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IN THE
COURT OF APPEALS OF INDIANA

JAMES WINGARD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 09A02-1008-CR-890
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CASS SUPERIOR COURT
The Honorable Richard A. Maughmer, Judge
Cause No.09D02-0209-FA-8

June 20, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

James Wingard appeals the thirty-six year sentence imposed after he pled guilty to child molesting, a class A felony.[1] In a cross-appeal, the State questions the propriety of the trial court's grant of Wingard's motion for permission to file a belated appeal.

We affirm.

ISSUES

1. Whether the trial court abused its discretion in granting Wingard's motion for permission to file a belated appeal.

2. Whether the trial court abused its discretion in imposing the sentence.

3. Whether the sentence imposed is inappropriate.

FACTS

Between January 1, 2001, and February 15, 2001, thirty-six-year-old Wingard subjected the thirteen-year-old female victim, a biological relative under his direct care, to acts of molestation. The probable cause affidavit provided that the victim is learning disabled and has an IQ of 80. The victim reported that Wingard had touched her inappropriately on at least ten occasions. Wingard began his abuse by rubbing his penis on the victim's buttocks and placing his penis in her "butt." (State's App. 1). When the victim was older, Wingard "would do it in the front," meaning he would place his penis in her vagina. (State's App. 1).

[1] Ind. Code § 35-42-4-3.

During the investigation, Wingard voluntarily spoke to the authorities but initially told them that the victim was lying. When Wingard returned to speak to police after the victim had been interviewed, he admitted touching the victim inappropriately on at least ten occasions because his wife did not want to have sex with him.

On September 30, 2002, the State charged Wingard with two counts of class A felony child molesting, one count of class B felony sexual conduct with a minor, and one count of class C felony child molesting. The State also filed its notice of intent to seek repeat sexual offender status because Wingard had a 1988 child molesting conviction.

On April 30, 2003, Wingard pled guilty to one count of class A child molesting. The open plea agreement provided that sentencing was left to the trial court's discretion and that the State would recommend a cap of thirty-six years on Wingard's executed sentence, fourteen years less than the maximum sentence for a class A felony.

At his May 20, 2003, sentencing hearing, Wingard stipulated that he was sentenced in 1988 to one year of imprisonment for class D felony child molesting of a relative. The victim testified that as a result of the instant offense, she had trouble concentrating in school, she dreamed every night about what Wingard did to her, and "[it] ruined my life." (Tr. Vol. 7. 11). Wingard's counsel argued that Wingard's cooperation with law enforcement was a mitigating circumstance.

The trial court found Wingard's guilty plea and cooperation with authorities to be mitigating circumstances. The trial court also found Wingard's previous child molesting conviction and his violation of a position of trust as a biological relative in the present

case to be aggravating circumstances. The trial court then imposed the thirty-six year sentence. It did not advise Wingard of his appellate rights.

On September 21, 2004, Wingard filed a petition for modification of his sentence, alleging that (1) he was remorseful; (2) the crime was unlikely to recur; (3) he would abide by any special stipulation the court may impose in granting his motion; (4) he did not understand the seriousness of his crime prior to its commission; (5) he was likely to respond positively to probation or a reduced sentence; (6) his and society's interest would best be served by reduction of his sentence or release on probation; and (7) he was rehabilitated. (State's App. 7-8). The trial court denied the petition.

On December 8, 2004, Wingard filed a petition for post-conviction relief. In the petition, he raised issues of ineffective assistance of counsel but no issues questioning the court's sentencing discretion. (State's App. 18). The State Public Defender appeared in Wingard's post-conviction relief proceeding beginning on January 26, 2005.

On May 25, 2010, Wingard, who, due to no fault of his own, had had three deputy public defenders, filed through his public defender a verified motion for permission to file a belated notice of appeal. In granting permission to file a belated notice of appeal, the trial court made the following relevant findings and conclusions:

Findings of Fact

> 13. Wingard graduated from high school at the age of nineteen, having attended special education classes due to his dyslexia. While in school, he received C's, D's, and F's. He becomes confused and emotional under stress. Although he has had prior contact with the justice system, he has only one prior felony conviction. Wingard has never appealed a sentence.

