MEMORANDUM DECISION

APPELLANT PRO SE

Steven Charles Clear
Greencastle, Indiana

ATTORNEYS FOR APPELLEE

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IN THE COURT OF APPEALS OF INDIANA

Steven Charles Clear,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 14, 2022

Court of Appeals Case No. 21A-PC-2133

Appeal from the Shelby Superior Court

The Honorable David N. Riggins, Judge

Trial Court Cause No. 73D02-1903-PC-4

Altice, Judge.

Case Summary

[1] Steven Clear, pro se, appeals following the denial of his petition for post-conviction relief. He raises the following restated issues:

> I. Did the post-conviction court abuse its discretion when it denied his post-conviction discovery motion asking the court to compel the State to produce all evidence from trial and for his prior counsel to produce their files?
>
> II. Did Clear receive ineffective assistance of trial or appellate counsel for their respective failures to challenge what he claims was an impermissible double enhancement of a misdemeanor operating while intoxicated charge?

[2] We affirm.

Facts & Procedural History

[3] On March 27, 2016, Clear operated a vehicle while intoxicated on I-74 in Shelby County and rolled his vehicle. Another driver, Robert Rardin, suddenly encountered the flipped vehicle, and as he swerved to avoid it, he saw a person inside "on his hands and knees" looking out through a window. *Transcript Vol. 3* at 41. Rardin stopped, called 911, and observed the individual exit the flipped vehicle. While he was at the scene, Rardin saw no other person get out of the vehicle.

[4] When Deputy Ian Michael arrived about twelve minutes after the 911 call, other emergency personnel were already present. Deputy Michael approached Clear, who was standing "right there . . . close to the vehicle," and asked Clear

if he was the only person in the vehicle. *Id*. at 65. Deputy Michael later testified that this is a routine question to determine both if anyone else may have been injured in the rollover and if the person was the driver. Clear told Deputy Michael that there were no other occupants. Clear failed several sobriety tests and submitted to a portable breath test and a blood draw at the scene. Thereafter, Deputy Michael read *Miranda* rights to Clear and asked him questions such as where he had been prior to the accident and where he was going. At no point did Clear indicate that anyone else had been driving the vehicle.

[5] On March 28, 2016, the State charged Clear with: Count 1, Class A misdemeanor operating a vehicle while intoxicated (OWI) endangering a person; Count 2; Level 6 felony OWI with a prior OWI conviction; Count 3, Class A misdemeanor driving while suspended. The State subsequently amended the charging information to add, as is relevant here, Count 5, Level 5 felony OWI while intoxicated while having a prior conviction for OWI causing serious bodily injury. The State also alleged that Clear was a habitual vehicular substance offender (HVSO) due to having three prior unrelated vehicular substance offense convictions. The State relied upon the same 1998 Cass County OWI causing serious bodily injury conviction to elevate the misdemeanor OWI charge to a Level 5 felony and to support the HVSO allegation.

[6] A bench trial was held on April 19, 2018. The State presented the testimony of Rardin and Deputy Michael, as well as audio of the 911 call and video at the

scene. The primary theory of defense was that the State did not prove that Clear was the operator of the vehicle on the night in question. The trial court stated that it was "firmly convinced that he was the driver" and found Clear guilty of all counts. *Id*. at 92. During the bifurcated HVSO phase, Clear's counsel stated, "[W]e're not gonna dispute the elevation to a [L]evel five" and admitted to Clear's HVSO status. *Id*. at 94. The trial court entered judgment of conviction on Counts 3 and 5, sentencing Clear to 34 days for Class A misdemeanor driving while suspended, five years for Level 5 felony OWI, and six years for being an HVSO, all to be served consecutive to each other.

