

## MEMORANDUM DECISION

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## IN THE COURT OF APPEALS OF INDIANA

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Jeremy Lee Johnson,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

May 18, 2023

Court of Appeals Case No.  
22A-CR-2560

Appeal from the Henry Circuit  
Court

The Honorable Bob A. Witham,  
Judge

Trial Court Cause No.  
33C01-2111-F5-107

**Memorandum Decision by Judge Brown**  
Judges Robb and Crone concur.

**Brown, Judge.**

- [1] Jeremy Lee Johnson appeals his aggregate sentence for burglary as a level 5 felony and habitual offender enhancement. We affirm and remand.

***Facts and Procedural History***

- [2] On or about November 3, 2021, Johnson broke and entered into a metal pole barn and lean-to barn in Henry County with the intent to exert unauthorized control over property, namely, a five-gallon gas can and a lock box containing \$1,000 in cash and two checks totaling \$1,991.
- [3] On November 5, 2021, the State charged Johnson with burglary as a level 5 felony. It later alleged he was an habitual offender. Johnson and the State entered into a plea agreement pursuant to which Johnson would plead guilty to burglary as a level 5 felony and admit he was an habitual offender, the State would dismiss cause number 33C01-2204-F6-133 (“Cause No. 133”),<sup>1</sup> and that a civil judgment of \$2,991 would be entered against Johnson. In July 2022, Johnson pled guilty and admitted to being an habitual offender pursuant to the plea agreement.
- [4] On September 27, 2022, the court held a sentencing hearing. Johnson indicated he was accepted into House of Hope and stated that “Every criminal case I have is a direct result of being high on something, drugs or alcohol. I am not making excuses, I am just making the evidence clear that I have a problem, you

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<sup>1</sup> According to the presentence investigation report, the charges in Cause No. 133 included auto theft and unlawful possession of a syringe as level 6 felonies and dealing in marijuana and possession of a controlled substance as class A misdemeanors.

know.” Transcript Volume II at 23. When asked “[w]hat type of treatment have you sought before,” he replied “[b]ack in 97’, I think it was, I went to Richmond State Hospital for 90 days, besides that in prison one (1) time.” *Id.* He was asked “[w]hat about probation” and answered “[y]eah, I was in IOP a couple different times.” *Id.* When asked “have you ever been to a facility where you’ve actually stayed in the facility,” he answered “[n]ot in the last 25 years, no,” and when asked “[d]o you think that you would be successful if you were to go to House of Hope,” he replied: “Yeah, I know I would be. I am tired of this life.” *Id.* He further testified “I am a union carpenter right now,” “I am in good standing with the union, I just have to get my dues caught up and all that,” “I have my license so that’s another good thing,” “I have family support out there that will help me get me started,” and “then it’s just all up to me and I just can’t reiterate enough that I am sick and tired of this, just sick.” *Id.* at 23-24 (capitalization omitted). He indicated he would be able to make monthly restitution payments and would not be able to pay any restitution if he went to prison. He also stated: “I just wanted to apologize to the victims. I am really sorry. I really am ashamed. I don’t know what to say to you. Just really ashamed at 46 years old doing stupid stuff like that, it’s ridiculous.” *Id.* at 24.

[5] One of the property owners provided the following statement:

Today is not about the money. Today is about my children. . . .  
That night you stole more than just money. You stole our family’s  
sense of security. . . . That night caused months and months of  
trauma that will never be gone. My oldest daughter could not enjoy  
life with their friends and stayed home for months afraid she would  
see Mr. Johnson in public. She had anxiety attacks at school before

she had to leave, because she [] might have to fill up her vehicle and he would be at the gas station. My other daughter would scream at night, because when she went to sleep she saw Mr. Johnson's face. During that . . . night my daughter had to control her breathing because you were standing right behind her and she didn't want him to find her. Unfortunately, the trauma did not stop there. The day he drove past our house and he decided to stop on the road and stare at her while she was in the front yard – she walked up and screamed mommy and ran and said mom it's him as he drove away. . . . We have endured many sleepless nights and long difficult and upsetting conversations about what to do if and when there is an intruder in our home. . . . Our kids watched this man make his way from building to building from window to window and attempt to go in our back door before our dogs scared him away.

*Id.* at 26-27.

- [6] The court found the aggravating factors included Johnson's record of criminal activity which included numerous felony convictions and cases for taking property. It also stated his probation had been previously revoked. It found Johnson's acceptance of responsibility and guilty plea to be mitigating. The court found "there was a drastic effect on the victim's [sic], specifically the two (2) children involved in this case." *Id.* at 32. It also stated "[y]ou are old enough to know that if you have a substantial problem instead of breaking into someone's business or someone's house or stealing something, certainly that's something you have the opportunity or the ability to try to get on your own before it comes to that point in time." *Id.* The court found the aggravating factors substantially outweighed the mitigating factors and sentenced Johnson to five years for his burglary conviction. It further stated: "I am going to find

that the sentence on the Habitual Offender, I think it calls for the maximum sentence of six (6) years on the Habitual Offender Enhancement. Those are going to be served consecutive to each other.” *Id.* The court’s written sentencing order and abstract of judgment indicate it imposed a “consecutive” sentence for the habitual offender finding. Appellant’s Appendix Volume II at 123, 125.

