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IN THE
COURT OF APPEALS OF INDIANA

MATTHEW RICHARDSON,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 79A05-0905-CR-241
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0807-FA-27

December 15, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Matthew Richardson appeals his thirty-eight year sentence following guilty pleas to one count of child molesting, a Class A felony, and one count of child molesting, a Class C felony. For our review, Richardson raises three issues, which we restate as whether the trial court abused its discretion in: (1) denying Richardson's motion for a continuance of the sentencing hearing; (2) admitting at sentencing hearsay evidence of Richardson's conduct while in custody pending the charges; and (3) denying Richardson credit time and jail time credit for 260 days Richardson was in jail pending sentencing. We conclude the trial court did abuse its discretion in denying Richardson's motion to continue the sentencing hearing, the error was harmless with respect to Richardson's thirty-eight year sentence, but was not harmless with respect to the trial court's decision to deny credit time.[1] Therefore, we affirm Richardson's thirty-eight year sentence and remand to the trial court for a hearing on whether Richardson is entitled to credit time.

Facts and Procedural History

On July 2, 2008, the State charged Richardson with twelve counts relating to the sexual abuse of his son. A warrant was issued for his arrest, and on the same day, Richardson was taken into custody at the Tippecanoe County Jail. Thereafter, the State filed four additional counts alleging Richardson molested D.B., one of his son's friends. On February 6, 2009, in accordance with a plea agreement, Richardson pled guilty to one count of child molesting, a Class A felony, committed against his son, and one count of child molesting, a Class C felony, committed against D.B. The plea agreement specified

[1] Because we decide the case on this basis, we need not decide whether the trial court abused its discretion in admitting the hearsay.

the executed portion of the sentence would be at least twenty but no more than thirty-eight years.

Following a guilty plea hearing, the probation department prepared a presentence investigation report ("PSI"), which was filed and served on Richardson on March 9, 2009. The PSI noted the following sentencing considerations: (1) Richardson's position of trust when he committed the crimes; (2) both victims were less than twelve years old at the time of the offenses; and (3) according to a probable cause affidavit, Richardson threatened to harm D.B. if he told anyone about the offenses and the threat made D.B. fear Richardson would kill him if he told. The PSI had no mention of threats or criminal solicitations made by Richardson after he was arrested for the instant offenses.

The trial court held a sentencing hearing on March 18, 2009. At the hearing, Richardson filed a "consideration for sentencing" submitting the following mitigators: "(1) [Richardson] is remorseful and has accepted respons[ibility]"; "(2) [Richardson] cooperated with law enforcement before his arrest"; and "(3) [Richardson] had a troubled childhood." Appellant's Appendix at 24. Testimony at the hearing was Richardson was molested as a child by his own father. Richardson admitted he violated a position of trust when committing his crimes and this was a proper aggravator. The State submitted the following additional aggravators: "(1) multiple victims . . . (3) very young age [of the victims] (4) multiple acts over span of time [with] [Richardson's son] (5) threats to kill if tell [sic] (6) threats to others after incarceration (7) history drug abuse [sic] (8) personal awareness of great harm caused by sexual abuse." Id. at 25.

At the sentencing hearing, the State called a court-appointed special advocate ("CASA") to speak on behalf of Richardson's son and daughter. The CASA testified that when visiting Richardson in jail prior to his guilty plea, he appeared unremorseful and "[h]is comment to me . . . was that everyone involved in the case was blowing it out of proportion. That he lived through this as a child and it wasn't any big deal." Sentencing Transcript at 7.[2] The State then called Officer William Dempster of the Lafayette Police Department to testify regarding a jailhouse informant's report that Richardson had made threats regarding individuals involved in the case after he was jailed pending the guilty plea. Richardson objected on relevancy grounds, but the trial court overruled his objection, stating the testimony would be relevant both as an aggravating factor for sentencing and as a ground for denying pre-sentencing credit time. Richardson further objected on grounds of unreliable hearsay, but the trial court overruled the objection, stating the hearsay would be admissible if the jailhouse informant was shown to be reliable.

Officer Dempster testified meeting with the informant, Lindsey Motton, a Tippecanoe County Jail inmate in the same jail "pod" as Richardson, on December 8, 2008. According to Officer Dempster, Motton related Richardson had solicited Motton to murder D.B., the deputy prosecutor assigned to Richardson's case, and an individual named Jamie Howard whom Officer Dempster could not otherwise identify. Specifically, Motton said Richardson offered him first a vehicle and then ten thousand dollars to murder D.B. and Howard, and fifteen thousand if Motton murdered the deputy

[2] Although bound in a single volume, the transcripts from Richardson's guilty plea hearing and sentencing hearing are separately paginated.

prosecutor. Richardson allegedly told Motton how the murders could be committed: D.B.'s house could be clogged up with furnace exhaust so his death would appear an accident, Jamie could be killed in what would look like a "bad drug deal," and the deputy prosecutor could be shot with a rifle from the woods behind her residence. Id. at 21.

