

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Kristin Eugene Smiley,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 14, 2021

Court of Appeals Case No.
20A-CR-2042

Appeal from the Jennings Circuit
Court

The Honorable Jon W. Webster,
Judge

Trial Court Cause No.
40C01-1910-F4-29

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Kristin Smiley (Smiley), appeals his conviction for child solicitation, a Level 4 felony, Ind. Code § 35-42-4-6(b).

[2] We affirm.

ISSUES

[3] Smiley presents two issues on appeal, which we restate as:

(1) Whether the State presented sufficient evidence beyond a reasonable doubt to sustain his conviction for child solicitation; and

(2) Whether Smiley's sentence is inappropriate in light of the nature of the offense and his character.

FACTS AND PROCEDURAL HISTORY

[4] In 2019, Sergeant Kyle Hall (Sergeant Hall) of the North Vernon Police Department oversaw a computer sting operation of a social network application called Whisper. Users of the application do not need to use their real name or email addresses to create an account, and users can also send private messages. On August 18, 2019, Sergeant Hall created a fake profile on Whisper under the name "Hannah is crazy" (Hannah). (Transcript Vol. II, p. 117). Late that night, he made a post that said, "North Vernon is very boring sometimes," and he received a private message from an account with the username "Virtual Insanity." (Tr. Vol. II, p. 118-19). Sergeant Hall introduced himself as Hannah and stated that she was thirteen years old. Virtual Insanity stated that he was

forty-four and his name was Mike. While conversing, Mike disclosed to Sergeant Hall/Hannah that he worked at Metaldyne and that he drove a grey Mercedes. After a while, Sergeant Hall/Hannah asked Virtual Insanity if she could text him directly and Virtual Insanity shared his number, which was not actually his real cellphone number, but a number generated by Text Now application.¹

[5] Through a series of text messages to Hannah which lasted for several hours, Mike expressed his desire to “fuck” Hannah. (State’s Exh. Vol. III, p.16). Hannah and Mike thereafter agreed to meet at around 4:30 a.m. at a Crystal Flash gas station. Sergeant Hall and Officer Isaac Barnes (Officer Barnes) both drove to the area near the gas station. Officer Barnes noticed a silver Mercedes with its parking lights on sitting in the CVS parking lot, which was caddy-corner to the Crystal Flash parking lot. Moments later, the person driving the Mercedes left the area. At approximately 4:50 a.m., Mike texted Hannah, and stated that he could see police officers and believed that Hannah was setting him up.

[6] Later that morning, Sergeant Hall and other officers went to Metaldyne factory, where Mike claimed was his place of work. When the officers asked if there was a Mike who drove a silver Mercedes who worked there, they were informed there was no Mike, but that Smiley fit that description. The officers

¹ The Text Now application that allows a person to text someone using a different number that is not their actual cellphone number.

were not able to immediately contact Smiley but were given an address where Smiley resided.

[7] On September 10, 2019, Officer Barnes spotted the silver Mercedes and Smiley in an alley on the street where Smiley lived. Officer Barnes approached Smiley, and he asked him if he was willing talk to Sergeant Hall. Smiley agreed, and Sergeant Hall, who was not far from that location, arrived moments later. Sergeant Hall then asked Smiley if he used the application known as Text Now, and Smiley told him that he did. Smiley then showed Sergeant Hall his Text Now number and allowed Sergeant Hall to take a photograph of the screen. Smiley's Text Now number was the same number as the number that had texted Hannah.

[8] On October 11, 2019, the State filed an Information, charging Smiley with Level 4 felony child solicitation. A two-day jury trial was conducted on August 25, 2020, and at the close of the evidence, Smiley was found guilty as charged. On October 22, 2020, the trial court conducted a sentencing hearing and sentenced Smiley to a term of six years in the Department of Correction.

[9] Smiley now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

[10] Smiley challenges the sufficiency of the evidence to support his Level 4 felony child solicitation conviction. In reviewing a challenge to the sufficiency of

evidence, we neither reweigh evidence nor judge witness credibility. *Moore v. State*, 27 N.E.3d 749, 754 (Ind. 2015). The evidence need not “overcome every reasonable hypothesis of innocence.” *Dalton v. State*, 56 N.E.3d 644, 647 (Ind. Ct. App. 2016).

[11] For Level 4 felony child solicitation, the State was required to prove beyond a reasonable doubt that Smiley, who was at least twenty-one years old, knowingly or intentionally solicited Hannah, who was under fourteen years old, to engage in sexual intercourse or other sexual conduct; that the solicitation occurred via a computer network; that Smiley traveled to meet Hannah, and that Smiley believed Hannah to be a child. *See* I.C. § 35-42-4-6(b). There is no requirement that a solicitor complete the act of meeting with his or her victim to commit the crime of child solicitation. *Kuypers v. State*, 878 N.E.2d 896, 899 (Ind. Ct. App. 2008).

[12] Smiley claims that he had an “early suspicion that Hannah was not who she claimed to be” and once he realized that Hannah’s “profile was actually manipulated by law enforcement” and that “law enforcement was trying to trap him into criminal conduct,” his “sexually explicit messages” were not sent with an “intent to solicit[,] but with an intent to catch law enforcement in their own ruse.” (Appellant’s Br. p. 14). We find his arguments to be without merit.

