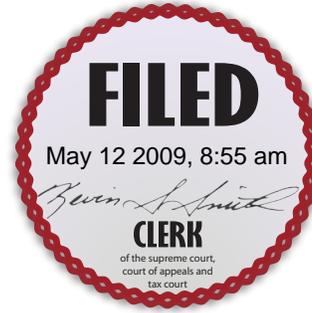


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JONATHAN BARR,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A04-0811-CR-652

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant W. Hawkins, Judge
Cause No. 49G05-0704-FA-59688

May 12, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Jonathan Barr appeals his convictions and sentence for two counts of Child Molesting, as Class A felonies, following a jury trial. He presents the following issues for review:

1. Whether the trial court abused its discretion when it denied his motion to suppress his post-arrest statement.
2. Whether his sentence is inappropriate under Indiana Appellate Rule 7(B).

We affirm.

FACTS AND PROCEDURAL HISTORY

Barr met Kathleen C. and her daughter, B.R., when Barr was eighteen years old and B.R. was seven or eight years old. Barr described his relationship with B.R. as “best friends” and stated that the mother and daughter lived with him for “a few months off and on” before Barr “went to prison.”¹ Suppression Hearing Exhibit A at 4. Barr next saw B.R. and her mother again in February 2007, when B.R. was thirteen years old. At that time, B.R. and her mother moved into a townhome with a relative, who was a friend of Barr.

Barr and B.R. began spending time together again, and the relationship became sexual. Because Barr was a family friend, he occasionally stayed overnight at the townhome. When Barr spent the night, he would sleep in the living room at first then sneak up to B.R.’s room. Barr and B.R. wrote poems for each other, and Barr bought B.R. a Colts hat and shirt and a dolphin picture. On the back of the picture, Barr wrote,

¹ Barr’s pre-sentence investigation report (“PSI”) shows that he was incarcerated from September 23, 2003 to January 19, 2005, for the offense of Criminal Deviate Conduct, as a Class B. felony. Barr’s probation in that case was revoked on June 30, 2005, and he was sentenced to three years.

in part, “I love you forever. John Barr.” Transcript at 140. After B.R.’s mother saw the dolphin picture, the mother became suspicious of the relationship and forbade Barr to have any contact with B.R.

On March 12, 2007, B.R. skipped school and invited Barr to her house while B.R.’s mother was out. Barr and B.R. had sexual intercourse in the living room. They then heard B.R.’s mother’s car outside and ran out of the back door of the home. When B.R.’s mother confirmed that B.R. was not at school, the mother and her boyfriend began searching for B.R. When the boyfriend saw Barr walking nearby, Barr turned and walked in the opposite direction. The boyfriend called 911, and B.R.’s mother reported B.R. as missing.

Barr ran from Indianapolis Metropolitan Police Department (“IMPD”) officers who had responded to the 911 call. The officers apprehended Barr with the assistance of a police canine, and they arrested Barr for “resisting fleeing.” Transcript at 42-43. Detective Craig Converse² subsequently interviewed B.R. and her mother, who reported that B.R. and Barr had had sexual intercourse on the morning of March 12. On April 6, Detective Converse interviewed Barr, who had been incarcerated since his March 12 arrest. After receiving and waiving his Miranda rights, Barr confirmed that he had had a sexual relationship with B.R. and had engaged in sexual intercourse with her on March 12.

On April 10, 2007, the State charged Barr with child molesting, as a Class A felony. The State later charged Barr with being an habitual offender. On March 27, Barr

² At the time of trial, Detective Converse had been promoted to Field Captain with the IMPD.

filed a motion to suppress the statement he had given to Detective Converse. The court held a hearing on June 4, 2008, on the motion to suppress, and Barr filed his memo in support of the motion on June 6. Although the court entered no order on the motion, the parties proceeded as if the motion had been denied.

Following a trial³ on October 2, a jury found Barr guilty of child molesting, as a Class A felony, and of being an habitual offender. On October 14, the court sentenced Barr as follows:

1. The Court found [sic] as mitigating factors: once arrested, Defendant cooperated with Detective Captain Converse and gave him a statement in which Defendant admitted to the allegations later filed in Count I; [D]efendant is at-risk to contract Huntington's disease; and defendant has had numerous relatives die of illness or tragedy.