[7] Clear appealed, asserting that the trial court erred by treating the HSVO enhancement as a separate offense with a separate sentence. This court agreed by memorandum decision and remanded, directing the trial court to vacate the separate six-year sentence on the HVSO determination and attach it to Clear's five-year sentence on the Level 5 felony OWI while intoxicated. *Clear v. State*, No. 18A-CR-1561, slip op. 1-4 (Ind. Ct. App. Dec. 21, 2018). The trial court issued an amended sentencing order in accordance with that decision.

[8] On March 5, 2019, Clear filed a pro se petition for post-conviction relief, later amended on June 21, 2021, asserting that trial counsel was ineffective for various reasons, including failing to: properly communicate with Clear, review charging documents, depose witnesses, "test the admissibility of statements made by Clear at the time of arrest that were later used to convict," and contest an impermissible double enhancement. *Appellant's Appendix* at 33. Clear also alleged that trial counsel actively sought to avoid trial, made stipulations

against Clear's instruction, and ignored a prejudicial conflict of interest with the State. Clear alleged that appellate counsel was ineffective for failing to raise issues on direct appeal, particularly the alleged impermissible double enhancement issue.[1]

[9] On March 21, 2021, Clear filed a "Motion for Discovery Order and Motion to Compel Production of Attorney Case File," asking the post-conviction court to order the county's prosecuting attorney to produce "the evidence submitted to this court and used prior to and during [the] bench trial" and order Clear's trial and appellate counsel "to produce each of their respective files" to Clear. *Id.* at 28. The post-conviction court ordered that the discovery motion would be heard at the hearing on Clear's petition for post-conviction relief.

[10] At the hearing, the post-conviction court, in addressing the pending discovery motion, asked Clear if he had contacted his prior counsel. Clear responded that he had written letters to trial and appellate counsel to request documents but had not received a response. The post-conviction court attempted to determine from Clear exactly what documents he was seeking. Clear stated that "[t]here was evidence that was used in the court's decision that I have never had access

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[1] On August 16, 2021, Clear filed a "Motion to Correct Sentencing Error," which he explained was "an attempt to resolve" the petition for post-conviction relief and avoid the need for the scheduled post-conviction hearing. *Appellant's Appendix* at 35. In his motion, Clear offered to withdraw his post-conviction petition if the court would attach the HVSO enhancement to a one-year sentence on Count 1, A misdemeanor OWI, for a total seven-year sentence. While it appears that the post-conviction court did not rule on this motion, the post-conviction court explained to Clear that "a motion to correct error should have been filed in the underlying criminal case" and that the court would be treating the motion "as part of your ineffective assistance of counsel" claims. *PCR Transcript* at 14.

to," and when the court inquired, "Like what?", the following exchange occurred:

> PETITIONER: Confession evidence. They say I confessed to the crime that I have alleged [sic] to have committed. I say I did not.
>
> THE COURT: That was all at trial. Do you have a copy of the transcripts?
>
> PETITIONER: I do have a copy of the transcripts.
>
> THE COURT: Then you have that evidence. . . . [Y]ou're free to reference that in the transcript if that's what you want to do as part of your hearing. Okay? Is there anything else you want that you're saying you do not have? I'm not hearing anything, so.

PCR Transcript at 6. The court denied the discovery motion and asked Clear if he was ready to proceed with the post-conviction petition, and he responded in the affirmative.

[11] Although Clear's petition for post-conviction relief had raised numerous claims of ineffective assistance of counsel, Clear stated at the hearing that he wished to pursue only the following two ineffectiveness claims: (1) trial counsel should have attempted to suppress his "inadmissible confession" at the scene regarding being the only occupant in the vehicle, and (2) the trial court erred by allowing the State to enhance the same misdemeanor OWI twice – first by increasing it to a felony under the progressive penalty statute and then attaching the HVSO enhancement to it and, therefore, both his trial and appellate counsel were

deficient in failing to challenge what he claimed to be an impermissible double enhancement. *Id.* at 17.

