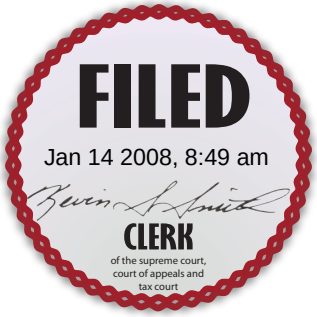

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IN THE
COURT OF APPEALS OF INDIANA

ANTHONY MAKAREK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 54A01-0703-CR-134
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MONTGOMERY CIRCUIT COURT
The Honorable Thomas K. Milligan, Judge
Cause No. 54C01-0604-FB-33

January 14, 2008

MEMORANDUM DECISION– NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Anthony Makarek appeals the ten-year aggregate sentence that was imposed following his guilty plea to two counts of Sexual Misconduct with a Minor,[1] a class B felony. Specifically, Makarek contends that the trial court did not consider various mitigating factors that were apparent from the record, that several aggravating circumstances were improperly identified, and that his sentence was inappropriate in light of the nature of the offenses and his character. Makarek also challenges the validity of two conditions of probation that were imposed. In essence, Makarek contends that his sentence should be revised to a term of six years, which should be suspended to probation. He also asserts that this matter should be remanded to the trial court for a clarification of the conditions of probation.

Finding that the ten-year sentence was appropriate, but concluding that several conditions of Makarek's probation were vague and overbroad, we affirm in part, reverse in part, and remand this cause to the trial court with instructions to clarify the conditions of probation.

FACTS

Makarek was born on March 3, 1972. Between January and June 2005, he resided in Parkersburg and lived near Paula Green. At some point, Makarek and Green engaged in an intimate relationship that lasted for approximately two months. Makarek eventually met Green's daughter, S.G., who was between fourteen and sixteen years of age in 2005.

Although Makarek's relationship with Green ended, he agreed to assist Green with

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[1] Ind. Code § 35-42-4-9.

S.G. Specifically, Makarek began taking S.G. to softball practice, and Makarek admitted that Green "trusted him" with S.G. Tr. p. 61-62. At some point, Makarek and S.G. engaged in wrestling matches, where Makarek frequently touched S.G.'s "private areas" over her clothing. Id. at 59-60. Thereafter, Makarek began touching S.G.'s breasts under her clothing, and on at least two occasions between January and June of 2005, Makarek put his penis inside S.G.'s mouth.

On April 3, 2006, the State charged Makarek with five counts of sexual misconduct with a minor, a class B felony. The State alleged that Makarek's actions took place between August 2, 2003, and August 1, 2005. However, the State subsequently amended the charging informations, alleging that Makarek committed the offenses between January and June 2005.

On January 3, 2007, the parties filed a plea agreement, which provided that Makarek would plead guilty to two counts in exchange for the dismissal of the remaining charges. It was agreed that the trial court would determine the sentence but the amount of executed time would not exceed ten years. The trial court accepted the plea and sentenced Makarek to ten years on each count, with six years executed and four years suspended to probation. The sentences were also ordered to run concurrently with each other.

In arriving at the sentence, the trial court identified the age difference between Makarek and S.G., Makarek's violation of his position of trust, and the ongoing and escalating nature of the crimes as aggravating circumstances. The trial court then identified Makarek's lack of criminal history, his character, show of remorse, and his participation in a

treatment program as mitigating circumstances. Thereafter, the trial court determined that the aggravating circumstances outweighed the mitigating factors and imposed the sentence set forth above.

Included among Makarek's conditions of probation were that he was to notify his probation officer of any "dating, intimate, and/or sexual relationship." Appellant's App. p. 71. Makarek was also directed to notify "any person with whom [he was] engaged in a dating, intimate, and/or sexual relationship of [his] sex-related conviction(s)." Id. Another condition of probation provided that Makarek:

> must never be alone or have contact with any person under the age of 18. Contact includes face-to-face, telephonic, written, electronic, or any indirect contact via third parties. [Makarek is] to report any incidental contact with persons under age 18 to [his] probation officer within 24 hours of the contact.

