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# IN THE COURT OF APPEALS OF INDIANA

Carl Eugene McDonald,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff.*

July 16, 2021

Court of Appeals Case No. 21A-CR-363

Appeal from the Cass Superior Court

The Honorable James K. Muehlhausen, Judge

Trial Court Cause No. 09D01-1907-F6-250

**Riley, Judge.**

## STATEMENT OF THE CASE

[1] Appellant-Defendant, Eugene McDonald (McDonald), appeals following his guilty plea to operating a vehicle while intoxicated, endangering a person with a passenger less than eighteen years old, a Level 6 felony, Ind. Code §§ 9-30-5-

2(b), 9-30-5-3(a)(2); three Counts of neglect of a dependent, Level 6 felonies, I.C. § 35-46-1-4(a)(1); operating a motor vehicle without ever receiving a license, a Class C misdemeanor, I.C. § 9-24-18-1; and to being an habitual vehicular substance offender (HVSO), I.C. § 9-30-15.5-2.

[2] We dismiss in part, affirm in part, reverse in part, and remand with instructions.

## ISSUES

[3] McDonald presents the court with six issues, which we consolidate and restate as the following two:

> (1) Whether McDonald's double-jeopardy challenge to his convictions is cognizable on direct appeal; and
>
> (2) Whether the trial court abused its discretion when it sentenced McDonald.

## FACTS AND PROCEDURAL HISTORY

[4] On June 29, 2019, McDonald, who had never held a driver's license, operated his vehicle when he was intoxicated. At the time he operated his vehicle while intoxicated, his three grandchildren, ranging in age from six months to six years old, were in his care in the car. McDonald was reported by concerned citizens who shared the roadway, and he was arrested after a traffic stop.

[5] On July 2, 2019, the State filed an Information, charging McDonald with Level 6 felony operating a vehicle while intoxicated, endangering a person with a passenger less than eighteen years old, three Counts of Level 6 felony neglect of

a dependent, and Class C misdemeanor operating a motor vehicle without ever receiving a license. On July 29, 2019, the State filed an additional Information, alleging that McDonald was an HVSO, having accumulated three prior, unrelated vehicular substance offense convictions. Those prior, unrelated offenses were a 1991 conviction for Class C misdemeanor operating a motor vehicle with a BAC of .10 or above, a 2006 conviction for Class A misdemeanor operating a vehicle while intoxicated, endangering a person, and a 2007 Class D felony conviction for operating a motor vehicle while intoxicated, endangering a person.

[6] On June 7, 2020, McDonald pleaded guilty to all charges and the HVSO enhancement without a plea agreement with the State. Prior to accepting McDonald's change of plea, the trial court enumerated the rights McDonald would waive with his plea, including his right to appeal his convictions. McDonald's presentence investigation report (PSI) indicated that, in addition to the convictions supporting his HVSO enhancement, McDonald had two misdemeanor convictions for public intoxication and three misdemeanor convictions for driving while suspended.

[7] On July 2, 2020, August 13, 2020, and February 1, 2021, the trial court convened McDonald's sentencing hearings. At these hearings, the State, McDonald's counsel, and the trial court agreed that the HVSO enhancement was not subject to being suspended. The probation officer who interviewed McDonald to prepare his PSI testified that he got the impression that McDonald did not appreciate the gravity of what he had done and that he was

treating his conduct like a "garden variety OWI." (Transcript p. 34). The probation officer recommended a mix of consecutive and concurrent sentences, resulting in an aggregate executed sentence of four and one-half years.

[8] Prior to rendering its sentence, the trial court recalled McDonald's probation officer and asked about McDonald's attitude regarding the offenses. The officer reiterated that McDonald seemed to feel that the offenses did not arise above "garden variety" operating while intoxicated offenses and that "the idea that there were children didn't strike him as being something that made it more serious." (Tr. p. 49). In its oral sentencing statement, the trial court observed that it had "seen worse records for driving but not many. And along the way we've talked about how I look at these cases. Because innocent people get hurt, in fact in your case your own family was in the car, your granddaughters." (Tr. p. 53).

[9] The trial court found McDonald's criminal history to be an aggravating circumstance, and it found his guilty plea and hardship to McDonald's family to be mitigating circumstances. The trial court found that the aggravating circumstance outweighed the mitigators. The trial court sentenced McDonald to two years, suspended, for operating while intoxicated, endangering a person with a passenger less than eighteen years old. The trial court imposed two-and-one-half-year sentences for all three of the neglect convictions, two of which were to be served consecutively and the remaining to be served concurrently. The trial court ordered a sixty-day suspended sentence for the operating never having been licensed conviction. Lastly, the trial court ordered McDonald to

serve an additional two years for being a HVSO, "consecutive" to all his other sentences, for an aggregate, initially-executed sentence of seven years. (Tr. p. 55). The trial court also ordered McDonald into purposeful incarceration, after the successful completion of which McDonald could petition for a modification of his sentence.

