MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Treundon Earl Johnson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 21, 2022

Court of Appeals Case No. 21A-CR-1970

Appeal from the Howard Circuit Court

The Honorable Lynn Murray, Judge

Trial Court Case No. 34C01-1811-F4-1728

Baker, Senior Judge.

Statement of the Case

[1] A head-on collision led to the tragic death of two teenagers and catastrophic injuries to three other teenagers, whose lives are forever changed. Treundon Earl Johnson appeals from the court's sentencing order after he pleaded guilty to ten offenses charged against him as the result of this traffic accident where he was driving with both alcohol and controlled substances in his system despite having a suspended driver's license. We affirm in part, and reverse and remand in part.

Issues

Johnson presents the following issues for our review:

I. Did the court err by impermissibly applying both a special habitual offender enhancement statute and a progressive penalty statute to Johnson's sentence?

II. Did the court err by imposing a $250 drug countermeasure fee?

Facts and Procedural History

[2] Officers responded just after 2:00 a.m. on November 18, 2018, to the report of a vehicular accident. One of the vehicles had flipped over and the occupants were trapped. Johnson was the driver of the second vehicle and reported to a responding officer that he believed his power steering had failed resulting in his vehicle's entrance into the oncoming lane of traffic striking the other vehicle. The officer interviewing Johnson observed that Johnson used his vehicle to keep himself steady on his feet. Empty beer cans littered the floorboard of

Johnson's vehicle and the area surrounding his vehicle. Johnson's speech was slurred and his eyes appeared glassy. The officer believed Johnson was intoxicated and asked Johnson to participate in field sobriety tests. During the tests Johnson began to complain that he was in pain, could not breathe, and could not complete the portable breath test properly. Blood test results revealed the presence of MDMA[1] in Johnson's blood. Another officer conducted a driver's license check and discovered that Johnson's license was suspended.

[3] There were five teenaged passengers in the other vehicle, and those passengers had been celebrating E.S.'s birthday. Two of the passengers, H.B. and A.M. died as a result of their injuries. E.W., E.S., and G.M. sustained serious injuries. E.S. sustained brain damage that affected her memory and cognitive ability, and she suffered post-traumatic stress disorder. E.W. was initially placed on a ventilator. She also suffered a cracked pelvis, lacerations to her liver and kidney, a skull fracture, a fracture to her tibia, a broken wrist, a cracked palate, and fractures to both orbital sockets.

[4] The State charged Johnson with seventeen felonies related to the crash. He entered into a plea agreement with the State wherein he would plead guilty to ten total counts: two counts of driving with a suspended license resulting in death; three counts of driving with a suspended license resulting in serious bodily injury; two counts of causing death when operating a motor vehicle with

[1] MDMA, or methylenedioxymethamphetamine, is also known as ecstasy. *See Ogburn v. State*, 53 N.E.3d 464, 468 (Ind. Ct. App. 2016), *trans. denied.*

a Schedule I or II controlled substance in the blood; and three counts of causing serious injury when operating a motor vehicle with a Schedule I or II controlled substance in the blood. Per the terms of the plea agreement, Johnson also agreed to admit his status as an habitual vehicular substance offender (HVSO). The plea agreement additionally provided that sentencing would be left to the trial court's discretion, but the executed portion of the sentence was capped at twenty-eight years.

[5] The court accepted the plea agreement and sentenced Johnson to an aggregate term of fifty years, with twenty-two years suspended to probation. At the sentencing hearing, the court said "[t]here may be a counter-measure fee of $250.00." Tr. Vol. II, p. 71. In the written sentencing order, the court imposed a "community drug free assessment fee of $250.00." Appellant's App. Vol. 3, p. 44. Johnson now appeals.

Discussion and Decision

Impermissible Double Enhancement?

[6] The State charged Johnson with, and Johnson pleaded guilty to, two counts of operating while intoxicated resulting in death. Those charges were elevated due to a prior conviction for operating while intoxicated within ten years, and as part of the plea agreement, he admitted his HVSO status. On appeal, he argues that "[t]he sentence imposed by the trial court contains an impermissible double enhancement as the sentence imposes a penalty for a progressive penalty statute as well as a penalty for habitual vehicular substance offender." Appellant's Br.

p. 6. The State responds first by arguing that Johnson may not challenge the terms of his plea agreement, Appellee's Br. p. 7, and next, by arguing in the alternative, that the sentence was not erroneous based on our Supreme Court's precedent on the issue. *Id.*

[7] In *Lee v. State*, our Supreme Court held that "[a] defendant may not enter a plea agreement calling for an illegal sentence, benefit from that sentence, and then later complain that it was an illegal sentence." 816 N.E.2d 35, 40 (Ind. 2004) (internal quotations omitted). The Court observed that defendants "who plead guilty to achieve favorable outcomes give up a plethora of substantive claims and procedural rights, such as challenges to convictions that would otherwise constitute double jeopardy." *Id.*

[8] Such is the case here. Johnson may not now complain of the plea agreement and sentence for which he bargained and from which he received a significant benefit. Seven charged felonies were not pursued due to the plea agreement Johnson negotiated with the State. Further, the executed portion of Johnson's sentence was capped well below the maximum allowed for his offenses, with some sentences to be served consecutively while others were to be served concurrently. *See* Appellant's App. Vol. 2, p. 146. Johnson is foreclosed from complaining about his sentence because by entering into the plea agreement, he has "relinquished the right to challenge his sentence as an impermissible double enhancement." *Mills v. State*, 868 N.E.2d 446, 453 (Ind. 2007).