14. In prison, Wingard relied on the assistance of an inmate, whom he met at the prison chapel, to assist him in his legal work. Wingard did not realize that he could seek a belated appeal of his sentence until his post-conviction attorney advised him.

Conclusions of Law

3. Ind. P-C.R. 2, which controls the procedure for seeking a belated appeal of sentences, provides:

   An eligible defendant convicted after . . . [a] plea of guilty may petition the trial court for permission to file a belated notice of appeal of the . . . sentence if:

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

4. The Indiana Supreme Court has articulated several factors that are relevant to a criminal defendant's diligence and lack of fault in the delay of filing a sentencing appeal: "the defendant's level of awareness of his procedural remedy, age, education, familiarity with the legal system, whether the defendant was informed of his appellate rights, and whether he committed an act or omission that contributed to the delay." *Moshenek v. State*, 868 N.E.2d 419, 424 (Ind. 2007), *quoting Land v. State*, 640 N.E.2d 106, 108 (Ind. Ct. App. 1994), [*trans. denied*].

5. The time spent by the State Public Defender investigating a petitioner's claim is not the fault of the petitioner and may not be held against him for purposes of diligence analysis. *See Kling v. State*, 837 N.E.2d 502, 508 (Ind. 2005).

6. Wingard did not appeal his sentence.

7. Under the fault analysis of *Moshenek*, at the time of his conviction Wingard had a high school education. While in school, he attended special education classes and earned low grades. Moreover, he suffers from dyslexia. Although he has previous dealings with the law, he was unfamiliar with the appellate process. Furthermore, he was not informed of his right to appeal his sentence in the instant

case until his post-conviction counsel advised him that he could seek it belatedly.

8. Wingard has established that his failure to file a timely Notice of Appeal was not his fault.

9. Under the diligence analysis of *Moshenek*, the Court must examine the passage of time from a defendant's conviction until he seeks his appeal, whether he has made interim filings attacking his sentence, and whether he raised issues in his *pro se* Petition for Post-Conviction Relief. *Id.* In *Moshenek*, the petitioner waited sixteen (16) years to move for Permission to File a Belated Notice of Appeal, he raised no sentencing issues in his Petition for Post-Conviction Relief, and his only interim filings were two *pro se* Motions for Transcripts; subsequently, the court denied his Motion. *Id*. In *Mead v. State*, 875 N.E.2d 304 (Ind. Ct. App. 2007), the petitioner waited four (4) years to move for Permission to File a Belated Notice of Appeal, but he filed motions or petitions regarding a sentencing appeal every eight (8) months during this four-[year] period. He raised no sentencing issues in his Petition for Post Conviction Relief. *Id*. The court, however, found him diligent and granted his motion. *Id*. Finally, in *Johnson v. State*, 878 N.E.2d [290] (Ind. 2008), the petitioner waited three (3) years before seeking Permission to File a Belated Notice of Appeal. Furthermore, he raised sentencing issues in his Petition for Post-Conviction Relief, but filed nothing between his conviction and his P-CR motion. *Id*. The Supreme Court found him diligent and granted him Permission to File a Belated Notice of Appeal.

10. The time spent in the State Public Defender's Office does not count against Wingard. From the time the Court sentenced Wingard in the instant matter until he filed his *pro se* Petition for Post-Conviction Relief, one (1) year, six (6) months, and eighteen (18) days elapsed. During this period, he filed a Petition for Sentence Modification. Under *Mead* and *Johnson*, Wingard has been diligent in seeking to attack his sentence.

11. The delay in filing Wingard's Notice does not prejudice the State, nor is it undue, nor has he slept on his rights.

(Wingard's App. 15-17).

DECISION

1. Belated Notice of Appeal

The State asserts that the trial court erred in granting Wingard's petition for permission to file a belated notice of appeal. Specifically, the State argues that the trial court erred in concluding that Wingard was diligent in requesting permission to file a belated appeal.

