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IN THE COURT OF APPEALS OF INDIANA

ROBERT W. GOLDSBERRY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 51A01-0512-CR-574
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARTIN CIRCUIT COURT
The Honorable R. Joseph Howell, Judge
Cause No. 51C01-0210-FA-190

December 8, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Robert W. Goldsberry was convicted after a jury trial of child molesting, a Class A felony,[1] and he appeals his sentence. Goldsberry sought permission to file a belated appeal, to which the State did not object; accordingly the State cannot now challenge the grant of Goldsberry's motion. As a result, Goldsberry may rely on *Blakely v. Washington*, 542 U.S. 296 (2004), *reh'g denied* 542 U.S. 961 (2004), to challenge an enhancement of his sentence based on aggravating circumstances neither found by a jury beyond a reasonable doubt nor admitted by Goldsberry.

Goldsberry's criminal history and his need for rehabilitative treatment, his admission he was in a position of trust with the victim, and his lack of remorse as demonstrated by his own testimony are all valid aggravating circumstances, and they outweigh the two mitigating factors the court found. We can therefore say with confidence the trial court properly enhanced Goldsberry's sentence, and we accordingly affirm.

FACTS AND PROCEDURAL HISTORY

Goldsberry was sentenced to forty years in the Department of Correction, with five years suspended. The presumptive sentence at that time for a Class A felony was thirty years. Twenty years could be added for aggravating circumstances, and ten years could be subtracted for mitigating circumstances. Ind. Code § 35-50-2-4. At sentencing, the trial court found as aggravating circumstances:

> [Goldsberry] does have a history of criminal or delinquent activity. Although the Court, again, does note that it is not substantial. And the

[1] Ind. Code § 35-42-4-3.

> Court would find [Goldsberry] is in the need of correctional, rehabilitative treatment that can best be provided by commitment of the person to a penal facility; given this being a sex crime; and there being very few, if any, treatment programs that do not involve in-patient treatment. And an effective . . uh . . or such effective programs are best found in . . in a secure facility or in-patient facility. And placing [Goldsberry] in a penal facility seems to be appropriate. Imposition of a reduced sentence or suspension of the sentence and imposition of a probation would depreciate the seriousness of the crime. It also seems to be appropriate under the facts and circumstances of the case. This going to the issue raised by the State that there does appear to be some lack of remorse and more of a statement by [Goldsberry] that this is someone else's fault; or he's more concerned with having been caught than with . . uh . . having actually committed the crime. This, in fact, is a sex crime. Although that . . uh . . that appears to . . uh . . be part and parcel of the underlying offense, that can't be an aggravating offense. I just wanted to note that. And, once again, this crime was committed within the hearing of a person that was less than eighteen years of age who was not a victim of the offense. That being, I believe, [K.G.] The Court would further find that [Goldsberry] did . . uh . . violate a position of trust based on the facts set forth by the State. That the young adult/juvenile/child was, in fact, thirteen years of age; her parents were contemplating divorce; she was living with her aunt and uncle. And, therefore, was particularly susceptible and vulnerable under the circumstances. And the crime would have extraordinary emotional . . negative emotional effects upon the child under those circumstances.

(App. at 278-280.)

With regard to mitigating circumstances, the trial court stated:

> As mitigating factors, the Court would find the following: That [Goldsberry] has led a law-abiding life for a substantial period of time before committing this crime . . . . I think it's unlikely [Goldsberry] will commit this type of crime in the future. But I can't say that with any degree of certainty because of the apparent lack of remorse or statement, and as the statements of justification made by [Goldsberry] in his statement made to the state police; which were introduced during the trial in this case. Those statements being particularly troubling. The Court would find that imprisonment of the person will result in undue hardship to the dependents of the person.

(*Id.* at 280.) The trial court found the aggravating circumstances outweighed the mitigating circumstances.

Goldsberry petitioned for permission to file a belated notice of appeal. The State responded it had no objection to the Petition. The trial court granted Goldsberry's petition to file a belated notice of appeal on November 14, 2005.

DISCUSSION AND DECISION

1. Applicability of *Blakely*

The State first contends Goldsberry should not be allowed to bring a belated appeal, as he did not timely pursue his appeal. The State has waived this argument, however, as it stated in response to Goldsberry's petition for permission to file a belated appeal: "The State does not object to allowing the defendant to file a belated Notice of Appeal." (App. at 22.)

The State then contends Goldsberry may not rely on *Blakely*. We decline to so hold, and instead hold *Blakely* applies in certain cases where permission to file a belated appeal has been properly obtained.[2]

Blakely held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. 542 U.S. at 301. In *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005), *cert. denied* __ U.S. __, 126 S.Ct. 545 (2005), our Indiana

[2] We recently so held in *Gutermuth v. State*, 848 N.E.2d 716 (Ind. Ct. App. 2006), *petition for transfer granted, decision vacated*. For the reasons articulated below, we decline to follow *Hull v. State*, 839 N.E.2d 1250, 1256 (Ind. Ct. App. 2005), and *Robbins v. State*, 839 N.E.2d 1196, 1199 (Ind. Ct. App. 2005), which decisions did not permit retroactive application of *Blakely*. It does not appear transfer was sought in *Hull* or *Robbins*.