[10] Later, on February 1, 2021, the trial court issued its written sentencing statement which differed from its oral sentence in that it imposed two-year sentences for each of the neglect convictions to be served concurrently, and it imposed 1,642 days as McDonald's HSVO sentencing enhancement. The abstract of judgment issued following sentencing reflects the trial court's written sentencing statement except that it indicates that McDonald was sentenced to 730 days for his Class A misdemeanor operating without ever being licensed conviction.

[11] McDonald now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

### I. *Double Jeopardy*

[12] McDonald challenges his felony convictions on constitutional and common law double jeopardy grounds. The State counters that McDonald may not challenge the validity of his convictions following his guilty plea. We agree with the State.

[13] It is well-established that a defendant who has pleaded guilty may not challenge the validity of his conviction on direct appeal. *See Tumulty v. State*, 666 N.E.2d

394, 395 (Ind. 1996) (holding that Tumulty, who pleaded guilty without a plea agreement, could not challenge the factual basis for his habitual offender guilty plea on direct appeal); *see also Mapp v. State*, 770 N.E.2d 332, 334 (Ind. 2002) (holding that this court improperly vacated Mapp's conviction because he had waived the right to appeal his convictions on double jeopardy grounds by pleading guilty); *Hayes v. State*, 906 N.E.2d 819, 821 (Ind. 2009) (reversing this court's *sua sponte* reversal of one of Hayes' convictions on direct appeal and noting that Hayes could not have appealed his convictions following his open guilty plea). A defendant who pleads guilty may directly appeal the trial court's sentencing decision where the trial court has exercised sentencing discretion, and a defendant may directly appeal the denial of a motion to withdraw a guilty plea prior to sentencing. *Hoskins v. State*, 143 N.E.3d 358, 360 (Ind. Ct. App. 2020). Any other claims are only properly brought through a petition for post-conviction relief. *Brightman v. State*, 758 N.E.2d 41, 44 (Ind. 2001).

[14] Relying on *Thompson v. State*, 82 N.E.3d 376, 379 (Ind. Ct. App. 2017), *trans. denied*; *Kunberger v. State*, 46 N.E.3d 966, 971 (Ind. Ct. App. 2015); and *McElroy v. State*, 864 N.E.2d 392, 396 (Ind. Ct. App. 2007), *trans. denied*, McDonald contends that "this [c]ourt has held for over a decade that when a defendant pleads guilty, he retains the right to challenge his convictions on direct appeal on grounds of substantive double jeopardy." (Appellant's Br. p. 6). However, as another panel of this court recently recognized, inasmuch as *Thompson* and *Kunberger* held that a defendant may directly appeal his conviction when he pleads open to charges, those cases are inconsistent with our supreme court's

holdings in *Hayes* and *Tumulty*. *See Yost v. State*, 150 N.E.3d 610, 613 n.3 (Ind. Ct. App. 2020) (rejecting Yost's double jeopardy challenge to his five convictions to which he had pleaded guilty pursuant to an open plea). We also observe that *McElroy* is a post-conviction relief case, not a direct appeal of convictions following a guilty plea. *McElroy*, 864 N.E.2d at 394.

[15] This court is bound by the precedent established by our supreme court. *Culbertson v. State*, 929 N.E.2d 900, 906 (Ind. Ct. App. 2010), *trans. denied*. We will follow *Tumulty* and *Hayes* until they are modified by our supreme court or legislative action. Accordingly, we dismiss McDonald's double jeopardy claims without prejudice so that they may be brought through a petition for post-conviction relief if he elects to pursue them. *See Yost*, 150 N.E.3d at 613.

## II. *Sentencing*

[16] McDonald also challenges several aspects of the trial court's sentencing decision. We review a trial court's sentencing orders for an abuse of its discretion. *McCain v. State*, 148 N.E.3d 977, 981 (Ind. 2020). "'An abuse of discretion occurs if the decision is 'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.'" *Id*. (quoting *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*).

