MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Roel Hernandez, III,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

June 4, 2024

Court of Appeals Case No.
23A-CR-3056

Appeal from the Lake Superior Court

The Honorable Samuel L. Cappas, Judge

Trial Court Cause No.
45G04-2004-F3-56

Memorandum Decision by Judge Brown
Judges Riley and Foley concur.

Brown, Judge.

[1] Roel Hernandez, III, appeals his sentence for child molesting as a level 4 felony and claims his sentence is inappropriate. We affirm.

Facts and Procedural History

[2] During the period of January 1, 2020, through March 5, 2020, Hernandez, who was born in January 2000, and the victim, who was twelve years old during that period, were at a residence in Hobart, Lake County, Indiana, where Hernandez knowingly and intentionally fondled and/or touched the victim's penis on multiple occasions and further attempted to touch the victim's penis after he told Hernandez to stop. Hernandez attempted to touch the victim's penis to satisfy his own sexual desires. The victim was Hernandez's cousin.

[3] The State charged Hernandez in an amended information with: Count I, child molesting as a level 3 felony; Count II, attempted child molesting as a level 4 felony; Count III, child solicitation as a level 5 felony; and Count IV, child molesting as a level 4 felony. The parties entered into a plea agreement pursuant to which Hernandez agreed to plead guilty to Count IV, the State agreed to dismiss Counts I through III, and the parties agreed to argue their positions regarding Hernandez's sentence. Hernandez pled guilty pursuant to the agreement.

[4] At sentencing, the prosecutor stated "the victim was 5 years old at the time this started" and "[i]t's a 7-year period of molestation. This was not just a one-time occurrence. It was not just a touching offense." Transcript Volume II at 29.

Hernandez's defense counsel stated that Hernandez "admitted to what he did. It started when he was a juvenile himself." *Id*. at 34. Hernandez expressed remorse. With respect to mitigating circumstances, the court found that Hernandez admitted his guilt but that his guilty plea was a practical solution to reduce his exposure to long-term incarceration and gave the factor little weight. It found that he had led a substantially law-abiding life but noted the offense took place "several times over a period of approximately seven (7) years" and gave the factor little weight. Appellant's Appendix Volume II at 118. It also found Hernandez was gainfully employed, he expressed remorse which it found to be sincere, and the defense submitted character letters from family and friends. As for aggravating circumstances, the court found that the offense occurred over an extended time period; the victim was five years of age when the activities started which it found particularly aggravating; the victim and his family have suffered substantial mental and emotional harm; Hernandez's risk to reoffend was high; and he groomed and manipulated a member of his family. The court found the aggravating factors outweighed the mitigating factors and sentenced Hernandez to ten years with one year suspended to probation.

Discussion

[5] Hernandez argues that his sentence is inappropriate. He argues that the advisory sentence for level 4 felony child molestation is six years which should act as a guidepost in a standard child molest case, child molestation by its nature is traumatic for every victim and family member, he was still relatively young at the time of the offense, and "[t]his differs from more heinous

occurrences with much broader age differences." Appellant's Brief at 11. He argues that he took full responsibility for his actions by pleading guilty, had no prior criminal history, was employed full time, and had overwhelming support from friends and family.

[6] Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." The burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). Sentencing is principally a discretionary function in which the trial court's judgment should receive considerable deference. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). This deference should prevail unless overcome by compelling evidence portraying in a positive light the nature of the offense and the defendant's character. *Oberhansley v. State*, 208 N.E.3d 1261, 1267 (Ind. 2023). Ind. Code § 35-50-2-5.5 provides that a person who commits a level 4 felony shall be imprisoned for a fixed term of between two and twelve years with the advisory sentence being six years.

[7] Our review of the nature of the offense reveals that, between January 1 and March 5, 2020, Hernandez knowingly and intentionally fondled and/or touched his twelve-year-old cousin's penis on multiple occasions and attempted to do so after he was asked to stop. Our review of the character of the offender reveals that Hernandez pled guilty to child molesting as a level 4 felony and left sentencing to the discretion of the trial court and the State dismissed three

counts including a level 3 felony. Although Hernandez did not have prior convictions, expressed remorse, and was employed full time, he was convicted of molesting a family member and his crime was not an isolated occurrence. Rather, there were repeated occurrences of sexual activity. After due consideration, we conclude that Hernandez has not sustained his burden of establishing that his sentence of ten years with one year suspended to probation is inappropriate in light of the nature of the offense and his character.[1]

[8] For the foregoing reasons, we affirm Hernandez's sentence.

[9] Affirmed.

Riley, J., and Foley, J., concur.

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[1] To the extent Hernandez argues the trial court abused its discretion in sentencing him, we need not address this issue because we find that his sentence is not inappropriate. *See Chappell v. State*, 966 N.E.2d 124, 134 n.10 (Ind. Ct. App. 2012) (noting that any error in failing to consider the defendant's guilty plea as a mitigating factor is harmless if the sentence is not inappropriate) (citing *Windhorst v. State*, 868 N.E.2d 504, 507 (Ind. 2007) (holding that, in the absence of a proper sentencing order, Indiana appellate courts may either remand for resentencing or exercise their authority to review the sentence pursuant to Ind. Appellate Rule 7(B)), *reh'g denied*; *Mendoza v. State*, 869 N.E.2d 546, 556 (Ind. Ct. App. 2007) (noting that, "even if the trial court is found to have abused its discretion in the process it used to sentence the defendant, the error is harmless if the sentence imposed was not inappropriate"), *trans. denied*), *trans. denied*. Even if we were to address Hernandez's abuse of discretion argument, we would not find it persuasive in light of the record.

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