Officer Dempster did not personally vouch for Motton's reliability but testified he had Motton wear a body wire to record the conversations. According to Officer Dempster, the first time Motton spoke with Richardson while wearing the wire, the device did not record, but on December 15, 2008, the device recorded Richardson speaking about the proposed murders and giving Motton his sister's telephone number to contact him in the future. Id. at 22-23. When Officer Dempster revealed the tape of the conversation was unavailable to play at the sentencing hearing, Richardson moved for a continuance to have an opportunity to review the tape. The trial court deferred ruling on the motion.

On cross-examination, Officer Dempster admitted Motton had been jailed pending charges for possession of cocaine and drug paraphernalia, had a prior conviction for theft, and his full criminal history was unknown. Officer Dempster testified Motton was released from jail on December 15, 2008, as a benefit for wearing the recording device, and the pending drug charges had been dismissed at least in part. At the conclusion of the State's evidence, the trial court denied Richardson's motion for continuance on the ground there is no confrontation right with respect to evidence of aggravating factors. The trial court accepted Richardson's guilty plea and the plea agreement and dismissed the remaining charges on the State's motion.

In support of its finding the aggravating circumstances of Richardson's crimes outweighed the mitigating circumstances, the trial court explained:

> The age of the victim is an element of the offense and so . . . the fact that the victims were so young . . . is an aggravating factor but . . . not a strong one. The threat to the victim that's reflected in the probable cause affidavit, is an aggravating factor. The defendant's position of trust . . . . That's a strong aggravating factor. The fact that there were multiple victims and multiple occasions of abuse is an aggravating factor. . . . I give credence to Officer Dempster's testimony concerning the solicitation . . . of murder. I don't know where to fit that into the concepts of aggravating and mitigating factors and I'm – I think the defendant deserves to certainly defend against that another day if another crime is charged. And he's not in a position to defend against it today either in terms of whether he was serious, whether he was misunderstood, whether he was set up, all things that he might conceivably be able to raise in his defense. But it – it reinforces the evidence contained in the probable cause affidavit of the threat to one of the victims and it's the sort of conversation which can't be tolerated whether in earnest or in jest. . . . and so just even making the threat is a – is an aggravating factor.

Id. at 39-40. Further, the trial court stated Richardson would be given jail time credit for 260 days actually served prior to sentencing, but would be denied credit time "because of . . . his actions in soliciting to – to commit murder." Id. at 41.

Following the sentencing hearing, the trial court entered a sentencing order and judgment stating:

> The Court finds as aggravating factors the victim of the offense was less than 12 years of age. The defendant threatened to harm the victim of the offense. The defendant was in a position of trust. The solicitation of murder. The multiple victims and multiple occasions.
>
> The Court finds as mitigating factors the defendant has no history of delinquency or criminal activity. The defendant was molested by his own father.
>
> The Court further finds that the aggravating circumstances outweigh the mitigating circumstances.

Appellant's App. at 27. The trial court sentenced Richardson to thirty-two years on the Class A felony count and six years on the Class C felony count, served consecutively in the Department of Correction, for a total sentence of thirty-eight years. Further, the trial court found Richardson "is not entitled to 260 days of time spent in confinement while these charges were pending because of his actions while incarcerated." Id. at 28. The trial court's abstract of judgment stated Richardson was confined for zero days prior to sentencing. Richardson now appeals his sentence.

Discussion and Decision

I. Denial of Continuance

A. Standard of Review

The trial court's decision to grant or deny a continuance of a sentencing hearing, when not based on statutory grounds, is reviewed for an abuse of discretion. Evans v. State, 855 N.E.2d 378, 386 (Ind. Ct. App. 2006), trans. denied. The appellant must overcome a strong presumption the trial court properly exercised its discretion and further must show specifically how he was prejudiced as a result of the denial of his motion. Id. at 386-87.

B. Denial of Opportunity to Refute Murder Solicitation

Richardson argues the trial court abused its discretion in denying a continuance of the sentencing hearing because the trial court's decision deprived him of an opportunity to refute the hearsay allegations he solicited murder while in jail pending his guilty plea. We agree. In general, "a defendant being sentenced must be given the opportunity to refute any information he claims is inaccurate." Cloum v. State, 779 N.E.2d 84, 92 (Ind.

