

MEMORANDUM DECISION



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.

APPELLANT PRO SE

Loren Wayne Tidwell
Bunker Hill, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

J.T. Whitehead
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Loren Wayne Tidwell,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 5, 2022

Court of Appeals Case No.
21A-CR-2223

Appeal from the Dearborn Circuit
Court

The Honorable Jonathan N. Cleary,
Special Judge

Trial Court Cause No.
15C01-9108-CF-041

Baker, Senior Judge.

Statement of the Case

- [1] Loren Wayne Tidwell appeals from the trial court's order granting the State's motion to correct error, claiming that: 1) the court committed clear error when it granted the State's motion for recusal of judge; 2) the court committed an

abuse of discretion by granting the State’s motion to correct error; and 3) his habitual offender status was based on insufficient evidence. The State contends that Tidwell’s challenge of his habitual offender status is barred by res judicata. We affirm.

Facts and Procedural History

- [2] Tidwell’s convictions of murder and conspiracy to commit murder, and his habitual offender determination were affirmed on direct appeal. *See Tidwell v. State*, 644 N.E.2d 557 (Ind. 1994). Next, he filed a petition for post-conviction relief in which he attacked the sufficiency of the underlying prior felonies used to establish his habitual offender status. After the post-conviction court denied Tidwell’s petition, this Court affirmed the denial of the petition, and the Supreme Court denied his petition for transfer. *See Tidwell v. State*, No. 24A01-0302-PC-60, 2003 WL 22076493 (Ind. Ct. App. Sept. 3, 2003), *trans. denied*.
- [3] On November 20, 2020, Tidwell sought permission from this Court to file a successive petition for post-conviction relief, which was denied in December. *See Appellant’s App. Vol. 2, p. 37*. Tidwell later filed a motion to correct erroneous sentence, claiming the very same grounds as respects his habitual offender enhancement. After the State’s response was filed, the court granted Tidwell’s motion.
- [4] The State filed a motion to correct error from the court’s decision on September 20, 2021, claiming the court’s order granting the motion to correct erroneous sentence was in error and asking for the trial judge to recuse. Dearborn Circuit

Court Judge Humphrey, who had prosecuted Tidwell’s habitual offender status, recused, and Senior Judge Stewart, who issued the order granting the motion to correct erroneous sentence, recused, after which Dearborn Superior Court Judge Cleary was appointed as special judge and took the matter under advisement. Special Judge Cleary granted the State’s motion to correct error, vacated the court’s August 13, 2021, order, re-instated the April 15, 1992, sentence “in full force and effect,” and ordered a new abstract of judgment reflecting the original sentence imposed. Tidwell now appeals.

Discussion and Decision

I. Recusals

[5] The State’s motion to correct error, in part, asked for the recusal of Special Judge Stewart, citing that he had previously represented Tidwell in one of the criminal cases resulting in a conviction that was used to establish Tidwell’s habitual offender status. The result of the motion was the recusal of both Judges Stewart and Humphrey. Judge Humphrey had previously prosecuted Tidwell’s habitual offender status. Tidwell says that the court committed clear error when it granted the State’s motion.

[6] “The ruling on a motion for change of judge is reviewed under the clearly erroneous standard.” *Garland v. State*, 788 N.E.2d 425, 433 (Ind. 2003). It is well established that findings are clearly erroneous only when the record contains no facts to support them either directly or by inference. *See Yanoff v. Muncy*, 688 N.E.2d 1259, 1262 (Ind. 1997). “A judgment is clearly erroneous if

it applies the wrong legal standard to properly found facts.” *Id.* We must be left with a firm conviction that a mistake has been made to reach the determination that a finding or conclusion is clearly erroneous. *Id.*

[7] While “the law presumes that a judge is unbiased and unprejudiced,” *see Garland*, 788 N.E.2d at 433, defendants in criminal actions have a due process right to a trial by an impartial tribunal. *See Blanche v. State*, 690 N.E.2d 709, 714 (Ind. 1998). To that end, Indiana Criminal Rule 12(B) provides that a party shall timely file an affidavit, alleging bias or prejudice, and stating facts and reasons for the belief of such bias or prejudice, accompanied by a certificate that the facts as stated are true.

[8] The State’s motion set out that it became aware that Special Judge Stewart, while in private practice, had represented Tidwell in one of the underlying felonies used to establish his habitual offender status. Appellant’s App. Vol. 2, p. 66. While in private practice, and as it pertained to Tidwell’s Franklin County criminal conviction that was later used to establish Tidwell’s habitual offender status, Special Judge Stewart signed an affidavit stating that he did not recall Tidwell or his Franklin County criminal case. *See Appellant’s App. Vol. 2*, p. 126. Tidwell asserts that this affidavit supports his argument that Judge Stewart should not have recused. However, as special judge, he recused pursuant to Indiana Trial Rule 79(C), and, subsection (4), in particular, is applicable here, along with the provisions of the Code of Judicial Conduct. (T.R. 79(C)(4)-judge shall disqualify if associated with pending litigation such that disqualification is required under Code of Judicial Conduct); (Ind. Judicial

Conduct Rule 2.11(6)(a)-judge shall disqualify in proceeding where impartiality might be questioned such as when the judge served as a lawyer in the matter in controversy). His recusal was not clearly erroneous because he served as Tidwell's lawyer pertaining to the matter at hand, and the Code of Judicial Conduct requires as much.

