape, a Class B felony. Hutchison raises one issue on appeal, which we restate as whether his sentence of twenty years, with fifteen years executed and five suspended, is inappropriate based on the nature of the offense and his character. We also address whether the trial court abused its discretion in sentencing Hutchison. Concluding that the trial court did not abuse its discretion in imposing Hutchison's sentence and that Hutchison's sentence is not inappropriate, we affirm.

Facts and Procedural History

On February 14, 2006, eighteen-year-old Hutchison accompanied his mother to St. Joseph's Hospital in Anderson after she complained of a fever. At some point that evening or after midnight, Hutchison began roaming around the hospital. Initially, he entered the room of eighty-five-year-old patient L.A. L.A. awoke to find Hutchison sitting on her bed and rubbing his hand across her face. L.A. stated she "fear[ed] for her life." Appellant's Appendix at 76. As he left her bedside, Hutchison ran his hand along L.A.'s breast.

Shortly after leaving L.A.'s room, Hutchison entered the room of ninety-two-year-old L.E., also a patient at the hospital. L.E. was comatose[1] and had various medical devices assisting her, including an IV, an oxygen machine, and a waste extraction tube. After

[1] The Presentence Investigation Report ("PSI") is the only part of the record that states L.E. was in a coma. However, even if L.E. was not in a coma, other parts of the record state she nevertheless was unaware of Hutchison's presence, and Hutchison admitted as much during his plea hearing.

attempting to wake L.E., Hutchison lifted L.E.'s hospital gown, climbed on top of her, and had vaginal intercourse with her for approximately two to three minutes.

Anderson police officers responding to these incidents found Hutchison hiding in a basement office of the hospital. The door to the office was locked, but Hutchison had gained access by climbing over a wall that separated the office from the hospital's common area. When officers apprehended Hutchison, he was carrying a plastic tub that contained various items, including personal planners, soft drinks, candy, and music CDs, all of which were hospital property.

The State charged Hutchison with burglary, a Class C felony; theft, a Class D felony; and sexual battery, a Class D felony, based on the incidents in the basement office and with L.A. Shortly thereafter, the State charged Hutchison with rape, a Class B felony, based on the incident with L.E. The parties agreed that Hutchison would plead guilty to the rape charge and that the State would dismiss the burglary, theft, and sexual battery charges. Sentencing was left to the trial court's discretion, except that the executed portion of Hutchison's sentence could not exceed fifteen years.

After accepting Hutchison's plea of guilty but mentally ill, the trial court conducted a sentencing hearing. Thereafter the trial court issued a sentencing statement, which reads in relevant part as follows:

> The Court finds aggravation: 1) Prior juvenile criminal and delinquent acts; 2) The defendant is in need or correctional and/or rehabilitative services that can best be provided by commitment to a penal facility; 3) The advanced age of the victim; 4) The victim was physically infirm at the time of the instant offense; and 5) Prior attempts at rehabilitation have not been successful. The Court finds mitigation: 1) The defendant plead [sic] guilty to the Instant Offense,

> saving the State the time and cost of a trial; 2) Defendant has a pattern of mental illness and diagnosis, none of which constitutes a defense; and 3) Defendant's highly dysfunctional home environment and a life of instability.

Id. at 113. Based on these findings, the trial court sentenced Hutchison to a total sentence of twenty years, with fifteen years executed and five suspended. Hutchison now appeals.

Discussion and Decision

I. Imposition of Sentence

Although Hutchison's primary argument is that his sentence was inappropriate based on the nature of the offense and his character, portions of this argument intersperse claims that the trial court abused its discretion in sentencing him because it did not "properly consider[] the mitigating factors in sentencing," appellant's brief at 9, and "fail[ed] to balance the applicable mitigating and aggravating factors," id. at 11. To the extent these claims urge us to review the trial court's weighing of aggravating and mitigating factors for an abuse of discretion, our supreme court's decision in Anglemyer v. State, 868 N.E.2d 482 (Ind. 2007), precludes such a review.

In Anglemyer, the court concluded that the weight a trial court gives to aggravating and mitigating factors is not subject to appellate review for an abuse of discretion because, under the new statutory sentencing scheme,[2] "the trial court no longer has any obligation to 'weigh' aggravating and mitigating factors against each other . . . [and therefore] can not now be said to have abused its discretion in failing to 'properly weigh' such factors." 868 N.E.2d

[2] This sentencing scheme became effective on April 25, 2005. See id. at 491 n.9. Because Hutchison committed his crime after that date, the new scheme applies to his sentence. See Gibson v. State, 856 N.E.2d 142, 146 (Ind. Ct. App. 2006).

at 491. Thus, we are precluded from reviewing Hutchison's claim that the trial court failed to properly weigh aggravating and mitigating factors.[3]

II. Appropriateness of Sentence

Hutchison argues his sentence is inappropriate based on the nature of the offense and his character.