Id. at 72. Makarek now appeals.

DISCUSSION AND DECISION

I. Sentence Review—Generally

Before addressing the merits of Makarek's claims, we must first decide what sentencing scheme applies. In general, the statute to be applied when arriving at the proper criminal penalty should be the one in effect at the time the crime was committed. Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007).

On April 25, 2005, the General Assembly amended Indiana's felony sentencing statutes, which now provide that the person convicted is to be sentenced to a term within a range of years, with an "advisory sentence" somewhere between the minimum and maximum terms. See Ind. Code §§ 35-50-2-3 to -7. The statutes were amended to incorporate advisory

sentences rather than presumptive sentences and comply with the holdings in Blakely v. Washington, 542 U.S. 296 (2004), and Smylie v. State, 823 N.E.2d 679 (Ind. 2005). See Ind. Code § 35-38-1-7.1, § 35-50-2-1.3.

As noted above, the State's amended charging informations alleged that Makarek committed the offenses between January and June 2005. Even though we apply the version of the statutes that were in effect when the defendant has committed the crime, it is unclear when Makarek actually committed the crimes. Because the modified sentencing structure amounted to a substantive change and could be disadvantageous to defendants, they may not be applied retroactively. Weaver v. State, 845 N.E.2d 1066, 1070-71 (Ind. Ct. App. 2006), trans. denied. Therefore, we will review Makarak's sentencing claims under the prior sentencing scheme.[2]

In accordance with that version, we note that Indiana Code section 35-50-2-5 provided that

> A person who commits a Class B felony shall be imprisoned for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances.

Sentencing decisions are within the sound discretion of the trial court. Jones v. State, 790 N.E.2d 536, 539 (Ind. Ct. App. 2003). In determining whether to increase the presumptive penalty, the trial court determines which aggravating and mitigating

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[2] We note that the State also analyzes Makarak's arguments under the former sentencing scheme because the trial court "discussed aggravating and mitigating circumstances and balanced the weight of the factors." Appellee's Br. p. 7.

circumstances should be considered. Westmoreland v. State, 787 N.E.2d 1005, 1008 (Ind. Ct. App. 2003). Moreover, the trial court is responsible for determining the weight to accord each of those factors. Id. A trial court's sentencing statement should: 1) identify significant aggravating and mitigating circumstances; 2) state the specific reason why each circumstance is aggravating and mitigating; and 3) demonstrate that the aggravating and mitigating circumstances have been weighed to determine that the aggravators outweigh the mitigators. Id.

II. Mitigating Circumstances

Makarak argues that his sentence must be set aside because the trial court failed to identify several mitigating circumstances that were apparent from the record. Alternatively, Makarak contends that the trial court failed to give appropriate weight to the mitigating factors that it found.

Generally, the trial court must consider all evidence of mitigating circumstances presented by a defendant. Gillem v. State, 829 N.E.2d 598, 604 (Ind. Ct. App. 2005), trans. denied. However, the trial court is not obligated to find a circumstance to be mitigating merely because it is advanced as such by the defendant. Spears v. State, 735 N.E.2d 1161, 1167 (Ind. 2000). Moreover, the trial court is not obliged to agree with the defendant as to the weight or value to be given proffered mitigating circumstances. Gillem, 829 N.E.2d at 605. When the trial court fails to find a mitigator that is clearly supported by the record, a reasonable belief arises that the trial court improperly overlooked this factor. Banks v. State, 841 N.E.2d 654, 658 (Ind. Ct. App. 2006), trans. denied.

In this case, Makarek argues that the trial court failed to consider his character a significant mitigating factor. In support of this claim, Makarek points out that the trial court described his character as "pretty good" and observed that he had graduated from high school. The trial court also noted that Makarek had been employed for eleven years and that he has no criminal history or drug abuse. Tr. p. 75-76. However, the trial court also observed that the true test of a person's character is "when no one is watching" and that Makarek's character had failed in that regard. Id. at 76. Moreover, the evidence established that S.G. trusted Makarek and he had "groomed" her to tolerate the sexual abuse. Id. at 59-60, 76-77. Under these circumstances, we cannot conclude that the trial court erred in refusing to assign more weight to Makarek's character as a mitigating factor.

