MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jason D. Sinnett,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

March 26, 2021

Court of Appeals Case No. 20A-CR-1406

Appeal from the Hamilton Superior Court

The Honorable Jonathan M. Brown, Judge

Trial Court Cause No. 29D02-1808-F5-5640

Mathias, Judge.

[1] Jason D. Sinnett appeals the Hamilton Superior Court's denial of his motion to correct erroneous sentence. Sinnett argues that the trial court imposed an

impermissible double enhancement when it sentenced him for both Level 5 felony auto theft—enhanced to a Level 5 because he had a prior unrelated felony auto theft conviction—and for being a habitual offender.

[2] Concluding that the trial court did not err when it sentenced Sinnett, we affirm.

Facts and Procedural History

[3] In August 2018, Sinnett was charged with Level 6 felony auto theft and Level 5 felony auto theft because Sinnett had a prior unrelated auto theft conviction. Specifically, the State alleged Sinnett was convicted of auto theft in 2013 under cause number 29C01-1307-FC-5883. The State also alleged Sinnett was a habitual offender. In support of that allegation, the State listed Sinnett's 2009 Class C felony forgery conviction (cause number 49G093-0907-FC-60848) and his 2007 Class C felony auto theft conviction (cause number 49G03-0711-FC-234528).

[4] On November 30, 2018, Sinnett and the State entered into a plea agreement that provided Sinnett would plead guilty to Level 5 felony auto theft and to being a habitual offender.[1] The plea agreement provided that Sinnett would serve eight years total: four years for the auto theft conviction with a four-year enhancement for the habitual-offender adjudication. Sinnett and the State agreed that he would serve four years executed in the Department of Correction

[1] In exchange, the State agreed to dismiss the Level 6 felony auto theft charge, and four theft counts: two Class A misdemeanors and two Level 6 felonies. The Level 6 felony theft charges were enhancements to the Class A misdemeanor charges due to a prior felony theft conviction.

("DOC") and two years on electronic home monitoring as a direct commitment to Hamilton County Community Corrections, if that placement was approved. If Sinnett was not approved for community corrections, he would serve six years in DOC. The remaining two years were suspended. The trial court approved the plea agreement on December 3, 2018, and sentenced Sinnett accordingly.

[5] On January 31, 2020, Sinnett pro se filed a motion to correct erroneous sentence. Sinnett claimed that he was not "eligible for the Habitual Criminal enhancement" because "[t]he original charge of auto theft had been enhanced previously under the progressive-penalty statute."[2] Appellant's App. p. 33. Sinnett also asserted that the General Assembly has not authorized the State to "first enhance a charge due to a prior conviction, then enhance it once again by filing the Habitual Offender" allegation. *Id*. at 35. In response, the State argued that "felonies enhanced by a prior felony can be enhanced by the [] habitual offender if the enhancing prior [felony] is not used again in the habitual determination." *Id*. at 38. The State observed that the felony used to support the Level 5 auto theft charge was not one of the felonies listed to support the habitual-offender allegation.

[2] Sinnett also argued that when the State filed the Level 5 felony auto theft charge, it should have moved to dismiss the Level 6 auto theft charge. The Level 6 charge was eventually dismissed under the plea agreement, and Sinnett cannot establish any error in this regard.

[6] The trial court denied Sinnett's motion February 7, 2020, without holding a hearing. Sinnett also filed a Trial Rule 60(B) motion, which the trial court concluded was duplicative of the motion to correct erroneous sentence. Therefore, the court denied the 60(B) motion on March 1, 2020. Sinnett attempted to file pro se a notice of appeal on March 9, 2020, but the trial court rejected his filing. *Id*. at 29. On August 11, 2020, Sinnett was granted permission to file a belated appeal. *Id*.

Discussion and Decision

[7] Sinnett argues that the "State of Indiana has no authority to further enhance an offense that has already been enhanced by a progressive penalty statute with the general habitual offender statute." Appellant's Br. at 8. Initially, we observe that

> It has long been established that double enhancements are not permissible unless there is explicit legislative direction authorizing them. But double enhancements are permissible when there is explicit legislative direction authorizing them. Whether a particular double enhancement is permissible, therefore, is a matter of statutory interpretation.

Dye v. State, 972 N.E.2d 853, 856–57 (Ind. 2012) (cleaned up), *aff'd on reh'g*, 984 N.E.2d 625 (Ind. 2013). Sinnett relies on *Dye* to support his argument that he was subject to an impermissible double enhancement. He misreads that decision.