The decision to grant permission to file a belated notice of appeal is within the trial court's discretion. *Moshenek,* 868 N.E.2d at 422. The trial court is "in a better position to weigh evidence, assess the credibility of witnesses, and draw inferences." *Id.* at 424. Indeed, because fault and diligence are fact sensitive, appellate courts "give substantial deference to the trial court's ruling." *Id*. at 423. There are no set standards of fault or diligence, and each case turns on its own facts. *Id*. Several factors are relevant to the defendant's diligence and lack of fault in the delay of filing. *Id*. These include "the defendant's level of awareness of his procedural remedy, age, education, familiarity with the legal system, whether the defendant was informed of his appellate rights, and whether he committed an act or omission which contributed to the delay." *Id.* The defendant bears the burden of proving by a preponderance of the evidence that he was without fault in the delay of filing and was diligent in pursuing permission to file a belated motion to appeal. *Id.* at 422-23.

Here, the trial court concluded that the combination of Wingard's lack of significant education, his lack of familiarity with the criminal justice system, and the trial court's lack of advisement about his right to appeal establish that Wingard was without

fault in the delay of filing a timely appeal. *See Johnson*, 898 N.E.2d at 291 (holding that "[t]he fact that a trial court did not advise a defendant about his right can establish that the defendant was without fault . . ."). The State concedes that the trial court is correct.

The trial court also concluded that Wingard was diligent under *Johnson*. In *Johnson*, the defendant pled guilty in 1997 and then waited until late 2000 to file a pro se petition for post-conviction relief. Sometime in early 2001, Johnson was afforded the assistance of a deputy public defender, who amended Johnson's petition to include a sentencing claim. In 2005, after our supreme court held in *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004) that the proper procedure for challenging a sentence imposed following an open plea was to file a direct appeal, Johnson filed a motion to dismiss his petition for post-conviction relief. In 2006, he filed a petition for permission to file a belated notice of appeal under Ind. Post-Conviction Rule 2. The Court found it significant that Johnson had challenged his sentence in his Ind. Post-Conviction Rule 1 petition and had promptly pursued his challenge under Ind. Post-Conviction Rule 2 after *Collins* was handed down.

The trial court determined that Wingard was diligent because he filed a request for sentence modification before filing his Ind. Post-Conviction Rule 1 petition and because, like the defendant in *Johnson*, he filed his motion to file a belated appeal at a time dictated by his public defender. Although a request for sentence modification differs from a challenge of the original sentence as an abuse of discretion, we cannot say that the trial court abused its discretion in determining that the request for sentence modification showed diligence under the circumstances. Furthermore, we must agree with the trial

court that Wingard should not be held responsible for any delay caused by his public defender. *See Kling*, 837 N.E.2d at 508.

2. Abuse of Discretion in Sentencing

Wingard contends that the trial court abused its discretion in imposing a thirty-six year sentence. Specifically, he argues that the trial court failed to give substantial weight to his limited criminal history and cooperation as mitigating circumstances.[2] We will review a trial court's sentencing decision only for an abuse of discretion, including the trial court's decision to increase or decrease the presumptive sentence because of aggravating or mitigating circumstances. *Sallee v. State*, 777 N.E.2d 1204, 1214 (Ind. Ct. App. 2002), *trans. denied*.

The trial court found as mitigating circumstances that Wingard had cooperated with law enforcement and pled guilty. It found as aggravating circumstances that Wingard had a criminal record consisting of a previous child molesting of a relative and that he had violated his position of trust with the victim as her direct caretaker.

Wingard did not did not argue at the sentencing hearing that his limited criminal record was a mitigating circumstance. Accordingly, he waived that factor for the court's consideration. *See Creekmore v. State*, 853 N.E.2d 2d 523, 530 (Ind. Ct. App. 2006), (holding that a defendant who fails to argue a mitigating circumstance to the trial court may not do so for the first time on appeal), *trans. denied*. Waiver notwithstanding,

[2] Wingard committed the molestation in 2001 and was sentenced in 2003, all before *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), was decided and the 2005 changes in our statutory scheme were made. *Blakely* and the subsequent advisory sentencing scheme do not apply to the belated appeal of offenses which occurred and sentences which were imposed prior to *Blakely*. *Gutermuth v. State*, 868 N.E.2d 427, 431 (Ind. 2007). Wingard's sentence will be reviewed as an enhanced presumptive sentence under prior law. *See, e.g., Boyle v. State*, 868 N.E.2d 435, 437 (Ind. 2007).

