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IN THE COURT OF APPEALS OF INDIANA

KYLE CHARLES JONES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A04-0606-CR-291
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-0508-FA-314

December 12, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Kyle Jones appeals his sentence for child molesting as a Class B felony, arguing that his sentence is inappropriate in light of the nature of his offense and his character. Finding that Jones' sentence is not inappropriate, we affirm.

Facts and Procedural History

On August 17, 2005, thirteen-year-old J.C. was dropped off by her mother at school for an athletic tryout. J.C. did not have the paperwork needed to participate, so she went to Jones' house. J.C. was a friend of Jones' stepdaughter. When J.C. arrived, Jones' stepdaughter was not home, but Jones was. Inside the house, Jones performed oral sex on J.C.

The State charged Jones with Child Molesting as a Class B felony.[1] In establishing a factual basis for Jones' guilty plea, the prosecuting attorney alleged, in pertinent part, that "[Jones] was married to a lady that lives in Lapel who has I think a thirteen-year-old daughter . . . . [T]he family and particular[ly] this daughter were friends with [J.C.]" Tr. p. 11. When asked by the trial court, "Is there anything he said that wasn't true?" Jones replied, "No, sir." *Id*. at 12. Jones pled guilty as charged and agreed to leave sentencing to the discretion of the trial court.

In sentencing Jones, the trial court identified two aggravating circumstances: (1) Jones violated a position of trust and (2) Jones was on probation when he committed the offense. The trial court found a single mitigating circumstance, namely, the fact that Jones pled guilty. Finding that the aggravating circumstances outweigh the mitigating

[1] Ind. Code § 35-42-4-3(a). The State originally charged Jones with Child Molesting as a Class A felony but later amended the charge to a Class B felony.

circumstance, the trial court imposed a sentence of twelve years with ten years executed and two years suspended. Jones now appeals.

Discussion and Decision

On appeal, Jones makes two distinct arguments. First, he argues that the trial court failed to properly find and balance the aggravating and mitigating circumstances. Second, he argues that his sentence is inappropriate in light of the nature of his offense and his character under Indiana Appellate Rule 7(B). As an initial matter, we note that Jones was sentenced under Indiana's new advisory sentencing scheme, which went into effect on April 25, 2005, nearly four months before Jones committed his offense. Under this scheme, "Indiana's appellate courts can no longer *reverse* a sentence because the trial court abused its discretion by improperly finding and weighing aggravating and mitigating circumstances[.]" *McMahon v. State*, 856 N.E.2d 743, 749 (Ind. Ct. App. 2006) (emphasis added). As such, appellate review of sentences in Indiana is now limited to Appellate Rule 7(B). *See id.* at 748-49. Nonetheless, an assessment of aggravating and mitigating circumstances is still relevant to our review for appropriateness under the rule, which states: "The Court may revise a sentence authorized by statute 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." *Id.* at 748-49. We will therefore consider the aggravating and mitigating circumstances identified by the trial court in addressing Jones' argument that his sentence in inappropriate.

Jones first contends that the trial court improperly found as an aggravating circumstance the fact that Jones was in a position of trust with his victim, J.C. We agree. The only facts known to the trial court were that J.C. was a friend of Jones' stepdaughter and that J.C. went to Jones' house because she was unable to participate in an athletic tryout. There is no evidence of any close or involved relationship between Jones and J.C. This Court has rejected the position of trust aggravator in circumstances involving a much closer relationship than that between Jones and J.C. In *Bluck v. State*, the defendant lived in the same apartment building as his thirteen-year-old victim. 716 N.E.2d 507, 511 (Ind. Ct. App. 1999). The victim visited the defendant "almost every day." *Id*. Eventually, the defendant began performing sexual acts with the victim. We held, "Being a neighbor, without more, is not a position of trust warranting its consideration as an aggravating circumstance." *Id*. at 514. If the defendant in *Bluck* was not in a position of trust with his victim, then neither was Jones, at least in light of the facts available to the trial court.[2]

Jones also challenges the second aggravating circumstance found by the trial court, i.e., the fact that Jones was on probation when he committed the instant offense. Jones focuses on the fact that he was on probation based on a conviction for possession of marijuana as a Class A misdemeanor. He argues, "For purposes of sentencing for child molesting, the marijuana misdemeanor offense did not justify the enhanced sentence