Next, we note that, contrary to Makarak's claim, the trial court observed at sentencing that Makarek had enrolled in a treatment program. Although Makarek points out that the trial court did not specifically comment at the sentencing hearing that Makarek had been a "successful participant" in the program as a therapist had indicated in a letter to Makarek's counsel, it does not necessarily follow that the trial court was not impressed with Makarek's progress, or that significant weight was not accorded to this factor. Indeed, had Makarek not been a successful participant in the program, the trial court likely would not have considered his enrollment as a mitigating factor.

We also reject Makarek's contention that the trial court should have considered his low risk of reoffending as a separate mitigating circumstance. Appellant's App. p. 148. The record shows that the trial court specifically found Makarek's lack of a criminal record—

which shows that Makarek is at a low risk for reoffending—to be a mitigating circumstance. Tr. p. 79. Additional factors presented at the hearing establishing that Makarek is at a low risk for reoffending included evidence regarding his character, the show of remorse, and his enrollment in the treatment program. Given these circumstances, it was not necessary for the trial court to specifically identify Makarek's low risk of reoffending as a separate mitigating factor.

Next, we note that the trial court specifically found that Makarek's show of remorse was a mitigating factor. Id. at 79. As a result, we reject Makarek's claim that the trial court should have separately identified his willingness to make restitution as a mitigating circumstance. In other words, Makarek's willingness to pay restitution amounts to evidence of remorse, and we cannot say that those two factors are separate. Even more compelling, until Makarek actually makes restitution, his willingness to do so is of slight significance.

Makarek also argues that the trial court erred when it did not identify his guilty plea as a separate and significant mitigating factor. Our Supreme Court has held that a guilty plea demonstrates acceptance of responsibility for a crime and must be considered a mitigating factor. Scheckel v. State, 655 N.E.2d 506, 511 (Ind. 1995). However, a guilty plea is not automatically a significant mitigating factor, and the extent to which a guilty plea is mitigating will vary from case to case. Mull v. State, 770 N.E.2d 308, 314 (Ind. 2002). Indeed, a plea bargain does not constitute a mitigating circumstance when the defendant has already received a significant benefit from the plea agreement or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one. Wells v. State, 836

N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied.

Here, Makarek's decision to plead guilty was not a significant mitigator because he received the benefit of the State's dismissal of three counts of sexual misconduct with a minor as a class B felony. Had these counts not been dismissed, a more substantial term of imprisonment could have resulted. Moreover, pursuant to the agreement, Makarek received concurrent presumptive sentences even though he could have received consecutive terms. In light of these circumstances, we conclude that Makarek's guilty plea did not deserve separate significant mitigating weight. Therefore, the trial court was not obliged to give any more weight to his guilty plea than it did.[3]

Finally, we note that Makarek received probation and a relatively short term of imprisonment. As discussed above, the ten-year sentence that was imposed was the presumptive sentence for a class B felony. I.C. § 35-50-2-5. Moreover, the trial court suspended four years of that sentence and ordered Makarek to probation. As a result, Makarek cannot successfully claim that the trial court erred when it did not specifically identify Makarek's likelihood of responding positively to probation or a short term of imprisonment as a separate mitigating factor.

In light of these circumstances, Makarek's challenges to his sentence based on his

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[3] As an aside, we note that in Anglemyer v. State, 868 N.E.2d 482, 493 (Ind. 2007), our Supreme Court recently observed that a trial court "cannot be said to have abused its discretion in failing to 'properly weigh' such factors." 868 N.E.2d at 491. More specifically, Anglemyer determined that "[t]he relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse." Id. Had Makarek been sentenced under the new sentencing scheme, his argument regarding the alleged improper weight that the trial court afforded his decision to plead guilty would "not [be] available for appellate review." See id.

contentions that the trial court failed to find and/or properly weigh mitigating circumstances do not succeed.