Ct. App. 2002). Generally this opportunity is provided when the defendant is served with a copy of the PSI prior to sentencing and allowed to dispute its accuracy at the hearing. See Ind. Code § 35-38-1-12 (defendant has right to review PSI prior to sentencing); Dillard v. State, 827 N.E.2d 570, 576-77 (Ind. Ct. App. 2005), trans. denied. Because hearsay is not per se inadmissible at sentencing, it is particularly important the defendant have an opportunity to refute hearsay allegations. See Cloum, 779 N.E.2d at 92. "We must strike a balance between generally allowing hearsay information regarding defendant's life and insuring that a defendant is not sentenced on invalid information," because "reliance upon improper or inaccurate information . . . undermines the fairness of the sentencing process." Id. (quotation omitted).

Richardson was served with his PSI prior to sentencing, but the PSI omitted any reference to the State's allegation Richardson solicited murder while in custody or the alleged conversations supporting it. Richardson and his counsel had no notice of the hearsay allegation prior to sentencing, despite the State's knowledge of the alleged conversations three months earlier, in December 2008. When Richardson moved for a continuance to have an opportunity to review the audiotape the State alleged corroborated the allegation, the trial court denied his motion. Because the continuance was denied, Richardson was unable to review the tape, effectively cross-examine Officer Dempster regarding its contents, introduce other evidence to refute Motton's credibility, or undermine the allegation the tape showed an intentional plan to murder three people. As a result, Richardson was deprived of any opportunity to refute the State's allegation. Further, because the trial court credited the allegation and considered it an aggravator for

sentencing purposes and a basis for denying Richardson credit time, Richardson has shown he was prejudiced by the denial of a continuance. For these reasons, we conclude the denial of a continuance was an abuse of the trial court's discretion. See id. at 93 (concluding defendant should have been given opportunity to refute character allegations in victim impact statement that conflicted with his own character and criminal history evidence). Notwithstanding this error, however, we do not need to remand for resentencing, as shown below.

II. Harmless Error

A. Thirty-Eight Year Sentence

The State argues the trial court's error in denying a continuance was harmless with respect to the thirty-eight year sentence imposed because the trial court would have imposed the same sentence had it not considered Richardson's alleged murder solicitation as an aggravator. We agree. It is well settled that even if the trial court abuses its discretion in sentencing a defendant, this court will remand for resentencing only if "we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (2007). Here, of the five aggravators found by the trial court, the murder solicitation was the only one based on the evidence presented at the sentencing hearing.[3] See Sent. Tr. at 39-40 (stating "the solicitation of . . . murder" as a separate and final aggravator). The other aggravators

[3] At the sentencing hearing, the trial court heard testimony from the CASA, which the State offered to refute Richardson's contention of remorse as a mitigating factor, and the trial court heard a statement from the mother of one of the victims. This testimony and statement, however, preceded Richardson's motion for a continuance, and the trial court did not appear to rely on the victim impact statement to support any aggravator.

were based on the PSI and guilty plea hearing, and as a result, the trial court's consideration of them was unaffected by its denial of Richardson's motion to continue the sentencing hearing.

In its oral sentencing statement and written sentencing order, the trial court identified five aggravators and explained the weight placed upon them. Richardson's violation of a position of trust was "a strong aggravating factor," and the age of the victims was an aggravating factor but "not a strong one." Id. at 39. The other aggravating factors—Richardson's threat to harm one of the victims, the multiple victims and multiple occasions, and the solicitation of murder—were thus neither particularly strong nor particularly weak aggravators in the trial court's judgment. The trial court found two mitigating factors and did not hesitate to find the aggravating factors outweighed the mitigating factors.

Although Richardson does not challenge the propriety of the trial court's reliance on the victims' age as an aggravating factor, this court has stated it is improper for a trial court to consider the youth of the victim as an aggravator when, as here, it is a material element of the charged crime. Erdington v. State, 909 N.E.2d 1093, 1097 (Ind. Ct. App. 2009), trans. denied. There is an exception to the rule when the "tender age" of a victim is a "particularized circumstance of the crime." Id. Therefore, the fact the victims were under twelve years old in this case may have been an improper aggravator as a matter of law. The trial court, however, was aware age was an element of the charged crimes and, on that basis, decided the victims' age was "not a strong" aggravator. Sent. Tr. at 39. Thus, it is clear the trial court did not afford considerable weight to the victims' age.

Even if the trial court had not considered the victims' age and Richardson's alleged murder solicitation as aggravators, it still would have considered three valid aggravators: Richardson's position of trust, the multiple victims and multiple occasions, and his threat to harm D.B. if he told about the offenses. Further, in sentencing Richardson to thirty-two years on the Class A felony count and six years on the Class C felony count, the trial court departed upward from the advisory sentence on each count by only two years. See Ind. Code § 35-50-2-4 (advisory sentence for Class A felony is thirty years); Ind. Code § 35-50-2-6(a) (advisory sentence for Class C felony is four years); see also Ind. Code § 35-38-1-7.1(d) (trial court may impose any sentence authorized by statute regardless of the presence or absence of aggravators).

