

Case Summary

Marco Santiago appeals the thirty-five year sentence he received for one count of Class A felony attempted child molesting. We affirm.

Issues

The State argues on cross-appeal that the trial court erroneously allowed Santiago to initiate a belated appeal. Santiago contends that his sentence is inappropriate.

Facts

In July 2000, six-year-old J.R. was diagnosed with herpes. In November 2000, J.R. told a police officer that her uncle, Santiago, had been “touching” her. App. p. 12. Santiago lived with J.R. and often babysat her while her mother was working. Santiago admitted to police that on at least two occasions three to four months previously, he had touched J.R.’s vagina with his penis but did not penetrate her. He also stated that he touched her genitals, and she touched his genitals. However, Santiago also claimed that J.R. had initiated the sexual contact by coming into his room naked and saying that “she wanted to do what big people do, referring to having sex.” Id.

The State charged Santiago with two counts of Class A felony attempted child molesting and two counts of Class C felony child molesting. Santiago entered into a plea agreement with the State, whereby he pled guilty to one count of Class A felony attempted child molesting and the remaining charges were dismissed. Additionally, the agreement placed a cap of thirty-five years on the sentence Santiago could receive; otherwise, sentencing was left to the trial court’s discretion.

On June 22, 2001, the trial court sentenced Santiago to thirty-five years. He was not advised of his right to challenge his sentence via direct appeal, but was told generally that he waived his right to appeal by pleading guilty. In March 2002 Santiago apparently attempted to initiate an appeal to this court pro se, but we dismissed this effort in August 2002. It also appears that at some point, Santiago filed a pro se petition for post-conviction relief. However, on March 10, 2005, the trial court granted his motion to dismiss the petition without prejudice and to appoint appellate counsel to attempt to pursue a belated appeal. Counsel did not learn of this appointment until August 2005, and he then filed a motion for permission to initiate a belated appeal on Santiago's behalf in September 2005. The trial court granted the request and we now consider Santiago's appeal.

Analysis

I. Propriety of Permitting Belated Appeal

We first address the State's cross-appeal claim that the trial court improperly granted Santiago permission to pursue a belated appeal. Indiana Post-Conviction Rule 2(1) provides in part:

Where an eligible defendant convicted after a trial or plea of guilty fails to file a timely notice of appeal, a petition for permission to file a belated notice of appeal for appeal of the conviction may be filed with the trial court, where:

- (a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and
- (b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

Where, as here, a trial court does not conduct a hearing on a petition for permission to file a belated notice of appeal, we review a trial court's decision regarding the petition de novo. Perry v. State, 845 N.E.2d 1093, 1095 (Ind. Ct. App. 2006), trans. denied. Factors courts may consider in deciding whether a defendant was without fault in the delay of filing the notice of appeal include the defendant's level of awareness of his or her procedural remedy, age, education, familiarity with the legal system, whether he or she was informed of his or her appellate rights, and whether he or she committed an act or omission that contributed to the delay. Id.

Other factors we have considered recently in deciding whether a trial court properly granted permission to file a belated notice of appeal, in cases where a defendant pled guilty and later attempts to challenge his or her sentence, include whether the defendant made previous efforts to challenge the sentence through other, collateral means, and the timing of such efforts in relation to our supreme court's decision in Collins v. State, 817 N.E.2d 230 (Ind. 2004). See id. at 1096. Collins clarified that a defendant who has pled guilty must challenge a resulting sentence on direct appeal, if at all, and not by way of a petition for post-conviction relief. Collins, 817 N.E.2d at 233. The court further stated that Post-Conviction Rule 2 "will generally be available" to defendants who were not advised by the trial court that they had a right to directly appeal a sentence imposed after an "open" guilty plea. Id.

Here, the trial court did not advise Santiago that he could challenge his sentence on direct appeal, but instead told him generally that he waived his right to appeal when he

pled guilty.¹ Santiago, who has no criminal history and an apparently very limited grasp of the English language,² first took steps to challenge his sentence in March 2002, although that first effort resulted in dismissal of the attempted appeal several months later. Santiago then filed a pro se petition for post-conviction relief. In March 2005, a few months after Collins was decided, Santiago sought to set aside his post-conviction relief petition and follow the suggestion of the Collins opinion that he instead attempt to initiate a belated appeal. Santiago's case seems to follow the pattern of those in which we have affirmed the initiation of a belated appeal. The trial court did not err in approving Santiago's motion to initiate a belated appeal.