[12] With regard to his statements at the scene of the accident, Clear asserted that he did not admit to being the driver and even if he did, any statements he made at the scene were in violation of *Miranda* such that his trial counsel should have challenged their admission prior to or at trial. The post-conviction court stated:

> You weren't in custody. You were, you were involved in a crash, they have a right to ask if you were the driver or if there's any other occupants as part of their safety and caretaking to make sure there wasn't somebody lying out somewhere who had been thrown out of the vehicle. You were not in custody, *Miranda* is not implicated. So, to the extent that you said, "I am a, I, I was the driver," to the extent that acknowledged that you were in control of the vehicle, if that, you consider that your confession, there's no problem with that under *Miranda*. And if you're thinking your counsel's ineffective for not objecting to that, you're wrong.

Id. at 18-19.

[13] With regard to the double enhancement issue, Clear asserted that under Ind. Code § 35-50-2-8(e), commonly known as the general habitual offender statute,[2]

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[2] It provides:

> The state may not seek to have a person sentenced as a habitual offender for a felony offense under this section if the current offense is a misdemeanor that is enhanced to a felony in the same proceeding as the habitual offender proceeding solely because the person had a prior unrelated conviction. However, a prior unrelated felony conviction may be used to support a habitual offender determination even if the sentence for the prior unrelated offense was enhanced for any reason, including an enhancement because the person had been convicted of another offense.

it was error to both enhance his OWI misdemeanor to a felony and adjudge him as an HVSO using the same 1998 Cass County conviction. The court explained, "You weren't sentenced under the habitual offender [statute]. You were . . . sentenced under the habitual vehicular substance offender [statute]. That's a different statute." *Id*. at 10. Clear urged that because the HVSO statute, Ind. Code § 9-30-15.5-2, contains a reference to "IC 35-50-2" – the Code chapter where the general habitual offender statute is found – the more-specific HVSO statute, like the general habitual offender statute, does not allow for double enhancement. Clear asserted that trial counsel and appellate counsel were ineffective for failing to raise the double enhancement issue.

[14] Clear offered and the court admitted the trial transcript as an exhibit, and he did not call any other witnesses. The trial court ruled against Clear from the bench on the assertion that trial counsel was ineffective for failing to seek to suppress Clear's statements at the scene, and it took the double enhancement ineffectiveness claim under advisement.

[15] On August 25, 2021, the post-conviction court issued an order denying Clear's petition for post-conviction relief. The court reaffirmed that trial counsel was not deficient for failing to seek suppression of his statements at the scene. As to the double enhancement issue, the post-conviction court stated in relevant part:

Ind. Code § 35-50-2-8(e).

> [Clear] believes the [trial] court erred by allowing the State to use both [a] progressive penalty statute and the [HVSO statute] on the same misd[e]meanor offense. . . . [Clear] believes both trial and appe[]llate counsel were constitutionally deficient by failing to object to the double enhancement.
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> The State of Indiana conce[des] that double enhancement of a misdemeanor is not proper when the general habitual offender statute is being used, but the State says the limitation does not apply to HVSO cases. The State points to *Beldon v. State*, 926 N.E.2d 480 (Ind. 2010) as demonstrating that such double enhancement is acceptable. . . .
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> [Clear] counters that *Beldon* was decided under Indiana Code 35-50-2-10 which has since been repealed, and therefore[,] *Beldon* is no longer good law. Upon careful examination of the caselaw and the Indiana Code, this court believes that *Beldon* is still good law. . . .
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> The law allows specialized habitual penalties to be stacked on top of progressive penalties in OVWI cases. There was no error in not objecting and neither trial nor appellate counsel were deficient.

Appellant's Appendix at 14-15. Clear now appeals.

Discussion & Decision

I. Discovery Motion

[16] Clear appeals the post-conviction court's denial of his "Motion for Discovery Order and Motion to Compel Production of Attorney Case File" that asked the court to order the State to produce "the evidence . . . used prior to and during

[the] bench trial," and order his appointed counsel to produce "each of their respective case files." *Appellant's Appendix* at 28. We observe that Clear is proceeding pro se. "It is well settled that pro se litigants are held to the same legal standards as licensed attorneys. This means that pro se litigants are bound to follow the established rules of procedure and must be prepared to accept the consequences of their failure to do so." *Basic v. Amouri*, 58 N.E.3d 980, 983-84 (Ind. Ct. App. 2016) (internal citation omitted).