[2] Jones also argues that the position of trust aggravator violated his Sixth Amendment rights under *Blakely v. Washington*, 542 U.S. 296 (2004), because it was not proven to a jury beyond a reasonable doubt and he did not admit it or consent to judicial factfinding. Jones' argument in this regard is misplaced, as the 2005 changes to Indiana's sentencing statutes eliminated the possibility of any violation under *Blakely*. *See* Ind. Code § 35-38-1-7.1(d) ("A court may impose any sentence that is authorized by statute and permissible under the Constitution of the State of Indiana regardless of the presence or absence of aggravating circumstances or mitigating circumstances.") (formatting altered).

which was imposed." Appellant's Br. p. 11. This statement is true. *See, e.g., Wooley v. State*, 716 N.E.2d 919, 929 (Ind. 1999) ("[A] criminal history comprised of a single, nonviolent misdemeanor is not a significant aggravator in the context of a sentence for murder."), *reh'g denied*. However, Jones is misconstruing the trial court's aggravator. The trial court did not rely on Jones' single prior conviction as an aggravating circumstance. Rather, the trial court was concerned with the fact that Jones was on probation for that conviction when he committed the instant offense. In other words, it is the fact of being on probation, not the nature of the conviction underlying that probation, which constitutes the aggravator. *See Ryle v. State*, 842 N.E.2d 320, 323 n.5 (Ind. 2005) ("Probation stands on its own as an aggravator. While a criminal history aggravates a subsequent crime because of recidivism, probation further aggravates a subsequent crime because the defendant was still serving a court-imposed sentence."), *cert. denied*, 127 S. Ct. 90 (2006). The trial court properly relied upon the fact that Jones was on probation when he committed the instant offense as an aggravating circumstance.

Next, Jones contends that the trial court overlooked certain mitigating circumstances. First, he points to testimony from his wife and his mother that he has remorse for his crime. 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, 535 (Ind. 2002). Absent evidence of some impermissible consideration by the trial court, we accept its determination of credibility. *Id.* Jones suggests no impermissible considerations by the trial court. Therefore, the trial court's rejection of this mitigator was not improper.

Jones also urges as a mitigating circumstance that he has "a good history of consistently working and supporting his family." Appellant's Br. p. 13. Jones did testify that he has a history of "constantly working" and "[s]upporting [his] family." Tr. p. 29. However, Jones has failed to direct us to any more specific evidence that supports those self-serving statements. As such, we cannot say that it was improper for the trial court to ignore this proffered mitigating circumstance.

Finally, Jones argues that the trial court failed to assign sufficient weight to his guilty plea as a mitigating circumstance. As Jones notes, the Indiana Supreme Court has stated, "[A] defendant who willingly enters a plea of guilty has extended a substantial benefit to the state and deserves to have a substantial benefit extended to him in return." Appellant's Br. p. 13 (quoting *Williams v. State*, 430 N.E.2d 759, 764 (Ind. 1982)). Here, Jones did receive a substantial benefit in exchange for pleading guilty. Namely, the State amended the charging information from a Class A felony, which carries a sentencing range of twenty to fifty years, to a Class B felony, which carries a sentencing range of six to twenty years. 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). The trial court was not required to assign greater mitigating weight to Jones' guilty plea.

We are left, then, with one significant aggravator—Jones was on probation when he committed the instant offense—and one insignificant mitigating circumstance—Jones pled guilty. In addition to these considerations, Jones contends that his sentence is

inappropriate in light of the nature of his offense. Jones stresses: (1) "[t]here was no gratuitous brutality during the act;" (2) "[t]here was no evidence of threats to keep [J.C.] from telling anyone;" (3) "[t]he action was a [one]-time occurrence;" and (4) "[t]here was no evidence of any emotional trauma to [J.C.] beyond what would be present in any crime of this nature." Appellant's Br. p. 14. Jones continues, "One non violent act of oral contact to [J.C.'s] genitals does not justify the maximum sentence." *Id.* at 15. However, Jones did not receive the maximum sentence. Though he faced a maximum sentence of twenty years, the trial court sentenced him to twelve years. This sentence is just two years above the advisory sentence, and the trial court suspended those two years. Considering the aggravating circumstance that Jones was on probation when he committed this offense, we cannot say that his sentence is inappropriate.

Affirmed.

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