A. Standard of Review

Our rules permit revision of a sentence "if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We may "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). In determining whether a sentence is inappropriate, the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). However, "a defendant must persuade the appellate court that his or her sentence has met this inappropriateness standard of review." Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

B. Nature of the Offense and Character of the Offender

The trial court sentenced Hutchison to twenty years, with fifteen years executed and five suspended. Thus, Hutchison's executed sentence was five years above the advisory sentence and five years below the maximum sentence. See Ind. Code § 35-50-2-5 ("A person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and

[3] Hutchison filed his brief before Anglemyer was decided and therefore could not have anticipated

twenty (20) years, with the advisory sentence being ten (10) years."). However, Hutchison nevertheless received the maximum sentence. See Weaver v. State, 845 N.E.2d 1066, 1072 n.4 (Ind. Ct. App. 2006) (explaining that a defendant's total sentence includes both the executed and suspended portion of a sentence).

Regarding the nature of the offense,[4] the record discloses Hutchison entered L.E.'s room and observed a ninety-two-year-old comatose woman. Still, Hutchison attempted to wake her and, when she did not respond, climbed on top of her and raped her. The character of the offense does not render Hutchison's sentence inappropriate.

Hutchison argues his sentence is inappropriate based on his character, specifically his "inability to control [his] behavior as a result of the impairment, a limitation of functioning, and an extended history of mental illness that was related to the commission of the crime." Reply Brief of Appellant at 4. To determine the proper weight to give mental illness, we examine "(1) the extent of the defendant's inability to control his or her behavior due to the disorder or impairment; (2) overall limitations on functioning; (3) the duration of the mental illness; and (4) the extent of any nexus between the disorder or impairment and the commission of the crime." Weeks v. State, 697 N.E.2d 28, 30 (Ind. 1998).

The record discloses a history of psychiatric treatment and mental illness. The PSI states Hutchison was diagnosed with Attention Deficit Hyperactivity Disorder when he was three years old and, following an evaluation, was recommended for placement in a

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this result.

psychiatric facility as early as 2002. However, two psychiatric evaluations prepared for a competency hearing conclude Hutchison "is capable of determining right from wrong and can understand the wrongfulness of his behavior . . . .," appellant's app. at 79, and that although Hutchison "presents himself as someone who is unable to control behavior and does not even remember his behavior. . . . [H]e was able to understand the wrongfulness of the conduct at the time of the offense and does not have a psychiatric disorder that interferes with that," id. at 83.

Moreover, Hutchison's statements at the sentencing hearing do not indicate any nexus between his mental illness and the offense. Describing his illness as a "demonic spirit," Hutchison initially credited, but ultimately disavowed, his illness's role in the commission of the crime:

> What I feel I did was wrong, stupid, it was out of this world. I mean, sometimes I feel like it was a demonic spirit pulling me in and I had smoked, I mean, I had a [sic] very first experience with marijuana that day, had smoked like a quarter of a joint, but I do not use that as an excuse for my behavior. Nothing is. Not even the demonic spirit. What I did was completely intentional and I take full responsibility for it.

Id. at 150. We also note Hutchison's mental illness is not the only evidence in the record that bears on his character. The PSI discloses that when Hutchison was eleven years old, the juvenile court made a true finding of child molestation, a Class B felony had Hutchison been

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[4] Hutchison does not argue his sentence is inappropriate based on the nature of the offense. However, our appellate rules require that we examine both "the nature of the offense and the character of the offender" to determine whether the sentence is inappropriate. App.R. 7(B).

an adult.[5] See Ind. Code § 35-42-4-3(a). Finally, the offense itself provides insight into Hutchison's character. Although we hesitate to classify any rape as anything but a serious crime, Hutchison's conduct, raping an incapacitated elderly woman lying in a hospital bed, was egregious and indicates his depraved character.

The burden was on Hutchison to demonstrate his sentence was inappropriate based on the nature of the offense and his character. Our review of the record convinces us that Hutchison has not met his burden. Therefore, we conclude Hutchison's sentence was not inappropriate.

Conclusion

The trial court did not abuse its discretion when it sentenced Hutchison and Hutchison's sentence is not inappropriate.

Affirmed.

VAIDIK, J., and BRADFORD, J., concur.

[5] At the sentencing hearing, Hutchison claimed the finding was reduced to fondling, a Class C felony had Hutchison been an adult. See Ind. Code § 35-42-4-3(b).