Supreme Court determined our sentencing system ran afoul of the Sixth Amendment because it mandated a fixed term but also permitted judicial discretion in finding aggravating or mitigating circumstances to deviate from the fixed term. *Id*. at 685.

The State asserted Smylie had forfeited his right to challenge his sentence under *Blakely* by failing to object on Sixth Amendment grounds at sentencing. The Court noted *Blakely* was decided while Smylie's case was pending on direct appeal, and held "Because *Blakely* radically reshaped our understanding of a critical element of criminal procedure, and ran contrary to established precedent, we conclude that it represents a new rule of criminal procedure." *Id*. at 687. Because a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases pending on direct review or not yet final, *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), the *Smylie* court concluded:

> First, as a new rule of constitutional procedure, we will apply *Blakely* retroactively to all cases on direct review at the time *Blakely* was announced. Second, a defendant need not have objected at trial in order to raise a *Blakely* claim on appeal inasmuch as not raising a *Blakely* claim before its issuance would fall within the range of effective lawyering. Third, those defendants who did not appeal their sentence at all will have forfeited any *Blakely* claim.

823 N.E.2d at 690-91.

The Indiana sentencing scheme that ran afoul of *Blakely* was used when Goldsberry was sentenced. Goldsberry moved for a belated appeal, to which motion the State explicitly declined to object. A case is "final" when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition of certiorari elapsed or a petition for certiorari finally denied. *Griffith*, 479 U.S. at 321 n.6. As Goldsberry properly obtained permission to file a belated appeal, his "availability of

appeal" was not "exhausted" when *Blakely* was announced, and therefore *Blakely* must be given retroactive effect.

2. Aggravating and Mitigating Circumstances

Goldsberry argues the trial court should not have enhanced his sentence, as many of the aggravating circumstances found by the trial court were improper under *Blakely*.

The trial court found Goldsberry had a criminal record, albeit meager. The use of that fact as an aggravator does not run afoul of *Blakely*. *See Young v. State*, 834 N.E.2d 1015, 1017 (Ind. 2005) (*Blakely* does not require a jury finding to increase a sentence based on the fact of a prior conviction).

The trial court also found Goldsberry was in need of corrective or rehabilitative treatment best provided by a penal facility. The trial court stated:

> [Goldsberry] has committed a very serious offense, [Goldsberry] has little insight into how committing the crime of child molesting has affected the victim, [Goldsberry] believes the victim is largely [to] blame for enticing him into committing the acts, [Goldsberry] has not voluntarily attempted any rehabilitation and is unlikely to complete court-ordered community-based treatment, [Goldsberry] will need intensive treatment and rehabilitation in a structured, secure setting such as a penal facility if [Goldsberry] is to be rehabilitated.

(App. at 68-69.)

Under *Blakely*, this cannot serve as a separate aggravating factor, but may reflect a legitimate observation about the weight to be given to facts appropriately noted by the trial judge. *Morgan v. State*, 829 N.E.2d 12, 17 (Ind. 2005).

The trial court also found, based on Goldsberry's testimony, that he lacked remorse for what he had done and was more concerned with being caught than with

having committed the child molestation. Lack of remorse is a proper aggravating circumstance. *Veal v. State*, 784 N.E.2d 490, 494 (Ind. 2003). Goldsberry's testimony at trial and sentencing, including the testimony noted above that he believed the victim was largely to blame for enticing him into committing the offense, permitted the sentencing court to conclude Goldsberry lacked remorse.

The trial court concluded, based on Goldsberry's admissions, that he was in a position of trust with his victim. Goldsberry testified at trial, and a statement he made prior to his arrest was admitted into evidence. Goldsberry admitted T.C.'s parents were divorcing and they had left her to stay with Goldsberry and his wife for a time. (*See* State's ex. 1 at 12; Tr. at 27.) He stated T.C. called him "Uncle Robert." (*Id.* at 20.) This is sufficient to permit the sentencing court to conclude Goldsberry was in a position of trust with T.C. *See Devries v. State*, 833 N.E.2d 511, 515 (Ind. Ct. App. 2005) (Devries' testimony at trial he was married to victim's mother, he took care of victim on more than one occasion, and he was living with victim's mother at the time of the alleged molestation and for at least fifteen months thereafter supported the sentencing court's conclusion DeVries was in a position of trust with the victim), *trans. denied* 841 N.E.2d 187 (Ind. 2005), *disapproved on other grounds by Ryle v. State*, 842 N.E.2d 320, 323 n.5 (Ind. 2005).

