MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE

COURT OF APPEALS OF INDIANA

Russell L. Albano,
Appellant/Defendant,

v.

State of Indiana,
Appellee/Plaintiff.

June 24, 2021

Court of Appeals Case No. 20A-CR-2298

Appeal from the LaPorte Superior Court

The Hon. Michael S. Bergerson, Judge

Trial Court Cause No. 46D01-2005-F1-657

Bradford, Chief Judge.

Case Summary

[1] In July of 2020, the then-ninety-year-old Russell Albano pled guilty to one count of Class B felony child molesting for acts committed between April of 2000 and May of 2003 against a relative who was between five and seven years old. In exchange for Albano's plea, the State dropped a charge involving another victim and reduced what had been originally a Class A felony charge. The trial court sentenced Albano to twenty years of incarceration, a sentence that he argues is inappropriately harsh and disproportionate to his offense. Because we disagree, we affirm.

Facts and Procedural History

[2] In January of 2020, eight-year-old Victim 1 reported to the Indiana Department of Child Services that Albano, her step-grandfather, had been touching her "down in her pants." Appellant's App. Vol. II p. 12. Victim 1 also reported that Albano would kiss her on the lips and touch her vagina under her clothes. When police interviewed other family members, Victim 2, a female relative who was twenty-five years old, reported that between April 1, 2000, and May 1, 2003, Albano had put his hands under her clothing and rubbed the inside of her vagina approximately five to eight times.

[3] On May 29, 2020, the State charged Albano with Class A felony child molesting (Victim 2) and Level 4 felony child molesting (Victim 1). On July 23, 2020, Albano and the State executed a plea agreement in which (1) Albano agreed to plead guilty to a lesser charge of Class B felony child molesting and (2) the State also agreed to dismiss the Level 4 felony charge. At the time of

Albano's molestation of Victim 2, Indiana Code section 35-42-4-3 provided in part, as follows: "A person who, with a child under fourteen (14) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits child molesting, a Class B felony." "'Deviate sexual conduct' means an act involving: (1) a sex organ of one person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object." *Ruel v. State*, 500 N.E.2d 1274, 1276 (Ind. Ct. App. 1986) (quoting Ind. Code § 35-42-4-2 (since repealed)). On November 19, 2020, the trial court sentenced Albano to twenty years of incarceration, finding his age and lack of criminal history to be mitigating and Victim 2's age, Albano's breach of trust, and the trial court's belief that he is a serial child molester to be aggravating.

Discussion and Decision

[4] Albano seems to both challenge the appropriateness of his twenty-year sentence and argue that it is disproportionate to his offense. As an initial mater, Albano argues that the trial court improperly found, as an aggravating circumstance, that he is a serial child molester, an argument that has relevance to both of his sentence challenges. The trial court presumably based this finding on the probable-cause affidavit included in Albano's presentence investigation report, which detailed the allegations of Victim 1. At sentencing, however, Albano agreed that the presentence investigation report was accurate. *See Sullivan v. State*, 836 N.E.2d 1031, 1036–37 (Ind. Ct. App. 2005) (concluding that a presentence investigation report defendant indicated was accurate at sentencing was evidence properly before the trial court at sentencing). Because Albano

raised no objection to consideration of the probable-cause affidavit at his sentencing hearing, he has waived this argument for appellate review. *See Dillard v. State*, 827 N.E.2d 570, 576 (Ind. Ct. App. 2005), (ruling that failure to object to a PSI waives appellate review of the trial court's consideration of its contents), *trans. denied*.

I. Appropriateness

[5] We "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." Ind. Appellate Rule 7(B). "Although appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Shouse v. State*, 849 N.E.2d 650, 660 (Ind. Ct. App. 2006), *trans. denied* (citations and quotation marks omitted). "[W]hether 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 myriad other factors that come to light in a given case." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). In addition to the "due consideration" we are required to give to the trial court's sentencing decision, "we understand and recognize the unique perspective a trial court brings to its sentencing decisions." *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). As mentioned, the trial court

sentenced Albano to twenty years of incarceration, the maximum sentence for a Class B felony. *See* Ind. Code § 35-50-2-5(a).