[17] Before addressing McDonald's claims, we first observe that there is a discrepancy between the trial court's oral and written sentencing statements in that the trial court orally imposed a seven-year aggregate executed sentence, but

its written sentencing statement reflects a four-and-one-half-year aggregate executed sentence. Neither party contends that the trial court's oral sentencing statement reflected its true intent. Therefore, we will proceed with our analysis based on the trial court's written sentencing order.

[18] McDonald first contends that the trial court improperly entered his HVSO sentencing enhancement as a separate, consecutive sentence. We agree. The HVSO statute provides that

> [t]he court shall sentence a person found to be a habitual vehicular substance offender to an additional fixed term of at least one (1) year but not more than eight (8) years of imprisonment, to be added to the term of imprisonment imposed under IC 35-50-2 or IC 35-50-3.

I.C. § 9-30-15.5-2. This court has recognized that the "to be added" language in the statute means that the HVSO, like the standard habitual offender enhancement, must be attached to the felony conviction with the highest sentence imposed and that the trial court must specify which felony count is being enhanced. *Weekly v. State*, 105 N.E.3d 1133, 1139 (Ind. Ct. App. 2018), *trans. denied*. In addition, an HVSO finding "does not constitute a separate crime nor result in a separate sentence but is an enhancement to an underlying felony conviction." *Id*. We conclude that the trial court abused its discretion when it failed to specifically attach the enhancement to one of McDonald's felony convictions and when it imposed the HVSO as a separate, consecutive sentence. Therefore, we reverse that portion of the trial court's sentencing order

and remand so that the trial court may specify which felony conviction it enhanced with its HVSO finding.

[19] McDonald next contends that we must remand for resentencing because the trial court sentenced him based on its incorrect belief, shared by the prosecutor and defense counsel, that the HVSO enhancement was not subject to being suspended. According to McDonald, it is impossible "to review the basis for the judge's decision in this case" or "to predict what the trial court would have done had [it] properly understood the law and heard arguments from a trial attorney that understood that an HVSO enhancement was suspendable." (Appellant's Br. pp. 32, 33). We agree with McDonald that, unlike the standard habitual offender statute, the HVSO statute does not contain a provision that it is nonsuspendible. *Compare* I.C. § 9-30-15.5-2 *and* I.C. § 35-50-2-8(i) ("An additional term under this subsection is nonsuspendible."). One way that a trial court abuses its discretion is by considering factors that are improper was a matter of law. *McCain*, 148 N.E.3d at 981. We conclude that the trial court's incorrect understanding of the HVSO statute was improper as a matter of law and constituted an abuse of its discretion.

[20] Although we find that the trial court abused its discretion, we do not agree with McDonald that remand for resentencing is necessary. When a trial court has abused its discretion in sentencing, we may remand for clarification, remand for resentencing, or exercise our authority to review and revise the sentence. *Windhorst v. State*, 868 N.E.2d 504, 507 (Ind. 2007). Remand for resentencing is not necessary if we can "say with confidence that the trial court would have

imposed the same sentence" had it properly considered the law applicable to the case. *Anglemyer*, 868 N.E.2d at 491. Here, the trial court never indicated that it would have suspended McDonald's HVSO enhancement if it could have. Rather, it recalled McDonald's probation officer to the stand at sentencing to question him about McDonald's lackadaisical attitude toward the offenses, stated that McDonald's record was one of the worst it had seen, and it imposed a four-and-one-half year HVSO, which was far in excess of the one-year minimum that it could have imposed under the HVSO statute. *See* I.C. § 9-30-15.5-2. These circumstances indicate to us that the trial court would not have suspended McDonald's HVSO enhancement, and we are confident that the trial court would have imposed the same sentence had it realized that it could have suspended the HVSO enhancement.

[21] Lastly, McDonald points out, and the State agrees, that McDonald's sentence for his Class C misdemeanor operating having never received a license conviction is incorrectly recorded on the abstract of judgment as 730 days, not the 60-day suspended sentence actually imposed by the trial court. Therefore, we remand so that a corrected abstract of judgment may be issued.

## CONCLUSION

[22] Based on the foregoing, we hold that McDonald may not challenge the validity of his convictions on direct appeal and dismiss his double jeopardy claims without prejudice. We also conclude that the trial court abused its discretion in sentencing McDonald but that remand to the trial court is only necessary so that the HVSO enhancement may be attached to a specific felony. We further

conclude that remand is necessary to correct the abstract of judgment to reflect the true sentence imposed by the trial court for McDonald's Class C misdemeanor conviction.

[23] Dismissed in part, affirmed in part, reversed in part, and remanded with instructions.

[24] Mathias, J. and Crone, J. concur