[8] Dye was convicted of unlawful possession of a firearm by a serious violent felon ("SVF") and found to be a habitual offender. On appeal, Dye claimed that

"tacking the habitual-offender enhancement on to the sentence for unlawful possession of a firearm by an SVF constitute[d] an impermissible double enhancement." *Id.* at 856. The *Dye* court held that "a double enhancement is improper where the underlying conviction is for unlawful possession of a firearm by an SVF." *Id*. at 858 (citing *Mills v. State*, 868 N.E.2d 446, 452 (Ind. 2007)). On rehearing, the court clarified that an SVF conviction enhanced by a habitual-offender adjudication is impermissible *only when* the same underlying offense, or an underlying offense within the res gestae of another underlying offense, is used to establish both the SVF status and the habitual-offender status. *Dye v. State*, 984 N.E.2d 625, 630 Ind. 2013). The prior conviction used to support Dye's SVF charge and one of the two prior convictions used to support the habitual-offender allegation arose from the same criminal incident. *Id*. at 629–30. Therefore, the court concluded that "the State is not [] permitted to support Dye's habitual offender finding with a conviction that arose out of the same *res gestae* that was the source of the conviction used to prove Dye was a serious violent felon." *Id*. at 630.

[9] Applying *Dye*, our court has held it is permissible for a defendant to be sentenced as both an SVF and a habitual offender in the same proceeding when the underlying felonies supporting those allegations are not related to each other. *See e.g., Shorter v. State*, 144 N.E.3d 829, 842 (Ind. Ct. App. 2020), *trans. denied*; *Shepherd v. State*, 985 N.E.2d 362, 363–64 (Ind. Ct. App. 2013); *see also Tuell v. State*, 118 N.E.3d 33, 37 (Ind. Ct. App. 2019) (recognizing "many Indiana decisions have held that there is no double enhancement unless more

than one of the statutes that authorize enhancements for repeat offenders are applied to the same felony or the same proof of an uninterrupted transaction") (cleaned up).

[10] As is relevant here, the habitual-offender statute authorizes a sentencing enhancement of between two and six years when the enhancement is attached to a Level 5 felony conviction. Ind. Code § 35-50-2-8(i)(2). Sinnett was convicted of Level 5 felony auto theft; therefore, to establish that Sinnet was also a habitual offender, the State was required to prove beyond a reasonable doubt that

> (1) the person has been convicted of two (2) prior unrelated felonies;
>
> (2) at least one (1) of the prior unrelated felonies is not a Level 6 felony or a Class D felony; and
>
> (3) if the person is alleged to have committed a prior unrelated:
>
> > (A) Level 5 felony;
> >
> > (B) Level 6 felony;
> >
> > (C) Class C felony; or
> >
> > (D) Class D felony;
>
> not more than ten (10) years have elapsed between the time the person was released from imprisonment, probation, or parole (whichever is latest) for at least one (1) of the two (2) prior unrelated felonies and the time the person committed the current offense.

I.C. § 35-50-2-8 (c).[3]

[11] The State alleged that Sinnett was a habitual offender based on his convictions for Class C felony forgery in 2009 and Class C felony auto theft in 2007. Sinnett pleaded guilty to being a habitual offender and he does not claim that his prior convictions do not satisfy the requirements of Indiana Code section 35-50-2-8(c).

[12] Sinnett's Level 5 felony auto theft conviction is a progressive penalty conviction because the auto theft felony statute elevates "the level of an offense (with a correspondingly enhanced sentence) where the defendant previously has been convicted of a particular offense." *Dye*, 972 N.E.2d at 857; *see also Brock v. State*, 983 N.E.2d 636, 641 (Ind. Ct. App. 2013). Sinnett was charged with Level 6 felony auto theft.[4] But because he had a prior unrelated Class C felony auto theft conviction from 2013, the State also alleged that Sinnett's offense was a Level 5 felony. Appellant's App. pp. 14, 16.

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[3] Subsection (e) provides that "[t]he 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." I.C. § 35-50-2-8(e). Therefore, section 35-50-2-8(e) does not bar double enhancement here because Sinnett's current offense is not a misdemeanor that was enhanced to a felony in the same proceeding as the habitual-offender proceeding solely because of a prior unrelated conviction.

[4] The State alleged that Sinnett committed the offense on or about December 27, 2017. Our General Assembly repealed and replaced the statute Sinnett was charged under effective July 1, 2018. *See* P.L. 176-2018, Sec. 7.

[13] Sinnett does not claim that the three felonies used to support his Level 5 felony auto theft conviction and the habitual-offender adjudication are related to each other. And on the face of the record before us, the felonies do not appear to be related (or part of the same criminal incident) because they were charged under separate cause numbers and committed on distinct dates each separated by more than one year.

[14] In sum, three unrelated and distinct felonies support the enhancements in this case. Sinnett has therefore not established that his sentence for Level 5 felony auto theft and the enhancement imposed pursuant to the habitual-offender adjudication constitute an impermissible double enhancement. *Cf.* *Shorter*, 144 N.E.3d at 842; *Shepherd*, 985 N.E.2d at 363–64.

Conclusion

[15] We affirm the trial court's order denying Sinnet's motion to correct erroneous sentence.

[16] Affirmed.

Altice, J., and Weissmann, J., concur.