MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Terry Scott Marcum,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 20, 2022

Court of Appeals Case No. 21A-CR-2504

Appeal from the Tippecanoe Circuit Court

The Honorable Sean M. Persin, Judge

Trial Court Cause No. 79C01-2003-F1-8

Bailey, Judge.

Case Summary

[1] Terry Scott Marcum ("Marcum") challenges the thirty-five-year sentence, with five years suspended to probation, imposed upon him following his plea of guilty to Child Molesting, as a Level 1 felony.[1] He presents the sole issue of whether his sentence is inappropriate. We affirm.

Facts and Procedural History

[2] On March 24, 2020, the State charged Marcum with two counts of Child Molesting, occurring in Tippecanoe County and involving the same victim, the seven-year-old daughter of Marcum's girlfriend. On June 10, 2021, Marcum pled guilty to a single count of Child Molesting. Pursuant to a plea agreement, the State moved to dismiss the second count. The agreement, which was accepted by the trial court, capped the executed sentence at thirty years and provided that the sentence would run concurrent with a sentence imposed in Boone County, also involving conduct against the same victim.

[3] Marcum provided a factual basis for his guilty plea. He admitted that he had performed anal intercourse upon the victim. On November 5, 2021, the trial court sentenced Marcum to thirty-five years imprisonment, with five years

[1] Ind. Code § 35-42-4-3(a)(1).

suspended to probation, with the sentence to run concurrent with a twenty-year sentence imposed in Boone County. Marcum now appeals.

Discussion and Decision

[4] A person convicted of Child Molesting, as a Level 1 felony, faces a sentencing range of twenty years to fifty years, with an advisory sentence of thirty years. I.C. § 35-50-2-4(c). Accordingly, the executed portion of Marcum's sentence is equal to the advisory sentence. Marcum argues that the sentence is inappropriate in light of his history of mental illness, and he requests that we revise the sentence to twenty years.

[5] Article 7, Sections 4 and 6, of the Indiana Constitution authorize independent appellate review and revision of a trial court's sentencing order. *E.g., Livingston v. State*, 113 N.E.3d 611, 613 (Ind. 2018). This appellate authority is implemented through Indiana Appellate Rule 7(B). *Id*. Revision of a sentence under Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of the nature of his offenses and his character. *See* Ind. Appellate Rule 7(B); *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). We consider not only the aggravators and mitigators found by the trial court, but also any other factors appearing in the record. *Baumholser v. State*, 62 N.E.3d 411, 417 (Ind. Ct. App. 2016), *trans. denied*. It is the defendant's burden to "persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." *Roush v. State*, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007). And the defendant "bears a particularly heavy burden in

persuading us that his sentence is inappropriate when the trial court imposes the advisory sentence." *Fernbach v. State*, 954 N.E.2d 1080, 1089 (Ind. Ct. App. 2011), *trans. denied*.

[6] Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented, and the trial court's judgment "should receive considerable deference." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). The principal role of appellate review is to attempt to "leaven the outliers." *Id*. at 1225. Whether we regard a sentence as inappropriate 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 myriad other factors that come to light in a given case." *Id*. at 1224. The question is not whether another sentence is more appropriate, but rather whether the sentence imposed is inappropriate. *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008). Deference to the trial court "prevail[s] unless overcome by compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant's character (such as substantial virtuous traits or persistent examples of good character)." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[7] Here, the trial court identified as aggravators Marcum's criminal history, his violation of probation, the significant harm suffered by the very young victim, and Marcum's violation of a position of trust. In mitigation, the trial court found that Marcum took responsibility by pleading guilty, he had a history of

mental illness, he had family support, and his dependents would suffer undue hardship from his incarceration.

[8] Marcum's thirty-year executed sentence is the advisory sentence for his crime, and the advisory sentence "is the starting point the Legislature selected as appropriate for the crime committed," *Fuller v. State*, 9 N.E.3d 653, 657 (Ind. 2014). Marcum, who had access to the victim because of his relationship with the victim's mother, awakened the sleeping seven-year-old and forced anal intercourse upon her. Thus, Marcum's crime was not accompanied by a show of "restraint" or "lack of brutality" on his part. *Stephenson*, 29 N.E.3d at 122.

[9] And the trauma to the child victim was significant and ongoing. A court-appointed special advocate for the child victim submitted a report to the trial court for sentencing purposes, observing that the child had been engaged in mental health therapy for two and one-half years. It was reported that the victim was unable to meet the therapeutic goals, cope appropriately, or form healthy relationships. The victim reportedly had to be removed from her family because of her aggression toward siblings. She was reportedly "easily triggered" and readily subject to "melt downs," attributable to the trauma of her having suffered repeated molestations by Marcum. (Tr. Vol. II, pg. 35.) There is nothing in the nature of the instant offense that militates toward a lesser sentence.

[10] Nor does Marcum's character support a sentence revision. He has seventeen prior misdemeanor convictions and three prior felony convictions. He had

recently violated the terms of his probation and previously had his probation and community corrections placements revoked. He pled guilty, arguably showing some acceptance of responsibility. *See Cloum v. State*, 779 N.E.2d 84, 90 (Ind. Ct. App. 2002). That said, Marcum received a significant benefit because one charge was dismissed, his potential exposure to incarceration was reduced from fifty years to thirty years, and the instant sentence was run concurrent with a sentence imposed in another county.

[11] Marcum has not shown that his sentence is inappropriate in light of the nature of his offense and his character.

[12] Affirmed.

Najam, J., and Bradford, C.J., concur.