[6] The nature of Albano's offense is that he took advantage of his time and position of authority babysitting Victim 2 to molest her when she was between five and eight years old. Victim 2 was therefore much younger than the under-fourteen-years-old requirement for Class B felony child molesting. Furthermore, Albano's molestation of Victim 2 occurred over a period of years, and he used his position of trust to keep her from reporting his crimes, telling her that he had cancer and that he would die in prison if she did. Albano has failed to cast the nature of his offense "in a positive light" such that a revision of his sentence is warranted. *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[7] Albano's character also supports the imposition of an enhanced sentence. "Whether a sentence is inappropriate ultimately turns on the culpability of the defendant, the severity of the crime, the damage done to others, and a myriad of other factors that come to light in a given case." *Thompson v. State*, 5 N.E.3d 383, 391 (Ind. Ct. App. 2014). As for the crime to which he pled guilty, Albano used his position of trust to molest a child put in his care, acknowledged his wrongdoing by apologizing to her when confronted a number of years later, and convinced her not to report his molestation by claiming that he would die in jail if she did. Moreover, the record supports the trial court's finding that Albano is a serial child molester. While Albano did not explicitly admit to molesting multiple victims, he agreed to the accuracy of the PSI, which

contained the affidavit of probable cause and, therefore, the allegations of Victim 1, at the very least.

[8] Finally, Albano argues that he accepted responsibility but did not receive a substantial benefit in return for his plea. The record does not support this argument. In exchange for his guilty plea, Albano received the substantial benefit of the dismissal of the Level 4 felony child-molesting charge and the reduction of the Class A felony child-molesting charge to a Class B felony. Where a defendant receives a substantial benefit in exchange for his guilty plea, a guilty plea is entitled to minimal mitigating weight. *Hollins v. State*, 145 N.E.3d 847, 852 (Ind. Ct. App. 2020) (citing *Anglemyer v. State*, 875 N.E.2d 218, 221 (Ind. 2007)), *trans. denied*. Consequently, we cannot say that Albano's guilty plea reflects well on his character. In summary, in light of the nature of Albano's offense and his character, he has failed to establish that his twenty-year sentence is inappropriate.

II. Proportionality

[9] Article 1, Section 16, of the Indiana Constitution's provision provides, in part, that "[c]ruel and unusual punishments shall not be inflicted. All penalties shall be proportioned to the nature of the offense."

> Article 1, Section 16 requires us to review whether a sentence is not only within statutory parameters, but also constitutional as applied to the particular defendant. *Knapp v. State*, 9 N.E.3d 1274, 1290 (Ind. 2014), *cert. denied*, —— U.S. ——, 135 S. Ct. 978, 190 L. Ed. 2d 862 (2015). Our standard for an as-applied proportionality challenge depends on the type of penalty at issue. *Id*. at 1290. For habitual-offender enhancements, we assess the "nature and

> gravity" of the present felony, and then the "nature" of the prior felonies on which the enhancement is based. *Id*. (quoting *Best v. State*, 566 N.E.2d 1027, 1031 (Ind. 1991)). For penalties not based on prior offenses, we have undertaken a simpler inquiry into whether the penalty is "graduated and proportioned to the nature of [the] offense." *Id*. (citing *Conner v. State*, 626 N.E.2d 803, 806 (Ind. 1993) (internal quotation marks omitted)).

Shoun v. State, 67 N.E.3d 635, 641 (Ind. 2017). "Stated differently, a legislatively determined penalty will be deemed unconstitutional by reason of its length only if it is so severe and entirely out of proportion to the gravity of the offense committed as to shock public sentiment and violate the judgment of reasonable people." *Foreman v. State*, 865 N.E.2d 652, 655 (Ind. Ct. App. 2007), *trans. denied*.

[10] We conclude that Albano has failed to show that his sentence was not proportionate as applied. Albano took advantage of a position of trust and authority to molest his five-to seven-year-old victim by penetrating her vagina with his finger and, when confronted, played on her sympathies to convince her not to report his molestation to anyone else. We believe it is worth noting that Albano acknowledged that his actions toward Victim 2 could have supported a Class A felony conviction, with its potential for a fifty-year sentence.[1] Under the circumstances, a twenty-year sentence is not disproportionate, nor does it shock public sentiment or violate the judgment of reasonable persons. *See, e.g.*,

[1] *See* Ind. Code § 35-50-2-4(a) ("A person who commits a Class A felony (for a crime committed before July 1, 2014) shall be imprisoned for a fixed term of between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years.").

Shoun, 67 N.E.3d at 641–42 (concluding that sentence of life without parole was graduated and proportionate where defendant fled work release facility and stabbed girlfriend to death and mutilated her body); *Pittman v. State*, 45 N.E.3d 805, 818 (Ind. Ct. App. 2015) (upholding six-year sentence for attempted stalking where defendant stole gun and told Victim he was going to kill her).

[11] We affirm the judgment of the trial court.

Crone, J., and Brown, J., concur.