In light of the three valid aggravators, the trial court's detailed explanation of its reasons for the sentence it imposed, and the fact the sentence on each count was only two years over the advisory sentence, we can "say with confidence that the trial court would have imposed the same sentence" had it granted the continuance and considered only the proper aggravators. Anglemyer, 868 N.E.2d at 491; see Erdington, 909 N.E.2d at 1101 (concluding, despite trial court's reliance on invalid youth-of-victim aggravator, it would have imposed same sentence if considering only defendant's position of trust, which was a "big aggravator"); Ridenour v. State, 639 N.E.2d 288, 297-98 (Ind. Ct. App. 1994) (declining to remand for resentencing despite trial court's reliance on three invalid aggravators; proper aggravators, including defendant's position of trust, supported enhanced and consecutive sentences). Therefore, remand for resentencing is not

appropriate, see Anglemyer, 868 N.E.2d at 491, and we affirm Richardson's thirty-eight year sentence.[4]

B. Denial of Credit Time

We cannot say, however, the denial of a continuance was harmless with respect to the trial court's decision to deny Richardson credit time. The trial court based its decision to deny credit time solely on Richardson's alleged murder solicitation, the only evidence of which came from the sentencing hearing. As discussed above, the denial of a continuance deprived Richardson of any opportunity to defend against the allegation. As a result, we cannot say the trial court would have reached the same decision as to credit time if it had granted the continuance. Therefore, we remand for a new hearing to determine what, if any, credit time Richardson is entitled to for his incarceration prior to sentencing.[5] See Members v. State, 851 N.E.2d 979, 982 (Ind. Ct. App. 2006) (trial court determines initial credit time when defendant is sentenced, and Department of Correction determines subsequent modifications or deprivations); see also Ind. Code § 35-50-6-5(b) (before deprivation of earned credit time, defendant must be granted hearing that complies with procedural safeguards); Ind. Code § 35-50-6-4(e) (procedural safeguards include written notice of alleged misconduct, reasonable time to prepare for hearing, and the opportunity to call witnesses and present evidence). The State concedes remand is appropriate.

[4] For these same reasons, any error in overruling Richardson's objection to Motton's hearsay statements was harmless with respect to the thirty-eight year sentence. Therefore, we need not decide whether the trial court abused its discretion in admitting the hearsay.

[5] We note that, absent a violation of penal facility rules or other basis for deprivation of earned credit time or assignment to a different credit time class, see Ind. Code § 35-50-6-5(a), Richardson would be entitled to Class I credit for his time spent in jail prior to sentencing. See Ind. Code § 35-50-6-4(a) ("A person who is not a credit restricted felon and who is . . . imprisoned awaiting trial or sentencing is initially assigned to Class I.").

In addition to the procedural safeguards noted above, Richardson is entitled on remand to introduce evidence refuting the reliability of Motton's hearsay statements and otherwise argue the hearsay is too unreliable to be admissible. Because we remand for a new hearing, we need not decide whether the trial court abused its discretion in admitting the hearsay, but we remind the trial court that hearsay is not always proper at sentencing, Cloum, 779 N.E.2d at 92. The State acknowledges "there is little doubt that there should be some indicia of reliability with respect to hearsay admitted at sentencing." Brief of Appellee at 9.

Remand is also appropriate for the trial court to clarify Richardson is entitled to jail credit for 260 actual days served prior to the March 18, 2009, sentencing hearing. "The time spent in confinement before sentencing applies toward a prisoner's fixed term of imprisonment," irrespective of whether credit time is also awarded. Robinson v. State, 805 N.E.2d 783, 789 (Ind. 2004). The trial court's oral sentencing statement gave Richardson jail credit for the 260 days he was confined before sentencing, but the written judgment and abstract do not reflect that time. On remand and following a hearing, the trial court should issue an amended judgment of conviction that, pursuant to Indiana Code section 35-38-3-2(b), separately includes both the amount of jail time Richardson served prior to sentencing and any amount of credit time he is entitled to. See Robinson, 805 N.E.2d at 789 (jail time and credit time should be "separately include[d]" in judgment of conviction).

Conclusion

The trial court abused its discretion in denying Richardson's motion to continue the sentencing hearing, the error was harmless with respect to the thirty-eight year sentence imposed, but was not harmless with respect to the trial court's decision to deny Richardson credit time. Therefore, we affirm Richardson's thirty-eight year sentence and remand to the trial court for a hearing on whether Richardson is entitled to credit time in addition to jail time served prior to sentencing.

Affirmed in part and remanded.

DARDEN, J., and MATHIAS, J., concur.