Other aggravating circumstances found by the trial court were improper. The trial court found that the imposition of a reduced or suspended sentence would depreciate the seriousness of the crime. As there was no indication the trial court was considering a reduced sentence, this aggravator was improper. *See Meadows v. State*, 785 N.E.2d

1112, 1127 (Ind. Ct. App. 2003) (this factor may be used only to support the refusal to impose a sentence less than the presumptive), *trans. denied* 792 N.E.2d 49 (Ind. 2003). The trial court also found the crime was committed in the presence of or within the hearing of a person who was less than 18 years of age — Goldsberry's daughter, K.G. Goldsberry testified K.G. was in the other room, but did not testify she was under 18. As a result, this aggravator was improper.

Goldsberry's criminal history and need for corrective or rehabilitative treatment, his lack of remorse, and his violation of a position of trust are valid aggravating circumstances. There were two mitigating circumstances: Goldsberry had led a largely law-abiding life and his incarceration would cause his dependents financial hardship. Given these factors, we cannot say the trial court would not have given Goldsberry a sentence of 40 years, which was less than the maximum sentence he could have received.

Affirmed.

BAKER, J., concurring in result with separate opinion.

SULLIVAN, J., concurring with separate opinion.

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BAKER, Judge, concurring in result.

I respectfully disagree with the majority's application of the ruling in Gutermuth v. State, 848 N.E.2d 716 (Ind. Ct. App. 2006). I believe that the better approach is to hold that where, as here, a defendant's right to a timely appeal lapsed before Blakely was decided, his case was not on direct review at the time Blakely was announced. Thus, Blakely does not apply retroactively to his case and he may not now seek the protection of the Blakely rule. Hull v. State, 839 N.E.2d 1250, 1256 (Ind. Ct. App. 2005); Robbins v. State, 839 N.E.2d 1196, 1199 (Ind. Ct. App. 2005). That being said, although I disagree with the majority with respect to the application of Blakely, I agree with its analysis and conclusion regarding Goldsberry's sentence. Thus, although I would have declined to consider Goldsberry's Blakely arguments, I concur in the result reached by the majority.

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SULLIVAN, Judge, concurring

I fully concur in the application of Gutermuth v. State, 848 N.E.2d 716 (Ind. Ct. App. 2006) and therefore in the application of Blakely for the reason that this case was "not yet final" when Goldsberry's Petition for Belated Appeal was filed and granted. 848 N.E.2d at 726.

I also agree that the sentence imposed is not invalid based upon the trial court's consideration of improper aggravators. In this regard, however, I disagree with my colleagues that the determination that "imposition of a reduced or suspended sentence would depreciate the seriousness of the crime" is an improper aggravator. Slip op. at 6.

My disagreement must acknowledge that the current state of the law with regard to the use of this aggravating factor is less than crystal clear. Our Supreme Court has held

that the "depreciating the seriousness of the crime" aggravating circumstance may be spoken of in two different ways. One is that the imposition of a *reduced* sentence would depreciate the seriousness of the crime. Ajabu v. State, 722 N.E.2d 339, 343 (Ind. 2000). A trial court may not enhance a sentence upon this ground, but may rely upon this factor only to refuse to impose a sentence less than the presumptive. Id. The second is that a sentence *less* than the enhanced sentence would depreciate the seriousness of the crime. Id. It is proper for the trial court to rely upon this second factor to support an enhancement. Id.

However, two months after deciding Ajabu, in another unanimous decision, Price v. State, 725 N.E.2d 82, 85 (Ind. 2000), the Supreme Court found meritorious appellant's argument that the "depreciat[ing] the seriousness of the crime" aggravator is "only appropriate when the trial court is considering imposing a sentence lower than the presumptive sentence . . . ." In doing so, but without distinguishing Ajabu, the court relied upon Garrett v. State, 714 N.E.2d 618, 622 (Ind. 1999), holding that "[the depreciating the seriousness of the crime aggravator] . . . may not enhance a sentence" and Sweeney v. State, 704 N.E.2d 86, 109 (Ind. 1998), cert. denied, 527 U.S. 1035 (1999), holding that "[t]his factor may not be used . . . as the basis for enhancing a sentence."

Although the various case law pronouncements appear to be in conflict they might be reconciled by reaching the conclusion that a trial court may appropriately state that it considered only whether to impose the presumptive or an enhanced sentence and that imposing any sentence less than the enhanced sentence would depreciate the seriousness

of the crime. However, the trial court must so state with great clarity and specificity. Otherwise the trial court may not appropriately allude to that factor as a generalized basis for imposing an enhanced sentence.

In the case before us the trial court clearly stated that imposition of a reduced or suspended sentence would depreciate the seriousness of the crime. In context, it reflects, to some degree, the trial court's justification for the enhanced sentence. This statement comports with the Supreme Court's advisement in Ajabu and in my view constitutes an appropriate aggravator.

I concur in the affirmance of the sentence as imposed.