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IN THE COURT OF APPEALS OF INDIANA

RICKY L. BARKER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 54A04-0708-CR-449
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MONTGOMERY CIRCUIT COURT
The Honorable Thomas K. Milligan, Judge
Cause No. 54C01-0608-FA-85

January 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

[1] Attorney Ian A.T. McLean filed an appellant's case summary and an appellant's brief on Barker's behalf. Attorney Thomas D. Sarver filed an appellant's reply brief but did not enter an appearance with this Court. Pursuant to an order of this Court dated December 20, 2007, McLean has since withdrawn his appearance, and Sarver has entered his appearance via an appellant's case summary.

Case Summary

Ricky L. Barker appeals his twelve-year sentence for class B felony child molesting. We affirm.

Issues

We restate the issues as follows:

I. Whether the trial court abused its discretion in sentencing Barker; and

II. Whether Barker's sentence is inappropriate in light of the nature of the offense and his character.

Facts and Procedural History

On August 17, 2006, the State charged the twenty-two-year-old Barker with two counts of class A felony child molesting and one count of class C felony child molesting for acts that allegedly occurred on or after July 2006 with E.S., a thirteen-year-old who lived near Barker. On June 5, 2007, Barker entered into a plea agreement in which he agreed to plead guilty to one count of class B felony child molesting in exchange for the dismissal of the remaining charges and a public intoxication charge in another pending case. The plea left sentencing to the trial court's discretion, with a cap of ten years on the executed portion. In establishing the factual basis, the prosecutor elicited testimony from Barker that he had performed oral sex on E.S. At the prosecutor's request, and without objection from Barker, the trial court took judicial notice of several documents, including E.S.'s deposition, in which she testified that Barker had furnished her and her friends with alcohol and that she and Barker had been undressed together on one occasion and had engaged in sexual intercourse on another occasion.

On July 13, 2007, the trial court accepted Barker's guilty plea. Barker proposed only one minor correction to the pre-sentence investigation report ("PSI") prepared by the probation department. Once again, at the prosecutor's request, and without objection from Barker, the court took judicial notice of several documents, including E.S.'s deposition. The court's sentencing statement reads in pertinent part as follows:

> The Court will find that as has been mentioned that Ricky Barber was born to a two parent family. The parents divorced fairly shortly after the birth and he was raised primarily by his mother and his grandmother. [His] childhood was rather chaotic. The household suffered physical and mental abuse and some sexual abuse. There was alcohol abuse in the home and the growing up years were difficult for Ricky. He began to use alcohol and other drugs at a fairly early age and has continued to use them until he was arrested on this charge and his use of alcohol, marijuana and other drugs has caused him to wind up in Court with criminal charges of various kinds and with a juvenile delinquency record as well. Ricky was not able to finish school and left school at about seventh or eighth grade and has not yet obtained his GED. He does not have a driver's license. He has been employed since about age seventeen when he left home and his employment has been spotty because of his substance abuse and also because of his involvement in the criminal justice system. But when he's been available he's been able to work and provide for himself and has had a relationship with his girlfriend Tina and they have two children, two daughters aged five and three who are living with their mother. Mr. Barker was living with his girlfriend and their daughters when this event occurred, although according to his mother there were some problems or difficulties in their relationship. The Court believes that based on the evidence that both Ms. Williams and Mr. Barker were alcoholics, at least they were drinking a lot of alcohol during the period of time that this event that gave rise to these charges occurred. The involvement with alcohol also spills over as part of the incident out of which these charges grew when by buying liquor and beer for the girls and making it available to them. The Court finds that based on the evidence and the information contained in the pre-sentence report that there may have been a certain amount of grooming going on, Mr. Barker preparing [E.S.] in subtle ways for sexual involvement and the preparation that took place over a period of time. The Court does believe that [E.S.] may have been interested in Mr. Barker because he was older and more experienced and bought alcohol for her and such but that's not to take anything away from his responsibility as the adult to discourage rather than encourage any sexual kind of involvement or behavior on the part of such a young girl. The occurrence of the offense the