2. The Court finds as aggravating factors: true finding on 12/14/1998 for Child Molesting that would have been a class C felony if committed as an adult; and a true finding for Resisting Law Enforcement of 12/14/1998. Defendant was also convicted as an adult of Resisting Law Enforcement on 4/17/2007. Further aggravation is found in that: on 2/9/1998 he was found to be in violation of his probation that he was on for his true finding for Disorderly Conduct; he failed formal home detention while facing charges as a juvenile for Resisting Law Enforcement; he failed his suspended commitment to [the] Indiana Boys' School that he'd received for his true findings for Theft; he adjusted poorly to the Department of Correction on separate terms of imprisonment, as evidence by his reprimands on 11/18/2003, 2/6/2006, and 12/21/2006; he committed 05-56498 [resisting arrest, battery, and battery by bodily waste] while he was on probation under 03-012802 [criminal deviate conduct]; he further violated the terms of his probation under 03-012802 by failing to comply with sex offender treatment, and the Court notes that if he had complied with that, perhaps this offense would not have occurred. He committed the instant offense of Child Molesting while on parole under 05-056498; Defendant's conduct in the instant case violated the trust of both the victim and her mother, and her mother, in an apparent attempt to prevent this from happening, had specifically asked Defendant to not be around the victim; and, the Court finds that the likelihood of Defendant committing another offense in the

³ Master Commissioner Mark A. Jones presided over the jury trial and signed the sentencing order. Judge Grant W. Hawkins approved the sentencing order.

future is great. Finally, the Court notes that though Defendant admitted is [sic] his statement to police—and did not contest in any way at trial—that he had molested the victim, he showed absolutely no remorse for his conduct in seducing her.

3. In weighing the aggravating and mitigating factors, the Court finds that the aggravating factors far outweigh the minimal mitigating factors. In light of those factors, the evidence, the Pre-Sentence Investigation and the arguments of counsel, the Court sentences Defendant as follows: under Count I, Child Molesting, [as] a class A felony, the Defendant is sentenced to forty-five (45) years in the Indiana Department of Correction, enhanced by thirty (30) years for the Habitual Offender enhancement, for a total sentence under Count I of seventy-five (75) years.

Appellant's App. at 131-33. Barr now appeals.

DISCUSSION AND DECISION

Issue One: Motion to Suppress Statement

Barr contends that the trial court abused its discretion when it denied his motion to suppress the statement he made to Detective Converse. But Barr is challenging the admission of evidence following his conviction. Thus, the issue is more appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial. Bentley v. State, 846 N.E.2d 300, 304 (Ind. Ct. App. 2006), trans. denied. A trial court is afforded broad discretion in ruling on the admissibility of evidence, and we will reverse such a ruling only upon a showing of an abuse of discretion. Id. An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. Id. In reviewing the trial court's ultimate ruling on admissibility, we may consider the foundational evidence from the trial as well as evidence from the motion to suppress hearing that is not in direct conflict with the trial testimony. Hendricks v. State, 897 N.E.2d 1208, 1211 (Ind. Ct. App. 2008).

The State has the burden under Miranda to prove that a defendant voluntarily made a knowing and intelligent waiver of his rights. See State v. Keller, 845 N.E.2d 154, 161 (Ind. Ct. App. 2006). Miranda warnings are based upon the Fifth Amendment Self-Incrimination Clause, and were designed to protect an individual from being compelled to testify against himself. Id. As such, “only verbal statements preceding an advisement of Miranda rights that are both testimonial in nature and elicited during custodial interrogation must be suppressed.” Id. (quoting Curry v. State, 643 N.E.2d 963, 976 (Ind. Ct. App. 1994), trans. denied). “A waiver of one’s Miranda rights occurs when the defendant, after being advised of those rights and acknowledging that he understands them, proceeds to make a statement without taking advantage of those rights.” Id.; Ringo v. State, 736 N.E.2d 1209, 1211-12 (Ind. 2000). There is no formal requirement for how the State must meet its burden of advising an individual consistent with Miranda, so this court examines the issue in light of the totality of the circumstances. Keller, 845 N.E.2d at 161; Wessling v. State, 798 N.E.2d 929, 936 (Ind. Ct. App. 2003).

