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IN THE
COURT OF APPEALS OF INDIANA

MARK TOLIVER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0702-CR-104
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
Cause Nos. 49G03-0609-FC-174207 and 49G03-0609-FC-186682

September 17, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Mark Toliver appeals his sentence following his conviction for two counts of Child Molesting, as Class C felonies, pursuant to a guilty plea. Toliver raises two issues for our review, which we consolidate into a single issue, namely whether Toliver's sentence is inappropriate in light of his remorse, advanced age, and poor health.

We affirm.

FACTS AND PROCEDURAL HISTORY

On September 15, 2006, the State charged Toliver with three counts of child molesting, as Class C felonies, under Cause Number 49G03-0609-FC-174207 ("174207") for offenses committed against his ten-year-old granddaughter, M.L. On September 27, 2006, the State charged Toliver with three counts of child molesting, as Class C felonies, and one count of vicarious sexual gratification, as a Class D felony, under Cause Number 49G01-0609-FC-186682 ("186682") for offenses committed against another granddaughter, twelve-year-old C.M.

On January 11, 2007, pursuant to a plea agreement, Toliver pleaded guilty to one count of child molesting, as a Class C felony, in each case, and the State dismissed the remaining charges. The plea agreement provided for a cap of ten years executed, with the sentences in the two cases to run consecutively. Toliver agreed to leave the exact term of the sentence to the trial court's discretion.

On January 19, 2007, after a hearing before a commissioner, the trial court sentenced Toliver in relevant part as follows:

> I appreciate that [Toliver] is ill, and I appreciate his age. However, I also appreciate the fact that he molested two of his grandchildren.

> So what I'm going to do on this: On cause number ending in [1]74207, he pled guilty to a Class C felony. There will be a six-year sentence on that. Of the six years, two will be executed in DOC. Four years will be suspended. He'll be on sex probation when he's released and ordered to successfully complete the sex probation program. That leaves the four years that that can be done.
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> * * *
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> [A]nd then on cause number . . . 186682, it's also a Class C felony. There also will be a four -- a six-year term. Of the six years, two will be executed in DOC, to be served consecutively, pursuant to the plea agreement, with cause number ending in [1]74207. . . .
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> * * *
>
> Oh, for the record, I do recognize the mitigator that he has a health problem, okay, and the fact that he did plead guilty. And he said on the record that he didn't want his grandchildren to go through the trial. I considered that.

Transcript at 34-35. Toliver's aggregate sentence is four years executed. He now appeals.

DISCUSSION AND DECISION

Toliver first contends that the trial court abused its discretion when it did not consider his remorse as a mitigator. Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." Anglemyer, 868 N.E.2d at 491 (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. "The court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the [c]ourt 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). In conducting our review under Rule 7(B), we assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142 (Ind. Ct. App. 2006). However, "a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." Anglemyer, 868 N.E.2d at 494 (quoting Childress, 848 N.E.2d at 1080) (alteration in original).

"Subject to the review and revise power under Indiana Appellate Rule 7(B), sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. Id.

A finding of mitigating circumstances lies within the trial court's discretion. Widener v. State, 659 N.E.2d 529, 533 (Ind. 1995). If a sentencing statement includes a finding of aggravating or mitigating circumstances, then the statement must identify the significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. Anglemyer, 868 N.E.2d at 490 (emphasis added). The trial court is not obligated to explain why it did not find a factor to be significantly mitigating, Chambliss v. State, 746 N.E.2d 73, 78 (Ind. 2001), and the

sentencing court is not required to place the same value on a mitigating circumstance as does the defendant, Beason v. State, 690 N.E.2d 277, 283-84 (Ind. 1998).

Here, Toliver claims that his remorse should have been identified and considered as a significant mitigating factor. However, he cites to only two occasions directly attributable to him in which he expressed remorse. Specifically, according to the presentence report, Toliver said that "he is very sorry for what he did to the girls. It was never his intention to hurt anyone. He made a mistake and says it will not happen again. He wishes he could make it up to his family and the girls." Presentence Report at 7. And at sentencing, when asked if he was sorry, Toliver stated, "I love my grandkids. I know I was wrong." Transcript at 24. The only other reference to Toliver's remorse was in argument made by his counsel, who opined that Toliver was one of counsel's more remorseful clients.

The evidence of Toliver's remorse in this case is not overwhelming. As noted above, the trial court was not required to detail mitigators that it did not find to be significant or to explain why it did not find a particular mitigator to be significant. Thus, we cannot say that the trial court failed to find a mitigating circumstance clearly supported by the record. See Widener, 659 N.E.2d at 533. We conclude that the trial court did not abuse its discretion when it did not identify Toliver's remorse as a mitigating factor.

Toliver next contends that the trial court "failed to properly credit his advanced age and extremely poor health as mitigating factors." Appellant's Brief at 8. At the time of sentencing, Toliver was 66 years old, and he was under treatment for high blood pressure, diabetes, and diabetic neuropathy. His medical history also included five heart

attacks, bypass surgery in 2003, treatment for an abdominal aneurysm, and the implantation of stents.

The trial court acknowledged Toliver's age and poor health when it sentenced him. Thus, the trial court considered those factors. And Toliver testified that none of his medical conditions are terminal. The trial court also considered the fact that Toliver pleaded guilty and did not want his grandchildren to go through a trial. Indeed, the trial court sentenced Toliver to an aggregate sentence of four years' executed time on the child molesting charges and suspended a total of eight years to probation. In essence, in making his argument under Appellate Rule 7(B), Toliver argues that the trial court should have given his age and poor health more weight as mitigators. But the trial court's determination on the weight accorded each aggravator and mitigator is not subject to review for an abuse of discretion. See Anglemyer, 868 N.E.2d at 491. Regardless, the trial court did give the mitigators significant weight when it suspended eight years of Toliver's 12-year aggregate sentence. Thus, Toliver's sentence is not inappropriate in light of his age and poor health.

We note that Toliver also frames the issues on appeal in terms of a more traditional Rule 7(B) review by arguing that his sentence is inappropriate in light of his character and the nature of the offense. Specifically, he contends that his remorse, advanced age, and infirmities go to his character. See, e.g., Appellant's Brief at 7 ("His remorse does, however, impact whether, even given [the aggravator that he molested his own grandchildren], Toliver's sentence was inappropriate in light of his character and the nature of that offense. It would be difficult to argue that two defendants, both of whom

have significant criminal histories, should receive the same sentence for the same crime when one of the defendants is remorseful and the other is not.") He claims that his sentence is inappropriate after considering those factors, even when weighed against the fact that he molested his grandchildren.[1] But whether those factors are considered in relation to his character or as mitigators, the result is the same. Even when Toliver's remorse, age, and poor health are taken into account, we cannot say that a twelve-year sentence with eight years suspended is inappropriate.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.

[1] We note that Toliver's character and the nature of the offense overlap to the extent we consider that he molested his own grandchildren.