### ***Discussion***

[7] Johnson argues his sentence is inappropriate. He argues, “[w]hile admittedly a burglary is serious and invades a victim’s sense of security and caused emotional trauma, there was no physical injury,” and “this offense as many other encounters for Johnson with the criminal justice system stems from continuing struggles with substance addiction.” Appellant’s Brief at 10-11. He asserts he “had been offered and participated in a number of options and opportunities to treat his addiction and engage in recovery, unfortunately, they had not been successful, but he continued to be committed to treatment and had arranged for treatment at a residential facility the House of Hope.” *Id.* at 11. He argued “he expressed remorse and had some insight into his addiction and a desire for an opportunity to get treatment at a facility and demonstrate to the Court that he could lead a law-abiding life.” *Id.* He also argues he was employed as a carpenter with a union job and had a driver’s license which would enable him to work and pay restitution.

[8] Ind. Appellate Rule 7(B) provides 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.” Under this rule, 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).

[9] Ind. Code § 35-50-2-6 provides that a person who commits a level 5 felony shall be imprisoned for a fixed term of between one and six years with the advisory sentence being three years. Ind. Code § 35-50-2-8 provides in part that the court shall sentence a person found to be an habitual offender to an additional fixed term that is between two and six years for a person convicted of a level 5 felony.

[10] Our review of the nature of the offense reveals that Johnson broke and entered into a metal pole barn and lean-to barn with the intent to knowingly exert unauthorized control over property, a gas can and a lock box containing \$1,000 in cash and checks totaling \$1,991, intending to deprive the owner of its value. At sentencing, one of the property owners provided a statement regarding the impact of Johnson’s offense on her two children which included an increased fear of intruders and anxiety.

[11] Our review of the character of the offender reveals that Johnson pled guilty to burglary as a level 5 felony and admitted he was an habitual offender pursuant to a plea agreement and in exchange the State agreed to dismiss Cause No. 133. The presentence investigation report (“PSI”) stated Johnson was born in 1975 and his criminal history includes seventeen misdemeanor and nine felony convictions. His prior convictions include battery resulting in serious bodily

injury as a class C felony and criminal mischief, resisting law enforcement, and theft/receiving stolen property as class A misdemeanors in 1995; operating a vehicle while intoxicated and resisting law enforcement as class A misdemeanors in 1996; two counts of theft as class D felonies in 1999; theft as a class D felony in 2001; false informing as a class B misdemeanor in 2003; conversion as a class A misdemeanor in 2004; possession of a controlled substance as a class A misdemeanor in 2006 for which he received a suspended sentence and was placed on probation, he later admitted to violating his probation, and the court revoked part of his previously suspended sentence; two counts of theft as class D felonies in 2007; possession of a controlled substance as a class D felony and operating a vehicle while intoxicated and driving while suspended as class A misdemeanors in 2011; criminal trespass as a class A misdemeanor in 2017 for which he was placed on probation which was later terminated as unsuccessful; and theft as a level 6 felony and criminal trespass as a class A misdemeanor in 2018. The PSI also indicated charges for operating a vehicle while intoxicated endangering a person as a class A misdemeanor and operating a vehicle with a controlled substance in person's body as a class C misdemeanor were pending in Delaware County.

[12] Further, the PSI stated Johnson was unemployed due to his incarceration and he indicated that, once he was released, he planned to return to work for the union and that he has been with the Carpenters Local Union for about five years. With respect to substance abuse, the PSI states Johnson reported he previously has had a problem with alcohol but his last drink of alcohol was

about eight to nine months earlier. He reported that his drug of choice is opiates and benzodiazepines and that he took Xanax prior to the instant offense. He stated that he started using marijuana at age fourteen and his last use was approximately six months earlier, he started using cocaine at age eighteen and his last use was approximately one year earlier, and he started abusing opiates at age twenty-three or twenty-four and his last use was recent. He reported abusing suboxone and his last use was in 2016 and he started using methamphetamines in 2016 and his last use was approximately six months earlier. He reported he has been in treatment for alcohol and drug use and he was at Richmond State Hospital in 1997. The PSI also indicates Johnson's overall risk assessment score using the Indiana risk assessment tool places him in the high risk to reoffend category. After due consideration, we conclude that Johnson has not sustained his burden of establishing that his sentence is inappropriate in light of the nature of the offense and his character.

- [13] However, “A habitual offender finding does not constitute a separate crime nor does it result in a separate sentence. Rather it results in a sentence enhancement imposed upon the conviction of a subsequent felony.” *Howard v. State*, 873 N.E.2d 685, 689 (Ind. Ct. App. 2007) (citations omitted). Here, the trial court imposed a separate sentence for the habitual offender enhancement and ordered that sentence to run “consecutive” to the sentence for the level 5 felony. Appellant’s Appendix Volume II at 123, 125. We remand for the trial court to correct the sentencing order and abstract of judgment to reflect that the habitual offender enhancement is not a separate conviction. *See Howard*, 873



N.E.2d at 691 (noting the trial court imposed a separate sentence for the habitual offender enhancement and ordered that sentence to run “consecutively” to the sentence for a class B felony and instructing the court on remand to correct the sentencing order to reflect that the habitual offender enhancement is not a separate conviction).

[14] For the foregoing reasons, we affirm Johnson’s sentence and remand for an amended sentencing order and abstract of judgment.

[15] Affirmed and remanded.

Robb, J, and Crone, J., concur.