[17] A post-conviction court's discretion "extends to decisions made while overseeing the proceedings before it and regulating discovery." *Bedolla v. State*, 123 N.E.3d 661, 666 (Ind. 2019). We review its decisions under a "deferential" abuse of discretion standard. *Id*. An abuse of discretion occurs if the court's decision is clearly against the logic and effect of the facts and circumstances before that court or reasonable, probable, and actual deductions to be drawn therefrom. *Id*.

[18] Clear argues that, to "secure a conviction, [the State] fabricated an alleged admission of guilt[,]" and because the trial court denied his request for discovery, he was not afforded an opportunity to present evidence in support of his post-conviction claim that his conviction was based in part on "an inadmissible confession." *Reply Brief* at 13, 19. More specifically, he urges that his convictions were "the result of the trial court's use of an alleged admission of guilt without a review of the totality of the circumstances during the trial, a situation Clear could only recreate at the post-conviction hearing with the evidence from the discovery that was not presented during the trial." *Id*. at 20.

[19] Clear's arguments concerning the "inadmissible" and "fabricated [] admission of guilt" stem from his statement to the officer at the scene that there was no one else in the vehicle. *Id*. at 13, 19. At the post-conviction hearing, the court discussed with Clear that the statements were in the transcript that he already had. The following exchange then occurred:

> Clear: Well, what I'm addressing is the fact that I don't believe I confessed to being the driver.
>
> Court: Well, that's a factual basis. I believe you did [confess to being the driver], [and] that's not appropriate challenge for post-conviction relief. That's a factual matter.

PCR Transcript Vol. II at 18-19.

[20] In arguing that the post-conviction court should have granted his discovery motion, Clear highlights that, at trial, Deputy Michael estimated that he arrived about twelve minutes after the 911 call was received and, on cross-examination, agreed that, if there had been another person in the vehicle with Clear, he or she would have had time to leave before the officer's arrival. However, this only reaffirms that whether Clear was the driver was a factual determination to be made by the court. Clear has not shown an abuse of discretion in the court's denial of his requests for the discovery of trial evidence on this issue.

[21] Clear's discovery motion also asked the post-conviction court to compel his trial and appellate attorneys to produce their files. However, there is no indication that Clear served a notice pursuant to T.R. 34(C) or a third-party request for

production and subpeona on his attorneys, as is required by our Trial Rules for discovery requests upon non-parties. Absent that, any motion to compel was not proper. *See* T.R. 37(A)(2) (stating party may move for an order compelling an answer if person fails to respond to a request submitted under T.R. 34). Nor did Clear call or subpoena the prior attorneys as witnesses at the post-conviction hearing. Again, Clear is bound by the same procedural rules as a licensed attorney. We find no abuse of discretion in the trial court's decision to deny Clear's request to compel his attorneys to produce their files.

II. Ineffective Assistance of Counsel

[22] Clear appeals the denial of his petition for post-conviction relief. A post-conviction petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1 § 5. "When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment." *Bethea v. State*, 983 N.E.2d 1134, 1138 (Ind. 2013). In order to prevail, the petitioner must demonstrate that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *Overstreet v. State*, 877 N.E.2d 144, 151 (Ind. 2007). Although we do not defer to a post-conviction court's legal conclusions, we will reverse its findings and judgment only upon a showing of clear error, i.e., that which leaves us with a definite and firm conviction that a mistake has been made. *Bethea*, 983 N.E.2d at 1138.