Wingard cannot prevail where his prior conviction, the molestation of a young girl to whom he was related, is related in nature to the instant conviction. *See Duncan v. State*, 857 N.E.2d 955, 959 (Ind. 2006).

As the trial court found, Wingard's initial cooperation with police officers should be given some weight. However, we cannot say that the trial court erred in concluding that Wingard's cooperation was not so significant as to outweigh the aggravating circumstances.

With regard to Wingard's guilty plea, we note that Indiana courts have recognized that a guilty plea is a significant mitigating factor in some circumstances. *Comer v. State*, 839 N.E.2d 721, 728 (Ind. Ct. App. 2005), *trans. denied.* Where the State reaps a substantial benefit from the defendant's plea, the defendant deserves to have a substantial benefit returned. *Id*. However, a guilty plea is not automatically a significant mitigating factor. *Id.* A trial court does not have to find that a guilty plea is a mitigating circumstance when the defendant receives a substantial benefit from the plea. *Sensback v. State*, 720 N.E.2d 1160, 1164-65 (Ind. 1999).

Wingard clearly reaped a substantial benefit from his plea. In exchange for the plea, the State dismissed three counts, including another class A felony count. The State also withdrew its notice to pursue a repeat offender enhancement. Furthermore, the State limited the possible sentence to thirty-six years instead of the fifty years authorized for a class A felony. The trial court did not abuse its discretion in not according Wingard's guilty plea more weight.

3. Inappropriate Sentence

Wingard contends that his thirty-six year sentence should be revised because it is inappropriate. The revision of a sentence is authorized by Indiana Appellate Rule 7(B), which provides that 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." In determining the appropriateness of a sentence, a court of review may consider any factors appearing in the record. *Schumann v. State*, 900 N.E.2d 495, 497 (Ind. Ct. App. 2009). The "nature of the offense" portion of the appropriateness review begins with the advisory sentence. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on rehearing*, 875 N.E.2d 218 (Ind. 2007); *Richardson v. State*, 906 N.E.2d 241, 247 (Ind. Ct. App. 2009). The "character of the offender" portion of the sentence review refers to general sentencing considerations and the relevant aggravating and mitigating circumstances. *Major v. State*, 873 N.E.2d 1120, 1131 (Ind. Ct. App. 2007), *trans. denied*. A defendant bears the burden of persuading us that his sentence is inappropriate. *Id.* at 1130.

With regard to the nature of the offense, we note that the sentencing range for a class A felony is twenty to fifty years, with an advisory sentence of thirty years. I.C. § 35-50-2-4. Although Wingard argues that the molestations were not ongoing, the victim stated that the molestations occurred over the course of eleven years and included uncharged acts of sexual intercourse. Indeed, Wingard informed police that at least ten inappropriate touches had occurred. These touches were part of a pattern that culminated

in actual penetration of the victim. In addition, as the trial court noted, Wingard, as a primary caretaker, violated a high level of trust with the victim. Finally, the offense was committed against a particularly vulnerable victim who could be exploited because of her disabilities.

With regard to Wingard's character, we note that a year in prison for molesting another family member did not teach him that underage relatives were off limits. Also, Wingard's admission and the victim's statement indicate that Wingard violated the law for many years prior to his arrest and conviction for the present offense. Furthermore, Wingard's cooperation with the law, which admittedly had some mitigating value, came only after he accused the victim of being a liar and only after additional evidence of guilt had been produced. In addition, Wingard made no expression of remorse on the record; and we cannot assume that his guilty plea, which afforded him substantial benefits, was such an expression. Finally, there is no indication of a nexus between Wingard's learning disability and his molestation of the victim.

In short, neither the nature of the offense nor Wingard's character lead us to the conclusion that his sentence was inappropriate.

CONCLUSION

The trial court did not err in granting Wingard permission to file a belated notice of appeal. Furthermore, the trial court did not abuse its discretion in imposing a thirty-six year sentence. Finally, the trial court's sentence was not inappropriate.

Affirmed.

RILEY, J., and BARNES, J., concur.