II. Appropriateness of Sentence

Santiago's sole challenge to the merits of his sentence is that it is inappropriate under Indiana Appellate Rule 7(B).³ He does not challenge the trial court's finding and weighing of aggravators and mitigators. However, even if there is no irregularity in the trial court's finding and weighing of aggravators and mitigators, we still may exercise our authority under Appellate Rule 7(B) to revise a sentence that we conclude is inappropriate in light of the nature of the offense and the character of the offender. Hope v. State, 834 N.E.2d 713, 718 (Ind. Ct. App. 2005).

¹ As our supreme court recently made clear, the fact that the plea agreement had a sentencing "cap" did not abrogate Santiago's ability to challenge the sentence on appeal because the trial court retained discretion to sentence him to any term up to the cap. See Childress v. State, 848 N.E.2d 1073, 1078-79 (Ind. 2006).

² A translator was required for Santiago's interview with the police and his court proceedings.

³ Santiago does not claim that his sentence violates Blakely v. Washington.

We observe initially that Santiago asserts he received a “maximum” sentence for this offense, and notes that maximum sentences normally are reserved for the “worst” offenses and offenders, a category he claims does not apply here. See Buchanan v. State, 767 N.E.2d 967, 973 (Ind. 2002). However, the maximum sentence for a Class A felony is fifty years. See Ind. Code § 35-50-2-4 (2004). Santiago was sentenced to thirty-five years, or an enhancement of five years above the presumptive of thirty years that existed at the time of his sentencing. See id.⁴ Santiago seems to be claiming that because his plea agreement capped his sentence at thirty-five years, he received a “maximum” sentence. He cites no authority for the proposition that a plea agreement cap constitutes a “maximum” sentence, as opposed to the statutory maximum, for purposes of a “worst” offense and offender analysis. We will analyze the appropriateness of Santiago’s sentence with reference to the fifty-year statutory maximum for a Class A felony, not the plea agreement maximum of thirty-five years.

Our independent review of the nature of the offense for which Santiago was convicted and sentenced reveals that he attempted to molest his six-year-old niece, with whom he lived. He also frequently took care of the child when her mother was not there. These circumstances indicate that Santiago enjoyed a position of trust vis-à-vis J.R., and that he violated that trust in trying to molest her. See Watson v. State, 784 N.E.2d 515, 523 (Ind. Ct. App. 2003) (defendant violated position of trust with respect to three-year-old daughter of his live-in fiancée whom he frequently took care of). There also is

⁴ Of course, well after Santiago was sentenced our legislature replaced “presumptive” sentences with “advisory” sentences.

evidence that Santiago infected J.R. with genital herpes, which is incurable and will cause problems and pain to J.R. for the rest of her life unless a cure is discovered. The nature of the offense warrants aggravation of Santiago's sentence.

Regarding Santiago's character, it is true that he lacks any criminal history, which normally warrants mitigating weight in sentencing. See Cloum v. State, 779 N.E.2d 84, 91 (Ind. Ct. App. 2002). Here, however, the mitigating weight of Santiago's lack of criminal history is at least partially counterbalanced by the fact that he is in this country in violation of our immigration laws. See Alexander v. State, 837 N.E.2d 552, 556 (Ind. Ct. App. 2005), disapproved of on other grounds by Ryle v. State, 842 N.E.2d 320 (Ind. 2005), cert.denied.

Santiago also pled guilty to this offense, and a guilty plea normally is entitled to some mitigating weight because it may demonstrate a defendant's acceptance of responsibility for the crime and extend a benefit to the State and to the victim or the victim's family by avoiding a full-blown trial. Francis v. State, 817 N.E.2d 235, 237-38 (Ind. 2004). The plea here did spare J.R. from having to relive the molestation in court. However, Santiago also benefited from the plea because three other charges, a Class A felony and two Class C felonies, were dismissed in exchange for the plea, which lowers the plea's mitigating weight. See Payne v. State, 838 N.E.2d 503, 509 (Ind. Ct. App. 2005), trans. denied. Additionally, the extent to which the plea demonstrated Santiago's acceptance of responsibility for this offense is debatable, also lowering the plea's mitigating weight. See id. Santiago maintained until the very end that J.R. had "provoked" him into molesting her. Tr. p. 25. Even if we were to accept at face value

Santiago's incredible claim that a six-year-old made sexual advances towards him, a grown man has a duty to resist such advances. Despite Santiago's lack of criminal history and guilty plea, there is nothing particularly mitigating regarding his character. In sum, in light of the aggravating nature of the offense and lack of overwhelming indicators of positive character on Santiago's part, we cannot say a thirty-five year sentence for a Class A felony is inappropriate.

Conclusion

The trial court properly granted Santiago's motion to initiate a belated appeal. However, we conclude that his thirty-five year sentence is not inappropriate.

Affirmed.

BAILEY, J., and VAIDIK, J., concur.