[23] Clear's conviction for operating a vehicle while intoxicated was elevated to a Level 5 felony and subjected to an HVSO enhancement based on the same prior

conviction, which he asserts "violates the general rules against double enhancements[.]" *Appellant's Brief* at 8. He argues that his trial counsel was ineffective for failing to challenge this double enhancement and that appellate counsel was ineffective for failing to raise it on direct appeal.

[24] In order to prevail on his claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel's performance was deficient and that he was prejudiced thereby. *French v. State*, 778 N.E.2d 816, 824 (Ind. 2002) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). The failure to satisfy either component will cause an ineffective assistance of counsel claim to fail. *Id.* Deficient performance is "'representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment.'" *State v. McManus*, 868 N.E.2d 778, 790 (Ind. 2007) (quoting *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002)). Counsel's performance is presumed effective, and a post-conviction petitioner must offer strong and convincing evidence to overcome this presumption. *Hinesley v. State*, 999 N.E.2d 975, 982 (Ind. Ct. App. 2013), *trans. denied*.

[25] To establish the requisite prejudice, a petitioner must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *French*, 778 N.E.2d at 816. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). The two elements of *Strickland* are separate and independent inquiries. Thus, if it is easier to

dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Landis v. State*, 749 N.E.2d 1130 (Ind. 2001).

[26] The General Assembly bears primary responsibility for determining appropriate criminal penalties and has provided "three types of statutes authorizing enhanced sentences for recidivist offenders: the general habitual offender statute, specialized habitual offender statutes, and progressive-penalty statutes." *Dye v. State*, 972 N.E.2d 853, 857 (Ind. 2012) (quoting *State v. Downey*, 770 N.E.2d 794, 795-96 (Ind. 2002)), *affirmed on reh'g* (2013) (*Dye I*). Our Supreme Court has described the three types:

> The first type, the "general habitual offender statute," Indiana Code section 35-50-2-8, provides that a person convicted of three felonies of any kind are classed as "habitual offenders." Habitual offenders are subject to an additional term of years beyond that imposed for the underlying felony. . . . The second type, "specialized habitual offender statutes," applies where the predicate underlying offenses are of a common type. . . . The third type, which we call "the progressive penalty statutes," is even more specialized. Under this type, the seriousness of a particular charge (with a correspondingly more severe sentence) can be elevated if the person charged has previously been convicted of a particular offense.

Beldon, 926 N.E.2d at 482 (citations and some quotations omitted); *see also Light v. State*, 28 N.E.3d 1106, 1107-08 (Ind. Ct. App. 2015).

[27] A double enhancement issue arises when, as here, "more than one of these statutes is applied to the defendant at the same time." *Dye I*, 972 N.E.2d at 857; *see also Afanador v. State*, 181 N.E.3d 462, 466 (Ind. Ct. App. 2022), *trans. denied*.

"The general rule is that, '*absent explicit legislative direction*, a sentence imposed following conviction under a progressive penalty statute may not be increased further under either the general habitual offender statute or a specialized habitual offender statute.'" *Dye I*, 972 N.E.2d at 857 (quoting *Downey*, 770 N.E.2d at 796) (emphasis in original). Whether a particular double enhancement is permissible is, therefore, a matter of statutory interpretation. *Id*.

[28] In this case, the trial court enhanced Clear's misdemeanor OWI charge to a Level 5 felony based upon application of I.C. § 9-30-5-3(b), a progressive penalty statute, which provides in relevant part:

> (b) A person who violates section 1 or 2 of this chapter or subsection (a)(2) commits a Level 5 felony if:
>
> > (1) the person has a previous conviction of operating while intoxicated causing death or catastrophic injury (IC 9-30-5-5); or
> >
> > (2) the person has a previous conviction of operating while intoxicated causing serious bodily injury (IC 9-30-5-4).

