

Case Summary

Kraig Burgan molested a three-year-old girl while he was living in a hotel room with her mother. The State charged Burgan with one count of class A felony child molesting and two counts of class C child molesting. Burgan pled guilty to one count of class C felony child molesting, and the State agreed to drop the remaining charges. The trial court sentenced Burgan to a six-year executed term. Burgan argues that his sentence is inappropriate because of the nature of the offense and his character. He has failed to show that the sentence is inappropriate, and therefore we affirm.

Facts and Procedural History

In October of 2006, Burgan molested his then-girlfriend's three-year-old daughter, L.C. On March 31, 2009, Burgan admitted to touching L.C. once while in bed with her and once while showering with her. In July of 2009, the State charged Burgan with one count of class A felony child molesting and two counts of C felony child molesting. In March of 2010, Burgan agreed to plead guilty to one count of class C felony child molesting, and the State agreed to drop the remaining charges. Sentencing was left to the trial court's discretion. On July 26, 2010, Burgan moved to withdraw his guilty plea. The trial court denied his motion to withdraw his guilty plea on August 13, 2010. The trial court gave Burgan a six-year executed sentence that he now appeals.

Discussion and Decision

In *Anglemeyer v. State*, our supreme court presented a four-part analysis for reviewing sentences on appeal. 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g* 875 NE.2d 482. First,

the sentencing court provides a statement with the “reasonable detailed reasons or circumstances” for the sentence. *Id.* at 491. Second, the reasons given, or those omitted and arguably supported by the record, are reviewable only for abuse of discretion. *Id.* Third, the *weight* given to those reasons that the trial court found, or those that should have been found, is not reviewable for abuse. *Id.* And finally, review by appellate courts of the merits of a sentence may be sought on the grounds outlined in Indiana Appellate Rule 7(B). *Id.*

We begin our analysis by reviewing the trial court’s sentencing statement:

In looking at your case, I do see some factors that do support an enhanced sentence. Defendant has one misdemeanor conviction, but I don’t give that any weight, as it is remote in time and unrelated to the offense in this case. I do [find] important the factors that Defendant was in a position of trust with the victim . . . [he] was the mother’s boyfriend, and I do give that factor significant weight. I also give significant weight to the fact that . . . Defendant used some degree of care and planning in committing the offense. This was not an impulse or a one-time event. Defendant committed the offenses in bed and in the shower.

There are circumstances that would support a reduced sentence . . . [he] did assume responsibility for his actions and pled guilty, but I do give this factor little to no weight as the defendant did receive a great benefit, a real benefit, being that the State agreed to dismiss a class A felony against him. Defendant is thirty-eight-years of age, and this is his first felony conviction. I do give this factor some weight. Defendant has some family backing and support, which could aid in his rehabilitation, and I do appreciate the fact that his family has consistently been there for him. They’ve written some very good letters on his behalf. I . . . give this factor little weight because . . . he could’ve used his family support to help prevent him from committing crimes.

I do consider the fact that Defendant’s biological mother has serious medical conditions. The Court gives this factor no weight . . . I use[d] to consider that as a factor when I sentenced people, but anymore, I found that I really do not give weight to other people’s problems and medical conditions. I do not let people avoid whatever sentence I think they should have due to other peoples’ health problems. It’s just something I’ve kind of grown to believe in over the past several years. Defendant has attempted to maintain gainful

employment in the past in order to meet his financial obligations. The court will give this some weight.

In balancing out these factors, I find that the factors supporting the enhanced sentence outweigh the circumstances supporting a reduced sentence.

Tr. at 51-53.

Although Burgan purports to appeal his sentence under Appellate Rule 7(B), his arguments are directed solely to the weight that the trial court gave (or should have given) various aggravating and mitigating circumstances. We are not permitted to review the weight the trial court gave to the aggravating and mitigating circumstances. *Anglemyer*, 868 N.E.2d at 491. As such, the State argues that Burgan has waived his challenge to the appropriateness of his sentence by failing to make a cogent argument. We agree. *See Perry v. State*, 921 N.E.2d 525, 528 (Ind. Ct. App. 2010) (“It is well established that a failure to make a cogent argument regarding the nature of the defendant’s offense and the defendant’s character results in waiver of the defendant’s appropriateness claim.”).

Waiver notwithstanding, we will address Burgan’s arguments in their proper context. Appellate Rule 7(B) permits an appellate court, after giving “due consideration” to the trial court’s decision, to revise a sentence only where it finds that the trial court’s sentence is inappropriate in light of the nature of the offense and the character of the offender. When reviewing the trial court’s sentence, we do not merely replace its judgment with ours. *Golden v. State*, 862 N.E.2d 1212, 1218 (Ind. Ct. App. 2007), *trans. denied*. “Although [Appellate Rule 7(B)] does not require the reviewing court to be extremely deferential to a trial court’s sentencing decision, the reviewing court still gives due consideration to that

decision.” *Richardson v. State*, 906 N.E.2d 241, 247 (Ind. Ct. App 2009). The defendant must persuade us that his sentence is inappropriate. *Horton v. State*, 936 N.E.2d 1277, 1286 (Ind. Ct. App. 2010).

“The advisory sentence is the starting point our legislature has selected as an appropriate sentence for the crime committed.” *Richardson*, 906 N.E.2d at 247. A person convicted of a class C felony faces a sentence of between two to eight years, with a four-year advisory sentence. Ind. Code § 35-50-2-6. Nothing about the nature of the offense suggests that Burgan’s six-year sentence is inappropriate. Burgan violated a position of trust he held with L.C., there was a significant age difference between him and L.C., and his actions were premeditated.

In support of his character, Burgan points out that he has never been convicted of a felony and that he pled guilty. While it is true Burgan has never been convicted of a felony, this fact alone does not make his sentence inappropriate. In *McElroy v. State*, our supreme court said that an enhanced sentence for a defendant with no prior criminal convictions was not inappropriate where the defendant refused to assume responsibility for the crime he committed. 865 N.E.2d 584, 592 (Ind. 2007). As part of his presentence investigation, Burgan said that the only reason he pled guilty was to avoid being convicted of the class A felony charge. It is clear from the record then that he did not plead guilty out of remorse or

to accept responsibility for his actions.¹ Moreover, he pled guilty a year after being charged, attempted to withdraw his plea a short time later, and advanced a self-serving reason for his plea. These facts do not reflect favorably on Burgan's character. In sum, he has not carried his burden to show that his sentence was inappropriate. Therefore, we affirm.

Affirmed.

ROBB, C.J., and NAJAM, J., concur.

¹ We remind Burgan's counsel that Indiana Appellate Rule 9(J) requires that documents and information excluded from public access pursuant to Indiana Administrative Rule 9(G)(1), which includes presentence investigation reports, must be filed in accordance with Indiana Trial Rule 5(G). That rule provides that those documents must be submitted on light green paper or have a light green coversheet and marked "Not for Public Access" or "Confidential". Ind. Trial Rule 5(G)(1).