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IN THE
COURT OF APPEALS OF INDIANA

VICTOR A. ANDREWS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0704-CR-226
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 6
The Honorable Mark D. Stoner, Judge
Cause No. 49G06-0610-FB-194342

December 7, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Victor Andrews (Andrews), appeals his conviction for child molesting, a Class B felony, Ind. Code § 35-42-4-3.

We affirm.

ISSUE

Andrews raises one issue on appeal, which we restate as follows: Whether the trial court properly sentenced Andrews to ten years imprisonment.

FACTS AND PROCEDURAL HISTORY

Over an eight-year period, Andrews engaged in repetitively molesting his stepdaughter, A.A. In particular, between April 19, 1996 and August 31, 1997, when A.A. was between eleven and twelve years old, Andrews directed her to perform oral sex on him and forced his penis into A.A.'s mouth. At the time, they lived in Marion County, Indiana. AA. reported the abuse to Child Protective Services, but was convinced by her mother and aunt to recant and say she was lying.

On August 24, 2004, A.A. gave a statement to Special Agent Richard Duwelius of the United States Naval Criminal Investigative Service (the U.S. NCIS) that she had been sexually abused by Andrews from the time she was four years old until she was twelve. On the same day, Detective Sergeant Matthew E. Miller (Detective Miller) of the Lawrence Police Department, was contacted by Special Agent Michael Gagner of the U.S. NCIS requesting information about Andrews with regard to the child molesting case.

On September 14, 2005, Special Agent Paul Graf (Special Agent Graf) of the U.S. NCIS obtained a statement from A.A.'s mother indicating that Andrews had molested A.A. when she was young. In late 2005, Special Agent Graf contacted Detective Miller regarding Andrews' child molesting case.

On October 9, 2006, the State filed an Information charging Andrews with Count I, child molesting, a Class B felony, I.C. § 35-42-4-3; Count II, attempted child molesting, a Class B felony, I.C. § 35-42-4-3; Count III, vicarious sexual gratification, a Class C felony, I.C. § 35-42-4-5; Count IV, child solicitation, a Class D felony, I.C. § 35-42-4-6; and Count V, child solicitation, a Class D felony, I.C. § 35-42-4-6.

On March 1, 2007, Andrews entered into a plea agreement with the State. According to the agreement, Andrews agreed to plead guilty to Count I, child molesting, a Class B felony. In exchange, the State agreed to dismiss Counts II through V. With regard to the sentence, the plea agreement specified: "Ten [] years with six [] to ten [] of those years executed. The remaining terms to the [trial c]ourt. . . ." (Appellant's App. p. 26). On March 22, 2007, the trial court accepted the agreement and sentenced Andrews to ten years of imprisonment.

Andrews now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Andrews contends the trial court abused its discretion by sentencing him to ten years of imprisonment while the plea agreement prescribed a total sentence of ten years with an executed prison sentence between six and ten years. Particularly, Andrews asserts that the

trial court failed to consider all proper mitigating circumstances. Furthermore, he alleges that his sentence was inappropriate in light of his character and nature of the offense. We disagree.

We will review defendant's sentence under the presumptive sentencing scheme if the offense for which the sentence is being imposed was committed prior to April 24, 2005. *Padgett v. State*, --- N.E.2d ---, 2007 WL 3072071, 4 (Ind. Ct. App. October 23, 2007). Sentencing decisions are within the trial court's discretion, and we will reverse only for an abuse of discretion. *Moyer v. State*, 796 N.E.2d 309, 312 (Ind. Ct. App. 2003). In considering the appropriateness of the sentence for the crime committed, trial courts should initially focus upon the presumptive sentence. *Simms v. State*, 791 N.E.2d 225, 233 (Ind. Ct. App. 2003). Trial courts may then consider deviating from the presumptive sentence based upon a balancing of the factors, which must be considered pursuant to I.C. § 35-38-1-7.1(a), along with any discretionary aggravating and mitigating factors found to exist. *Id*.

I. *Aggravators and Mitigators*

Andrews alleges that the trial court's decision did not properly weigh the mitigating circumstance of the military service and did not include a reasonably detailed recitation of its reasons for imposing a particular sentence.[1]

[1] In support of his arguments, Andrews refers to case law dealing with Indiana's current advisory scheme. However, due to the date of Andrews' offenses, Indiana's former presumptive sentencing scheme applies, and thus, the case law relied upon by Andrews is inapplicable.

Indiana Code section 35-50-2-5 provided that a person who commits a Class B felony can be charged with a presumptive sentence of ten years, a minimum sentence of six years, and a maximum sentence of twenty years.

Under the presumptive sentence regime, there is a presumptive, fixed term upon which trial courts focus initially. When the trial court imposes the presumptive sentence prescribed by a particular criminal statute, compliance with the applicable sentencing statutes is presumed regardless of whether the record includes the trial court's specific enumeration of aggravating and mitigating factors. *Custis v. State*, 793 N.E.2d 1220, 1228 (Ind. Ct. App. 2003), *trans. denied*. A trial court is not required to find mitigating factors or to accept as mitigating the circumstances proffered by the defendant. *Dylak v. State*, 850 N.E.2d 401, 410 (Ind. Ct. App. 2006), *reh'g denied.* Nor is the trial court obligated to explain why it did not find a factor to be significantly mitigating. *Id.*

At sentencing, the trial court found Andrews' military service as a mitigating factor, but did not give much credit to it, as Andrews was committing the offense during his service. It was the trial court's prerogative to determine that since Andrews was engaged in molesting his stepdaughter during the eight years he was serving in the military this mitigator should not be given much weight in the case at bar.

Andrews also contends that the trial court did not consider his character and attitude as a mitigating factor. However, the record indicates that this factor was never proffered to the trial court. If the defendant fails to advance a mitigating circumstance at sentencing, this court will presume the circumstance is not significant and the defendant is precluded from

advancing it as a mitigating circumstance for the first time on appeal. *Simms*, 791 N.E.2d at 233. Thus, based on the evidence before us, it was appropriate for the trial court to apply the presumptive sentence of ten years.

II. *Indiana Appellate Rule 7(B)*

Next, Andrews claims his sentence is inappropriate in light of the nature of the offense and his character. He asks this court to revise his sentence in accordance with Ind. Appellate Rule 7(B).

Regarding the nature of the offense, the evidence established that Andrews repeatedly molested his stepdaughter for over eight years. A.A. was only four when Andrews began molesting her. Moreover, Andrews violated his position of trust as a stepfather when he molested A.A. These facts describe the seriousness of the offense. Andrews contends that he never used threat or weapon to molest A.A., which, he claims, should be viewed favorably and calls for reduction of his sentence. However, we agree with the State that, had Andrews used a threat or weapon, he would have been charged with a higher offense. Thus, we conclude his sentence is not inappropriate with respect to the nature of the offense.

With regard to his character, Andrews alleges that he has no juvenile or adult criminal record. However, we find that the fact that he was engaged in molestation of his stepdaughter over an eight-year period clearly shows his history of criminal conduct. Furthermore, Andrews also asks this court to consider his guilty plea as a factor in favor of his good character. As our supreme court held, 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 return. *Frances v. State*, 817 N.E.2d 235-237 (Ind. 2004). However, a guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea 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, the guilty plea was clearly beneficial to Andrews, because in exchange for it, he avoided prosecution on four other charges. Therefore, Andrews' decision to plead guilty was merely a pragmatic one, and we find his ten-year sentence is not inappropriate.

CONCLUSION

Based on foregoing, we find that the trial court properly sentenced Andrews.

Affirmed.

FRIEDLANDER, J., and SHARPNACK, J., concur.