III. Aggravating Factors

Makarek next contends that his sentence must be set aside because the trial court improperly identified a number of aggravating factors. Specifically, Makarek argues that the trial court erred in determining that the following were aggravating circumstances: (1) the conduct was ongoing and it occurred over a period of time; (2) the psychological effects that the conduct would have on S.G.; and (3) the difference in Makarek and S.G.'s ages.

In addressing Makarek's claims, this court has previously held that the ongoing nature and frequency of the offenses is a proper aggravating circumstance. Cruz Angeles v. State, 751 N.E.2d 790, 800 (Ind. Ct. App. 2001). Moreover, this court has determined that repeated molestations occurring over a period of time can be considered an aggravating factor. Newsome v. State, 797 N.E.2d 293, 300-01 (Ind. Ct. App. 2003).

On the other hand, we note that if a trial court accepts a plea agreement under which the State agrees to dismiss or not file charges and then uses facts that give rise to those charges to enhance a sentence, the plea agreement is effectively circumvented. Roney v. State, 872 N.E.2d 192, 201 (Ind. Ct. App. 2007). However, in this case, the trial court did not use this aggravating factor to enhance Makarek's sentence. Rather, as noted above, Makarek received presumptive concurrent sentences with a portion of the sentence suspended to probation. Thus, under these circumstances, we conclude that the trial court's use of this aggravating factor was proper.

As for Makarek's contention that the trial court improperly identified the psychological effects that his crime would have on S.G. as an aggravating factor, there is no evidence that the trial court considered this to be a separate aggravating factor. Instead, the record shows that after the trial court explained the effects of Makarek's crime and the likely effect that similar offenses would have on other victims, the trial court stated that "[t]hat's why the legislature views the seriousness of this kind of offense as a class B felony rather than some lower grade felony." Tr. p. 78. In our view, the trial court was simply explaining why the crime was a class B felony, rather than offering an explanation as to why Makarek's sentence should be aggravated based on the effects of his crime on S.G. Therefore, Makarek's claim fails.

Finally, with regard to Makarek's claim that the trial court improperly identified the age difference as an aggravating factor, we note that this court has determined that a fact that comprises a material element of the offense may not also constitute an aggravating circumstance to support an enhanced sentence. Davis v. State, 851 N.E.2d 1264, 1267 (Ind. Ct. App. 2006), trans. denied. On the other hand, the trial court may properly consider the particularized circumstances of the material elements of the crime. McCann v. State, 749 N.E.2d 1116, 1120 (Ind. 2001).

Pursuant to Indiana Code section 35-42-4-9, both S.G. and Makarek's ages are elements of the crime. In this case, however, there was an approximate eighteen-year age difference between S.G. and Makarek. Under these circumstances, we cannot say that the trial court erred in concluding that the difference in ages was an aggravating factor. See

Buchanan v. State, 767 N.E.2d 967, 971 (Ind. 2002) (observing that the trial court did not err in identifying the difference in the victim and defendant's ages as an aggravating factor when it was determined that the victim of a child molesting was only five years old and the defendant was fifty-eight years old). Moreover, the trial court in this case referred to the age difference to explain why a sentence below the presumptive term was not warranted. See Kirby v. State, 746 N.E.2d 440, 444 (Ind. Ct. App. 2001) (observing that the trial court properly used this factor to support its refusal to reduce the presumptive sentence). As a result, Makarek's claim fails.

Even if we were to assume solely for argument's sake that the trial court improperly identified the vast age difference between Makarek and S.G. as an aggravating circumstance, we note that a single aggravating factor may support the imposition of an enhanced sentence. Payton v. State, 818 N.E.2d 493, 496 (Ind. Ct. App. 2004). Therefore, because we have determined that the trial court properly identified other aggravating circumstances—including a finding of Makarek's violation of trust that he does not contest on appeal—his challenge to the sentence because of the aggravating factors that the trial court identified fails.