Barr contends that the statement he gave to Detective Converse was not voluntary because (1) the detective did not tape record the “important part of the interrogation[,]” namely, the reading of Barr’s rights and Barr’s waiver of those rights, Appellant’s Brief at 15; (2) Detective Converse induced Barr to make a statement by telling Barr that the detective “was going to talk to the prosecutor and Barr would get a better deal if he talked to [the detective] about what happened[,]” id. at 16; (3) there was a delay between Barr’s arrest and the date the State charged him with child molesting; and (4) Barr was suffering

from “physical injuries and emotional distress” at the time he gave his statement, id. at 17. We address these contentions in turn.

Barr first argues that his April 6 statement was not voluntary because Detective Converse did not begin recording his interview with Barr until after the detective had read Barr his rights and Barr had waived those rights. We strongly encourage law enforcement officers to record the advisement of rights. See Gasper v. State, 833 N.E.2d 1036, 1041 (Ind. Ct. App. 2005), trans. denied. But the lack of a recording of an advisement and waive of rights is not dispositive of whether a defendant knowingly and voluntarily waived those rights. Id. Moreover, Detective Converse reviewed an advisement of rights form with Barr, and Barr signed the form to indicate his waiver of those rights.

Barr further contends that the his statement was not voluntary because Detective Converse told Barr that he would “get a better deal if he talked to [the detective] about what happened.” Appellant’s Brief at 16. But at trial Detective Converse denied having made such a promise. We need not consider Barr’s testimony from the suppression hearing that conflicts with Detective Converse’s trial testimony. See Hendricks, 897 N.E.2d at 1211.

Barr also argues that his statement was not voluntary because of delay between his arrest and the date the State charged him with child molesting. But Barr has not supported that argument with citations to relevant authority or cogent reasoning. As such, that contention is waived. See Ind. Appellate Rule 46(A)(8)(a).

Finally, Barr contends that his “physical injuries and emotional distress” at the time he gave his statement rendered the same involuntary. But Barr does not state in his appellate brief the nature of his injuries or emotional distress. And, again, Barr has not supported that argument with citations to the record, citations to relevant authority, or cogent reasoning. Thus, that contention is waived. See Ind. App. Rule 46(A)(8)(a). Waiver notwithstanding, Barr did not express any such distress during his April 6 interview with Detective Converse, nor does he assert that his distressed condition was apparent to the detective. And even if Barr suffered on April 6 from discomfort due to the dog bites sustained at the time of his March 12 arrest, Barr has not shown that such discomfort affected the voluntariness of his statement.

In sum, Barr has not shown that his April 6 statement to Detective Converse was not voluntarily made for any of the reasons argued on appeal. Thus, he cannot show that his statement was not voluntary under the totality of the circumstances. As a result, Barr’s argument must fail.

Issue Two: Sentence

Barr next challenges his sentence. Specifically, he argues that the imposition of consecutive sentences is inappropriate in light of the nature of the offenses and his character. Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution “authorize[] independent appellate review and revision of a sentence imposed by the trial court.” Roush v. State, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007) (alteration original). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id.

Revision of a sentence under Appellate 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 assess the trial court’s recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, “a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.” Roush, 875 N.E.2d at 812 (alteration original).

The sentence for a Class A felony is fixed term between twenty and fifty years, with an advisory sentence of thirty years. Ind. Code § 35-50-2-4. For the habitual offender enhancement, the court must sentence a defendant “to an additional fixed term that is not less than the advisory sentence for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense. However, the additional sentence may not exceed thirty (30) years.” Ind. Code § 35-5-3-8(h). Here, the court sentenced Barr to forty-five years for the offense and thirty years for the habitual offender enhancement, for an aggregate sentence of seventy-five years.⁴ Thus, we consider whether Barr’s seventy-five year sentence is inappropriate under Appellate Rule 7(B).

Barr asserts that his sentence is inappropriate in light of the nature of the offense. In support, he argues that his full statement to Detective Converse shows that he “cared for B.R. and believed he loved her” and that B.R. believed that she loved him. Appellant’s Brief at 10. But Barr admits to “struggles of consciousness [sic].”

⁴ The habitual offender enhancement imposed here is not subject to revision because, under Indiana Code Section 35-50-2, it cannot be lower than the thirty-year advisory sentence for a Class A felony or lower than the thirty-year maximum.

Appellant's Brief at 6. He also told the detective that he had "tried to be more like the adult towards" B.R. but that "[s]he just broke down my defenses[.]" Suppression Hearing Exhibit A at 6-7. Barr's statements demonstrate that he was fully aware of the wrongfulness of his conduct and yet he proceeded to engage in a sexual relationship with B.R.