> Court finds nothing particularly unique or remarkable about it. It's a neighbor taking advantage of a neighbor girl under circumstances which presented themselves the opportunity to be involved and they had their sexual contact not only once but several times in a variety of ways. Mitigating circumstances the Court finds that it is a mitigating circumstance that Mr. Barker has cooperated with his attorney and with law enforcement, with the Court and that this is his first felony conviction and to the extent that he did provide for his children financially and also provide emotional and physical support and comfort it's a hardship to them for him to be incarcerated. Aggravating circumstances have to be Mr. Barker's criminal history going back to his juvenile delinquency finding in April of 1999 and he has been pretty much involved with the criminal justice system ever since except for 2002 and 2001 and even then he was partly under the supervision of the Court and the probation department. It's also an aggravating circumstance that he was on bond when this offense was committed. That he has had the ongoing difficulty with alcohol and substance abuse and was never, although he's had the opportunity over the years, never taken advantage of any of those opportunities to seriously address those issues. The Court finds on balance that the aggravating circumstances outweigh the mitigating circumstances and the Court finds that the sentence should be enhanced. The Court will order that Ricky Lynn Barker be sentenced to the Indiana Department of Corrections [sic] for a period of twelve years. The Court will order that nine of those years be served and three be suspended on probation.

Tr. vol. V at 31-33. Barker now appeals his sentence.

Discussion and Decision[2]

I. Abuse of Discretion

Initially, we observe that "courts sentence a defendant under the sentencing statutes in effect at the time the defendant committed the offense." *Robertson v. State*, 871 N.E.2d 280, 284 (Ind. 2007). Barker molested E.S. in July or August 2006, more than a year after our legislature amended Indiana's sentencing statutes effective April 25, 2005. The legislature

[2] We note that Barker's counsel included Barker's PSI in the appellant's appendix. Indiana Administrative Rule 9(G)(1) states that the information therein "is excluded from public access and is confidential." Indiana Trial Rule 5(G)(1) requires that such documents be separately identified and "tendered on light green paper or have a light green coversheet attached to the document, marked 'Not for Public Access' or 'Confidential.'"

enacted these amendments in response to the Sixth Amendment problem presented in *Blakely v. Washington*, 542 U.S. 296 (2004).[3]

To the extent that Barker raises a *Blakely* Sixth Amendment challenge to the trial court's determination of his sentence based on facts (and inferences therefrom) not found by a jury or admitted by Barker—as opposed to the bases for the facts and inferences themselves—this challenge fails because, as the State correctly observes, "under the new sentencing regime, there is no ground upon which to lay the foundation for a *Blakely* argument, or a violation of the Sixth Amendment." Appellee's Br. at 5; *see Anglemyer v. State*, 868 N.E.2d 482, 487-88 (Ind. 2007) (explaining that the legislature "remed[ied] the constitutional infirmity" of Indiana's sentencing scheme by devising "'a system in which there is no "fixed term" (or at least none that has legally binding effect) in which judges would impose sentences without a jury.'") (quoting *Smylie v. State*, 823 N.E.2d 679, 685 (Ind. 2005)).

With respect to appellate review under the revised sentencing scheme, our supreme court has stated,

> So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion. As we have previously observed, "In order to carry out our function of reviewing the trial court's exercise of discretion in sentencing, we must be told of [its] reasons for imposing the sentence.… This necessarily requires a statement of facts, in some detail, which are peculiar to the particular defendant and the crime, as opposed to general impressions or conclusions. Of course such facts must have support in the record." *Page v. State*, 424 N.E.2d 1021, 1023 (Ind. 1981). 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

[3] Our supreme court analyzed this problem in great detail in *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005), and *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007). We see no need to reiterate those analyses here.

> drawn therefrom." *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006) (quoting *In re L.J.M.*, 473 N.E.2d 637, 640 (Ind. Ct. App. 1985)).
>
> One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.
>
> Because the trial court no longer has any obligation to "weigh" aggravating and mitigating factors against each other when imposing a sentence, unlike the pre-*Blakely* statutory regime, a trial court can not now be said to have abused its discretion in failing to "properly weigh" such factors.

Anglemyer, 868 N.E.2d at 490-91 (brackets in *Anglemyer*).