[29] The trial court also adjudged Clear to be an HVSO pursuant to I.C. § 9-30-15.5-2, a specialized habitual offender statute. It states:

> (a) The state may seek to have a person sentenced as a habitual vehicular substance offender for any vehicular substance offense[3] by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) or three (3) prior unrelated vehicular substance offense convictions. If the state alleges only two (2) prior unrelated vehicular substance offense convictions, the allegation must include that at least one (1) of the prior unrelated vehicular substance offense convictions occurred within the ten (10) years before the date of the current offense.
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> * * *
>
> (d) The 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.

[30] Clear argues, "If the . . . A misdemeanor is enhanced pursu[ant] . . . to the progressive penalty statute, then [the HVSO statute] is no longer available according to I.C. § 35-50-2-8(e) as well as the general rule against double enhancements." *Appellant's Brief* at 10. Stated differently, Clear's argument is that the State must either prosecute as a misdemeanor and then enhance with

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[3] Ind. Code § 9-30-15.5-1 defines Vehicular Substance Offense and states:

> As used in this chapter, "vehicular substance offense" means any misdemeanor or felony in which operation of a vehicle while intoxicated, operation of a vehicle in excess of the statutory limit for alcohol, or operation of a vehicle with a controlled substance or its metabolite in the person's body, is a material element. *The term includes an offense under IC 9-30-5*, IC 9-24-6-15 (before its repeal), IC 9-24-6.1-7, and IC 9-11-2 (before its repeal).

(Emphasis added.) There is no dispute that Clear's misdemeanor OWI offense that was enhanced to a felony was an offense "under IC 9-30-5" and thus qualifies as a vehicular substance offense.

the HVSO adjudication or prosecute the case as felony under the progressive penalty statute – but not both. *See Reply Brief* at 11 (arguing "the specialized habitual offender statute . . . replaces the . . . progressive penalty statute[] as the appropriate enhancement for a violation of the misdemeanor vehicular substance offense")

[31] To resolve this issue, we turn to our Supreme Court's direction in *Beldon*, where the Court addressed a double enhancement challenge similar to Clear's but under the now-repealed habitual substance offender statute, I.C. § 35-50-2-10. There, the trial court used the same 2003 OWI conviction to both elevate Beldon's OWI charge from a misdemeanor to a Class D felony, pursuant to the progressive penalty provisions of I.C. § 9-30-5-2(b), and as a predicate offense for a habitual substance offender (HSO) enhancement pursuant to I.C. § 35-50-2-10, a "specialized habitual offender" statute. Beldon challenged the double enhancement as impermissible, and the court of appeals agreed. *Beldon v. State*, 906 N.E.2d 895, 903 (Ind. Ct. App. 2009), *trans. granted*.

[32] Our Supreme Court, however, found that the requisite express legislative intent for double enhancement existed in I.C. § 35-50-2-10. The Court emphasized that while a defendant convicted under a progressive penalty statute may not have his or her sentence enhanced under the *general* habitual offender statute by proof of the same felony used to elevate the underlying charge, "we have already held in *Downey* . . . that the requisite legislative direction exists to

authorize an underlying elevated conviction to be enhanced by the specialized [HSO] enhancement."[4] *Beldon*, 926 N.E.2d at 484.

[33] Clear acknowledges *Beldon* but asserts it is no longer good law because *Beldon* relied on I.C. § 35-50-2-10, which was repealed in 2014. Therefore, he urges, "the *Beldon* rationale does not govern this case" and "the general rule against double enhancements 'remains intact[.]'" *Appellant's Brief* at 6-7. We disagree and, like the post-conviction court, find that the reasoning and analysis of the HSO statute in *Beldon* leads to the same result here when applying the specialized HVSO statute.