In an apparent attempt to lessen his culpability, Barr also states that B.R.'s mother, who was only fourteen years old when B.R. was born, "did not possibly have the maturity to set proper boundaries between" himself and B.R. Appellant's Brief at 12. Regardless of the parenting skills initially employed by B.R.'s mother, she eventually became suspicious of the relationship and forbade Barr from seeing B.R. Nonetheless, Barr continued the relationship, directly defying the wishes of B.R.'s mother. Again, Barr knew that his conduct with B.R. was wrong and even concedes that he "carr[ies] the majority of the responsibility of what happened in his relationship with B.R." Id.

B.R.'s mother initially believed Barr to be a close family friend and even allowed him to stay overnight in her home. Barr defied that trust by engaging in a sexual relationship with B.R., sometimes having relations with B.R. by sneaking up to her room in the middle of the night. Barr cultivated a relationship with B.R., a thirteen-year-old girl, by writing for her and giving her presents. And, for the instant offense, he secretly met and had sex with B.R. when B.R. was supposed to be in school and her mother was away from home. Given Barr's obvious awareness that his conduct was wrong, his violation of a position of trust, his cultivation of the relationship with B.R., and his admission that he had sex with B.R. on more than one occasion but was only charged

with and convicted for one count of child molesting, we cannot say that Barr's sentence is inappropriate in light of the nature of the offense.

Barr also argues that his sentence is inappropriate in light of his character. Specifically, Barr observes that he is "probably immature for his age[.]" that his first sexual experience occurred at age twelve with a seventeen-year-old partner, and that his family has a history of Huntington's Disease⁵ and other illnesses.⁶ In other words, Barr attempts to paint himself as emotionally stunted by childhood tragedy and his status as a victim of child molestation. But Barr has not shown how his troubled background supports his contention that his sentence is inappropriate.

Barr's criminal history also belies his argument that his sentence is inappropriate. In its oral and written sentencing orders, the trial court noted only part of Barr's criminal history and lack of success in serving sentences. According to the PSI, Barr has juvenile adjudications for disorderly conduct, as a Class B misdemeanor if committed by an adult (1997); two counts of theft, as Class D felonies if committed by an adult (1998); child molesting, as a Class C felony if committed by an adult (1998); and resisting law enforcement, as a Class A misdemeanor if committed by an adult (1998). He also has adult convictions for resisting law enforcement, as a Class A misdemeanor (1997); resisting law enforcement, as a Class A misdemeanor, and possession of marijuana, as a

⁵ Barr infers that he may suffer from Huntington's Disease, but testing to determine whether he is so afflicted has been inconclusive.

⁶ In his brief, Barr argues that these factors should be considered as part of the nature of the offense. But each more accurately describes Barr's character than the offense at issue. Thus, we discuss them as such.

Class A misdemeanor (2002); criminal deviate conduct,⁷ as a Class B felony (2003); and resisting law enforcement, as a Class D felony, along with battery and battery by bodily waste, as Class A misdemeanors (2005).

Barr's lack of success with rehabilitation also weighs against his claim that his sentence is inappropriate. As a juvenile, he violated his probation for disorderly conduct; he failed home detention while charges were pending for resisting arrest; and he failed his suspended commitment to the Indiana Boys' School, imposed for his theft convictions. As an adult, Barr "adjusted poorly to the Department of Correction[,]" accumulating three "write-ups" on separate terms of incarceration in 2003 and 2006. He also committed the 2005 offenses while he was on probation for criminal deviate conduct, failed to follow up on ordered sex offender treatment, and was on parole when he committed the instant offense.

In addition to Barr's significant criminal history and failure to successfully complete ordered sentences and alternative sentencing, the trial court found Barr's lack of remorse to be an aggravating factor. We agree. Again, Barr's statement to Detective Converse shows that he knew his conduct regarding B.R. was wrong, yet he nurtured and maintained a sexual relationship with her. Given all of these aspects of Barr's character, we cannot say that his seventy-five-year aggregate sentence is inappropriate.

Affirmed.

FRIEDLANDER, J., and VAIDIK, J., concur.

⁷ Barr's conviction for criminal deviate conduct was based on his attack and digital penetration of an adult female acquaintance when he was twenty years old.