[13] After Smiley messaged Hannah on Whisper, she told him that she was thirteen years old. Smiley was not deterred by Hannah’s age. He proceeded to share his Text Now phone number with Hannah and shared his interests which

comprised doing “adult things” like getting “naked.” (Tr. Vol. II, p. 188). Then, in an attempt to solicit Hannah to engage in sexual intercourse or other sexual conduct, Smiley texted Hannah sex emojis that are associated with a penis and vagina and told Hannah, “[l]et’s go fuck.” (State’s Exh. Vol. III, p. 16). Smiley then planned to meet Hannah at a Crystal Flash gas station, and he indicated that he drives a grey Mercedes. When Officer Barnes arrived, he noticed a silver Mercedes with its parking lights on sitting in the CVS parking lot caddy corner to the Crystal Flash. At his jury trial, Smiley admitted that he was not forced to continue talking to Hannah after Hannah told him she was thirteen years old, and he admitted that he was the first person to bring up the subject of having sexual intercourse.

[14] Here, the evidence showed that Smiley initiated contact with Hannah, who he later discovered to be thirteen years old, he expressed desire to have sexual relations with her and attempted to meet with her at a predetermined location. Based on the foregoing, we conclude that the State presented sufficient evidence beyond a reasonable doubt to support Smiley’s Level 4 felony child solicitation conviction.

II. *Inappropriate Sentence*

[15] Smiley claims that his six-year sentence is inappropriate in light of the nature of the offense and his character. Indiana Appellate Rule 7(B) empowers us to independently review and revise sentences authorized by statute if, after due consideration, we find the trial court’s decision inappropriate in light of the nature of the offense and the character of the offender. *Reid v. State*, 876 N.E.2d

1114, 1116 (Ind. 2007). The “nature of the offense” compares the defendant’s actions with the required showing to sustain a conviction under the charged offense, while the “character of the offender” permits a broader consideration of the defendant’s character. *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008); *Douglas v. State*, 878 N.E.2d 873, 881 (Ind. Ct. App. 2007). An appellant bears the burden of showing, after consideration of both prongs, that the sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). Whether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and a myriad of other considerations that come to light in a given case. *Cardwell*, 895 N.E.2d at 1224.

[16] The advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. *Abbott v. State*, 961 N.E.2d 1016, 1019 (Ind. 2012). For his Level 4 felony child solicitation conviction, Smiley faced a sentencing range of two to twelve years, with the advisory sentence being six years. I.C. § 35-50-2-5.5. The trial court sentenced Smiley to the advisory sentence.

[17] We first examine the nature of Smiley’s offense. Smiley argues that his conduct can be described as “innocuous or vague chatting with a law enforcement officer posing as a thirteen [] year old girl,” his texts were “punctuated by a few comments with sexual content,” and he only travelled to a location near the meet up spot. (Appellant’s Br. p. 17). He argues that no one was harmed by his conduct, and that he did not deserve a “significant period of incarceration.”

(Appellant's Br. p. 17). The record shows that forty-four-year-old Smiley contacted Hannah, who was thirteen-years old, via a social networking application, and then through text messages. Over a span of several hours, Smiley made numerous sexual references, even going as far as saying that he wanted to "fuck" Hannah, and then he drove to a Crystal Flash gas station at 4:30 a.m. and parked at the CVS close by and waited for Hannah. (State's Exh. Vol. III, p.16). Here, we find that the nature of his offense renders his sentence inappropriate.

[18] We note that "[t]he character of the offender is found in what we learn of the offender's life and conduct." *Perry v. State*, 78 N.E.3d 1, 13 (Ind. Ct. App. 2017). Further, we note that when considering the character of the offender, another relevant fact we look at is the defendant's criminal history. *Sanders v. State*, 71 N.E.3d 839, 844 (Ind. Ct. App. 2017), *trans. denied*. The record shows that when Smiley was arrested for the instant offense, he was also charged with dealing in methamphetamine. Although minimal, Smiley has a criminal history which speaks poorly of his character. Smiley has two prior misdemeanor convictions, one for possession of cocaine in 2003 and one for possession of methamphetamine in 2018.

[19] To salvage his poor character, Smiley claims that his depression contributed to his past drug use and his prior drug possession convictions. Contrary to his assertion, Smiley has presented no evidence to suggest he has been diagnosed with depression other than his own self-serving statements, nor has he shown any nexus between his depression and his child solicitation offense. *See Smith v.*

State, 929 N.E.2d 255, 259 (Ind. Ct. App. 2010) (holding defendant had not established, among other things, “whether there was a nexus between his mental condition and the crime.”).

[20] In light of the foregoing, we decline to find that Smiley six-year sentence is inappropriate in light of the nature of the offense and his character.

CONCLUSION

[21] Based on the foregoing, we conclude that the State presented sufficient evidence beyond a reasonable doubt to sustain Smiley’s conviction for child solicitation, and that Smiley’s sentence is not inappropriate in light of the nature of the offense and his character.

[22] Affirmed.

[23] Mathias, J. and Crone, J. concur