IV. Appropriateness

Makarek next contends that his sentence must be set aside because the sentence was inappropriate in light of his good character. Specifically, Makarek argues that the sentence must be reduced because the record "is replete with information regarding [his] outstanding

character." Appellant's Br. p. 15.[4]

In resolving this issue, we note that this court has the constitutional authority to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is "inappropriate in light of the nature of the offense and the character of the offender." Indiana Appellate Rule 7(B). However, we refrain from merely substituting our judgment for that of the trial court. See Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). With regard to the nature of the offense, the presumptive sentence is the starting point that our legislature has selected as an appropriate sentence for the crime committed. Wiess v. State, 848 N.E.2d 1070, 1072 (Ind. 2006).

As noted above, the trial court considered Makarek's character to be "pretty good," and specifically observed that Makarek was from a strong and supportive family. The trial court also noted that Makarek graduated from high school and has maintained employment with no criminal history. However, the trial court also observed that Makarek had breached his position of trust with S.G. and groomed her to tolerate his sexual abuse. Tr. p. 59-60, 76-77. In short, Makarek's acts speak poorly of his character, and we conclude that the trial court's imposition of concurrent presumptive sentences was appropriate.

V. Conditions of Probation

Finally, Makarek argues that the trial court imposed two improper conditions of probation. Specifically, Makarek maintains that the conditions of probation regarding his

[4] Makarek makes no inappropriateness argument regarding the nature of the offense.

duty to report any "dating" relationship to his probation officer and the prohibition of any "incidental contact" with persons under the age of eighteen were not sufficiently clear and must fail under due process principles. Appellant's Br. p. 16-17.

In McVey v. State, 863 N.E.2d 434 (Ind. Ct. App. 2007), trans. denied, a different panel of this court addressed nearly the same issue regarding conditions of probation. In McVey, we found that the defendant's duty to report the establishment of a dating relationship to his probation officer was not sufficiently clear to inform the defendant of what conduct is actually prohibited under the conditions. Specifically, it was observed that

> [McVey would have] to report the most mundane activities, like going out for coffee with a friend. This would amount to an unreasonable burden. On the other hand, McVey interprets the condition as limited to intimate occasions and sexual contact. However, McVey's understanding would make the insertion of "date" in the probation condition superfluous as "intimate and/or sexual relationships" are clearly listed as a separate category.

Id. at 448-49. As a result, we remanded the cause to the trial court to clarify this condition with greater specificity. Id. at 449.

Additionally, identical to the condition of probation that was imposed upon Makarek, McVey's probation order provided that:

> You must never be alone with or have contact with any person under the age of 18. Contact includes face-to-face, telephonic, written electronic, or any indirect contact via third parties. You must report any incidental contact with persons under age 18 to your probation officer within 24 hours of the contact.

Id. at 449. We determined that the prohibition regarding "incidental contacts" was overly broad. Id. In arriving at this conclusion, we acknowledged McVey's argument that if he is "handed his food [at McDonald's] by a young man who looks to be eighteen but could be

seventeen, a call to his probation officer would seemingly be required." Id. As a result, we further instructed the trial court on remand to alter the conditions prohibiting McVey from being alone or having contact with any person under the age of eighteen. Id.

In addition to the example that was pointed out in McVey, we note that Makarek would likely come into contact with an individual under eighteen on any given day. Indeed, such contact might occur at the grocery store, a gas station, or a local department store. Seemingly, Makarek could be required to be on the telephone with his probation officer throughout the day. Therefore, following the lead of our colleagues in McVey, we remand this case to the trial court with instructions that it clarify the condition regarding the establishment of a dating relationship and reporting that relationship to his probation officer with greater specificity. Also, because we find that the prohibition regarding "incidental contact with persons under eighteen" set forth in Makarek's conditions of probation is overly broad, we further instruct the trial court to clarify the condition of probation that prohibited Makarek from being alone or having contact with any person under the age of eighteen.

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions.

DARDEN, J., and BRADFORD, J., concur.