[9] As for Judge Humphrey, Tidwell acknowledged that "Judge Humphrey was the [prosecutor] on this particular case and he is the one who actually filed the Habitual Offender Enhancement that is in question in Tidwell's Erroneous Sentence Motion." *See* Appellant's App. Vol. 2, p. 98. Judge Humphrey recused himself under Trial Rule 79, where reasons similar to those of Judge Stewart would require him to do so. Judge Humphrey, while working for the State, prosecuted Tidwell on this very matter. His recusal was not clearly erroneous.

[10] Tidwell also complains that he was excluded from the process by which Special Judge Cleary was selected, arguing that Judge Humphrey appointed "his friend and everyday colleague" to decide the matter. *See id.* However, this argument is unavailing. Trial Rule 79(D) does set out the procedure for the selection of a special judge by agreement of the parties, but, nonetheless, states "[t]his provision shall not apply to criminal proceedings." Trial Rule 79(H) provides for the selection of a special judge in such circumstances according to local rule. Here, Dearborn County Local Rule 15-AR-7(B) provided that the judge of either of the Dearborn Superior Courts was the first eligible to qualify for the assignment. Dearborn Superior Court Judge Cleary's appointment by the

Dearborn County Clerk under this procedure was not an abuse of discretion, nor was it clearly erroneous. We find that the recusals were not clearly erroneous and that there was no abuse of discretion or clear error in the process by which Special Judge Cleary was selected.

II. Motion to Correct Error

- [11] Tidwell claims that the court abused its discretion by granting the State's motion to correct error. In general, a court has broad discretion to correct errors, and we will reverse only for an abuse of that discretion. *Wurster Const. Co., Inc. v. Essex Ins. Co.*, 918 N.E.2d 666, 671 (Ind. Ct. App. 2009). "An abuse of discretion occurs when the trial court's action is against the logic and effect of the facts and circumstances before it and the inferences that may be drawn therefrom, or is based on impermissible reasons or considerations." *Id.*
- [12] Tidwell's July 15, 2021 motion to correct erroneous sentence, claimed grounds that went far afield from those allowed in such a motion. A motion to correct an erroneous sentence under Indiana Code section 35-38-1-15 (1983), may only be filed to address a sentence that is erroneous on its face. *See Neff v. State*, 888 N.E.2d 1249, 1251 (Ind. 2008) (citing *Robinson v. State*, 805 N.E.2d 783, 786 (Ind. 2004)). Here, however, Tidwell argued that the habitual offender enhancement was insufficient on grounds it was improperly certified and authenticated, and supplied documentary evidence to support those arguments. The court determined that it had erroneously granted the motion, when it became evident that the asserted claims were attacks on the sufficiency of the

evidence with respect to the habitual offender adjudication, not to facial errors pertaining to the sentence. When consideration of the proceedings before, during, or after trial are required, they may not be presented by way of a motion to correct erroneous sentence. *See Robinson*, 805 N.E.2d at 787. The court did not abuse its discretion by correcting its prior ruling and granting the State’s motion to correct error, thereby denying Tidwell’s motion to correct erroneous sentence.

III. Habitual Offender Status and Res Judicata

[13] Next, Tidwell claims that his habitual offender status was unsupported by properly signed, certified, and authenticated documentation. The State, on the other hand, says that his argument is barred by res judicata, as that issue has previously been decided against Tidwell, and may not be presented as a free-standing claim in this appeal. We agree with the State.

[14] The doctrine of res judicata encompasses the principles of issue preclusion and claim preclusion. *See Freels v. Koches*, 94 N.E.3d 339, 342 (Ind. Ct. App. 2018). Whether in the form of claim preclusion or issue preclusion, res judicata’s function is to prevent repetitious litigation of disputes that are essentially the same by holding a prior final judgment binding against both the original parties and their privies. *See, e.g., Indianapolis Downs, LLC v. Herr*, 834 N.E.2d 699, 703 (Ind. Ct. App. 2005), *trans. denied*. “Claim preclusion applies where a final judgment on the merits has been rendered and acts as a complete bar to a

subsequent action on the same issue or claim between those parties and their privies.” *Wright v. State*, 881 N.E.2d 1018, 1022 (Ind. Ct. App. 2008).

[15] Here, Tidwell admittedly alleged in his petition for post-conviction relief that the evidence supporting the underlying felonies used to establish his habitual offender enhancement was insufficient. *See* Appellant’s Br. p. 5. His petition was denied, that denial was affirmed on appeal, and his petition to transfer was denied. Next, Tidwell sought permission to file a successive petition for post-conviction relief, raising the same argument about the validity of his habitual offender status. This Court denied Tidwell’s request for permission to file his petition because he had “failed to establish a reasonable possibility that [he] is entitled to post-conviction relief.” Appellant’s App. Vol. 2, p. 37.

[16] Because Tidwell’s claim has already been decided against him, he may not raise it here again as a free-standing claim of error. His claim is barred. He has not established that the court erred by granting the State’s motion to correct error on these grounds, thereby denying Tidwell’s motion to correct erroneous sentence.

Conclusion

[17] In light of the foregoing, we affirm the decision of the trial court.

[18] Affirmed.

Najam, J., and May, J., concur.