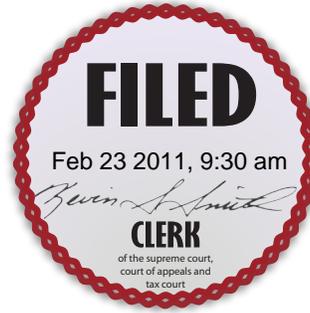


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

WILLIAM S. LEBRATO
Fort Wayne, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

BRIAN REITZ
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

DORRIS MERRIWEATHER, III,)

Appellant/Defendant,)

vs.)

No. 02A05-1008-CR-514

STATE OF INDIANA,)

Appellee/Plaintiff.)

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-1003-FA-18

February 23, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Dorris Merriweather, III appeals the sentence imposed by the trial court following his guilty plea to one count of Attempted Murder, a Class A felony,¹ and two counts of Child Molesting as a Class A felony.² We affirm.

FACTS AND PROCEDURAL HISTORY

On March 29, 2010, the State charged Merriweather with Class A felony attempted murder, Class A felony burglary, three counts of Class A felony child molesting, and Class B felony criminal confinement. The charging information alleged that on or about April 3, 2003, Merriweather did knowingly or intentionally: (1) break into five-year-old A.G.'s residence with the intent to molest A.G.; (2) remove A.G. from the residence; (3) perform oral, vaginal, and anal sexual intercourse on A.G.; and (4) choke or strangle A.G. causing her to lose consciousness.³ On June 18, 2010, Merriweather pled guilty to Class A felony attempted murder and two counts of Class A felony child molesting. Pursuant to the terms of his plea agreement, Merriweather agreed to an aggregate sentence of seventy-five years, and the State agreed to dismiss the remaining charges. The parties further agreed that the trial court would decide whether the sentence imposed in the instant matter should run concurrent or consecutive to the forty-five-year sentence imposed in an unrelated matter, Cause Number

¹ Ind. Code §§ 35-42-1-1 (2002) and 35-41-5-1 (2002).

² Ind. Code § 35-42-4-3 (2002).

³ The record on appeal does not contain a copy of the guilty plea hearing or the factual basis supporting Merriweather's guilty plea. As a result, our statement of the facts relating to Merriweather's underlying criminal conduct is limited to the allegations included in the charging information.

02D04-0903-FA-20 (“Cause No. FA-20”).⁴

On July 30, 2010, the trial court accepted Merriweather’s plea agreement and, pursuant to the terms of the parties’ agreement, imposed an aggregate seventy-five-year sentence. The trial court ordered that Merriweather’s seventy-five-year sentence for the instant matter be served consecutive to his forty-five-year sentence imposed in Cause No. FA-20. This appeal follows.

DISCUSSION AND DECISION

Merriweather contends that the trial court abused its discretion in sentencing him. Initially, we note that Merriweather’s offenses occurred prior to the April 25, 2005 revisions to the sentencing statutes. “The Indiana Supreme Court has held that we apply the sentencing scheme in effect at the time of the defendant’s offense.” *Upton v. State*, 904 N.E.2d 700, 702 (Ind. Ct. App. 2009) (citing *Robertson v. State*, 871 N.E.2d 280, 286 (Ind. 2007); *Gutermuth v. State*, 868 N.E.2d 427, 432 n.4 (Ind. 2007)), *trans. denied*. Consequently, the pre-April 25, 2005 presumptive sentencing scheme applies to Merriweather’s convictions.

Under the pre-April 25, 2005 sentencing statutes, sentencing decisions rest within the discretion of the trial court and are reviewed on appeal “only for an abuse of discretion, including a trial court’s decision[] to increase or decrease the presumptive sentence because of aggravating or mitigating circumstances and to run the sentences concurrently or

⁴ The record indicates that Merriweather was sentenced to forty-five years after being convicted of one count of Class A felony child molesting and one count of Class C felony child molesting under Cause No. FA-20. Merriweather concedes that the two cases are wholly unrelated and that his victim in Cause No. FA-20 was his daughter.

consecutively.” *Henderson v. State*, 769 N.E.2d 172, 179 (Ind. 2002). “An abuse of discretion occurs only if ‘the decision is clearly against the logic and effect of the facts and circumstances.’” *Upton*, 904 N.E.2d at 702 (quoting *Pierce v. State*, 705 N.E.2d 173, 175 (Ind. 1998)).

On appeal, Merriweather contends that the trial court abused its discretion in ordering that his aggregate seventy-five-year sentence for the instant matter be run consecutive to the forty-five-year sentence imposed in the unrelated Cause No. FA-20. Specifically, Merriweather argues that the trial court failed to consider his guilty plea and his remorse to be significant mitigating circumstances that would warrant that the sentences be run concurrent to one another. The Indiana Supreme Court has held that “even a single aggravating circumstance may support the imposition of consecutive sentences.” *Hampton v. State*, 873 N.E.2d 1074, 1082 (Ind. Ct. App. 2007) (quoting *Mathews v. State*, 849 N.E.2d 578, 589 (Ind. 2006)).

In ordering that the instant seventy-five-year sentence run consecutive to the aggregate forty-five-year sentence imposed in Cause No. FA-20, the trial court noted that the matters were wholly unrelated, occurred at separate times, and involved the molestation of two separate victims, one being A.G. and the other being Merriweather’s daughter. The trial court found that because the matters were “entirely separate,” they were deserving of separate sentences. Tr. p. 24. Further, the trial court noted that although Merriweather pled guilty and expressed remorse, it did not find either to be a significant mitigating factor which would outweigh the aggravating nature of Merriweather’s actions and warrant that the instant

sentence be run concurrent to the unrelated forty-five-year sentence imposed in Cause No. 20. Given the egregious facts of this case, *i.e.*, that Merriweather performed vaginal and anal intercourse on five-year-old A.G. and choked or strangled her to the point where she lost consciousness, and the aggravating circumstance as stated by the trial court, we cannot say that the trial court abused its discretion in ordering the aggregate seventy-five-year sentence in the instant matter to run consecutive to the sentence that had been imposed in the unrelated offense.⁵ See *Hampton*, 873 N.E.2d at 1082.

The judgment of the trial court is affirmed.

KIRSCH, J., and CRONE, J., concur.

⁵ We note that with respect to the instant Class A felony child molestation convictions, Merriweather will not qualify for Class IV credit time as a credit restricted felon because he committed the instant molestations prior to the July 1, 2008 effective date of the credit restricted felon statute. See *Upton v. State*, 904 N.E.2d 700, 704-06 (Ind. Ct. App. 2009), *trans. denied*.