[34] In reaching our decision, we observe that the HSO statute in *Beldon* authorized the State to "seek to have a person sentenced as a habitual substance offender for any substance offense by alleging ... that the person has accumulated two prior unrelated substance offense convictions" and provided that a "substance offense" meant "a Class A misdemeanor or a felony in which the possession, use, abuse, delivery, transportation, or manufacture of alcohol or drugs is a material element of the crime" and "include[d] an offense under IC 9-30-5." In like fashion, the HVSO statute applied to Clear authorized the State to "seek to

[4] The *Downey* Court reasoned that because the HSO statute "permits [an HSO] enhancement to be imposed on a person convicted of three unrelated 'substance offense[s]'" – which term is defined to include "a Class A misdemeanor or a felony in which the possession ... of ... drugs is a material element of the crime" – the Legislature, "[b]y its specific inclusion of drug possession misdemeanors and felonies in the category of offenses that are subject to habitual substance offender enhancement[,]" evinced an intention to authorize a double enhancement notwithstanding the existence of the drug possession progressive penalty statute. 770 N.E.2d at 798 (citing I.C. § 35-50-2-10(a)(2), (b)).

have a person sentenced as a habitual vehicular substance offender for any vehicular substance offense by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two or three prior unrelated vehicular substance offense convictions." I.C. § 9-30-15.5-2(a). And I.C. § 9-30-15.5-1 defines "Vehicular Substance Offense" as "any misdemeanor or felony in which operation of a vehicle while intoxicated, operation of a vehicle in excess of the statutory limit for alcohol, or operation of a vehicle with a controlled substance or its metabolite in the person's body, is a material element" and "includes an offense under IC 9-30-5[.]" We conclude that, just as "the requisite legislative direction exist[ed] to authorize an underlying elevated conviction to be enhanced by the specialized [HSO] enhancement," the requisite legislative directions exists for such double enhancement under the HVSO statute. *Beldon*, 926 N.E.2d at 484

[35] In reaching our decision, we reject Clear's related argument that, because the specialized HVSO statute makes reference to "IC 35-50-2," the limitations of the general habitual offender statute found in that Chapter, I.C. § 35-50-2-8(e), apply. Specifically, Clear relies on the following mention of I.C. Chap. 35-5-2: "The 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(d) (emphasis

added). The HSO statute applied in *Beldon* contained an equivalent provision,[5] but the Court did not find, as Clear asks us to do now, that the *general* habitual offender statute applied and precluded double enhancement. We decline his request to do so.

[36] In sum, pursuant to our Supreme Court's reasoning in *Beldon* and *Downey*, we find that the requisite legislative direction exists for the trial court to have elevated Clear's conviction to a Level 5 felony and imposed an enhanced sentence pursuant to the specialized HVSO statute. Accordingly, Clear's trial counsel was not ineffective for failing to challenge the double enhancement.

[37] Clear also argues that his appellate counsel was ineffective for failing to present the double enhancement issue on direct appeal. We review claims of ineffective assistance of appellate counsel using the same standard applicable to claims of ineffective assistance of trial counsel. *Henley v. State*, 881 N.E.2d 639, 644 (Ind. 2008). Accordingly, to prevail on his claim, Clear was required to show both that counsel's performance was deficient and that the deficiency resulted in prejudice. *Id*. To prove deficient performance, Clear needed to show that the unraised claims were "significant and obvious upon the face of the record" and were clearly stronger than those presented. *Isom v. State*, 170 N.E.3d 623, 650 (Ind. 2021).

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[5] *See* I.C. § 35-50-2-10(f) ("The court shall sentence a person found to be a habitual substance offender to an additional fixed term of at least three (3) years but not more than eight (8) years imprisonment, to be added to the term of imprisonment imposed *under IC 35-50-2* or IC 35-50-3.") (emphasis added).

[38] Because Clear has not established that he was subjected to an improper double enhancement, he has failed to establish that his appellate counsel was ineffective for failing to present the double enhancement issue on direct appeal. Clear has not met his burden to show that the post-conviction court erred in denying his PCR petition.[6]

[39] Judgment affirmed.

Vaidik, J. and Crone, J., concur.

[6] To the extent that Clear intended to assert that his trial counsel was ineffective for failing to raise a double jeopardy challenge, his claim is waived as he only mentions the term double jeopardy generally, without any double jeopardy analysis or argument in support. Ind. Appellate Rule 46(A)(8).