Barker suggests that the trial court abused its discretion in finding certain facts and drawing certain inferences that are not supported by the record. First, Barker disputes the trial court's finding as an aggravating circumstance that "although he's had the opportunity over the years, [he has] never taken advantage of any of those opportunities to seriously address [his] issues" with alcohol and substance abuse. Tr. at 33. Barker's PSI indicates that he was adjudicated a delinquent in June 1999 for illegal consumption of alcohol and marijuana possession and underwent inpatient treatment at Fairbanks Hospital as a condition of probation. While on probation, Barker again used alcohol and marijuana and was readmitted to Fairbanks. Barker was found to have violated his probation and was placed at Rescare. In October 2000, Barker was again adjudicated a delinquent for illegal consumption and marijuana possession and was again placed at Rescare. As an adult, Barker has been convicted of illegal consumption, marijuana possession, and public intoxication, and was

found to have violated his probation on several occasions. Clearly, Barker did not respond positively to the treatment opportunities he received as a juvenile, and there is no indication that his adult convictions and incarcerations for substance-related offenses have prompted him to "seriously address" his issues with alcohol and substance abuse. As such, we find no abuse of discretion here.

Next, Barker takes issue with the trial court's finding that he and E.S. "had their sexual contact not only once but several times in a variety of ways" and that "there may have been a certain amount of grooming going on, Mr. Barker's preparing [E.S.] in subtle ways for sexual involvement and the preparation that took place over a period of time." *Id*. at 32. We agree with the State that the trial court did not consider these factors as aggravating circumstances and that they "were discussed only in connection with the trial court's assessment of [Barker's] character, and the circumstances surrounding the crime, both of which the trial court stated that it was obligated to consider." Appellee's Br. at 7.[4] To the extent that the trial court erred in relying on evidence regarding dismissed charges,[5] we find such error to be de minimis in light of Barker's nearly perpetual involvement with the juvenile and criminal justice system since April 1999.

[4] The State correctly observes that "[t]hese are no longer mandatory considerations for the trial court's consideration under advisory sentencing." Appellee's Br. at 7-8 (citing Ind. Code § 35-38-1-7.1). We note that the trial court's findings are supported by E.S.'s deposition, of which the court took judicial notice without objection from Barker.

[5] *See Farmer v. State*, 772 N.E.2d 1025, 1027 (Ind. Ct. App. 2002) (agreeing with appellant's contention that "the sentencing court's reliance on facts that supported the burglary, intimidation and resisting law enforcement charges dismissed as part of his plea agreement essentially circumvents the plea agreement and is therefore improper.").

Finally, Barker challenges the trial court's finding as an aggravating circumstance that he was "on bond" when he committed the instant offense. Tr. at 33. At the sentencing hearing, Barker admitted that he was on pre-trial release in a battery/disorderly conduct case when he committed the instant offense. *Id*. at 21. On appeal, Barker claims that he was tried and convicted in the battery/disorderly conduct case ten days *before* he molested E.S. Given Barker's admission at the sentencing hearing, it is tempting to characterize any error on this point as invited error. At the very least, any error was harmless, in that Barker was either going to be tried or had been tried and was awaiting sentencing in an unrelated criminal proceeding when he committed the instant crime.

In sum, we conclude that any errors in the trial court's sentencing statement are harmless and do not require remand for resentencing. *Cf. Anglemyer*, 868 N.E.2d at 491 ("[R]emand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.").

II. Appropriateness of Sentence

Barker claims that his twelve-year sentence is inappropriate and invokes Indiana Appellate Rule 7(B), which provides that this 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." Barker bears the burden of persuading us that his sentence has met that standard. *Anglemyer*, 868 N.E.2d at 494. Barker's inappropriateness argument, however, is premised largely on his unsuccessful argument that the trial court abused its discretion in finding

aggravating circumstances. Although the trial court found "nothing particularly unique or remarkable" about the instant offense, Tr. at 32, it bears mentioning that Barker has a significant juvenile and adult criminal history dating from 1999 that has graduated from misdemeanor substance, vehicle, and battery offenses to class B felony child molesting. He has violated probation as a juvenile and as an adult. Barker claims that he is not a "hardened, lifetime criminal with a six-yard record sheet[,]" Appellant's Br. at 12, but he certainly appears to be heading in that direction. In sum, Barker has failed to persuade us that his twelve-year sentence for class B felony child molesting is inappropriate in light of the nature of the offense and his character.

Affirmed.

NAJAM, J., and BAILEY, J., concur.