[9] Turning to the merits, however, as is our preference, *see Butler v. State*, 140 N.E.3d 870, 874, n.1 (Ind. 2019) ("[W]here possible, we prefer to address cases on their merits."), Johnson has not established sentencing error.

[10] In *Beldon v. State,* our Supreme Court discussed "the general habitual offender statute, Indiana Code section 35-50-2-8 [(2017)]," which provides that individuals "convicted of three felonies of any kind are called habitual offenders." 926 N.E.2d 480, 482 (Ind. 2010). "Habitual offenders are subject to an additional term of years beyond that imposed for the underlying felony." *Id.* (citing *State v. Downey*, 770 N.E.2d 794, 795 (Ind. 2002)). Specialized habitual offender statutes apply "where the predicate underlying offenses are of a common type." *Id.* Examples of those statutes involve habitual traffic violators, repeat sexual offenders, and habitual substance offenders. *See* Ind. Code § 9-30-10-4 (2015) (habitual traffic violators); Ind. Code § 35-50-2-14 (2009) (repeat sexual offenders); Ind. Code § 9-30-15.5-2 (2015) (HVSO).

[11] Progressive penalty statutes allow for the elevation of a charge based on its seriousness, with a correspondingly more severe sentence, if the person charged has previously been convicted of a particular offense. *See Beldon*, 926 N.E.2d at 482. Examples of progressive penalty statutes include Indiana Code section 35-48-4-11 (2018) (drug offenses elevated if prior offenses under the statute); Indiana Code sections 9-30-10-16 and 17 (2015) (motor vehicle offenses elevated if prior offenses under the statute); and Indiana Code sections 9-30-5-2 and 3 (2014) (operating a motor vehicle while intoxicated with prior offenses elevated).

[12] In *Downey*, our Supreme Court reiterated the general rule that a "trial court would not be able to use either the general habitual offender statute or a specialized habitual offender statute *absent explicit legislative direction*." 770 N.E.2d at 798. However, the Court found that there was such explicit legislative direction when "the Legislature modified the habitual substance offender statute to provide that prior convictions for operating vehicles while intoxicated, including those where the charge had been elevated because of a prior conviction, could serve as predicate offenses for habitual substance offender enhancements" in response to two prior decisions of the Court that found otherwise. *Id.* at 797. The *Downey* Court addressed the legislative amendments and concluded that, "[b]y its specific inclusion of drug possession misdemeanors and felonies in the category of offenses that are subject to habitual substance offender enhancement, we find the Legislature intended to authorize such an enhancement notwithstanding the existence of the drug possession progressive penalty statute." *Id.* at 798. "The amendment provided that prior convictions for operating a vehicle while intoxicated, including those where the charge had been elevated because of a prior conviction, properly served as predicate offenses for habitual substance offender enhancements." *Haymaker v. State*, 667 N.E.2d 1113, 1115 (Ind. 1996).

[13] The *Beldon* Court found that it had already resolved the matter in *Downey* and *Haymaker* by holding "that the requisite legislative direction exists to authorize an underlying elevated conviction to be enhanced by the specialized habitual substance offender enhancement." 926 N.E.2d at 484. The same holds true

here. Johnson's offenses for causing death and for causing serious bodily injury while operating a vehicle with a Schedule I or II controlled substance in his blood were elevated to higher level offenses because of a prior conviction for operating while intoxicated. And at the time of Johnson's offense, the statute for operating while intoxicated resulting in death provided that the offense was a Level 4 felony if the person had a previous OWI conviction within the past ten years. Ind. Code § 9-30-5-5 (2018). Similarly, an OWI offense causing serious bodily injury is elevated because of a prior conviction within five years. Ind. Code § 9-30-5-4 (2018). A HVSO is a person who has two or three prior unrelated vehicular substance offense convictions. Ind. Code § 9-30-15.5-2 (2015). A vehicular substance offense is any misdemeanor or felony in which the operation of a vehicle while intoxicated is a material element and includes any offense under Indiana Code chapter 9-3-5. Ind. Code § 9-30-15.5-1 (2016).

[14] We conclude that our Supreme Court has allowed the use of a progressive penalty statute in tandem with the HVSO statute and found no impermissible double enhancement. We find no error here.

Excessive Fee Assessment?

[15] Next, Johnson says that the court abused its discretion by imposing what it described from the bench as "a counter-measure fee of $250.00," *see* Tr. Vol. II, p. 71, and then called in its written sentencing order a "community drug free assessment fee of $250." Appellant's App. Vol. 3, p. 44. The State concedes the court erred. *See* Appellee's Br. p. 11.

[16] Sentencing decisions include decisions to impose restitution, fines, costs, or fees and are left to the trial court's discretion. *Berry v. State*, 950 N.E.2d 798, 799 (Ind. Ct. App. 2011). "If the fees imposed by the trial court fall within the parameters provided by statute, we will not find an abuse of discretion." *Id.*

[17] Here, however, there is no "community drug free assessment fee" authorized by statute. And to the extent the court meant to impose the alcohol and drug countermeasure fee, it is statutorily capped at $200. *See* Ind. Code § 33-37-5-10 (2004). Therefore, we reverse the court's $250 fee imposition and remand the matter to the trial court to impose a $200 countermeasures fee.

Conclusion

[18] Based on the foregoing, we conclude that Johnson cannot be heard to complain about the application of both the progressive penalty statute and HVSO enhancement to his sentence resulting from his negotiated plea. But, even so, the sentence is not an impermissible double enhancement according to binding precedent. We do conclude that the court abused its discretion by imposing a fee that exceeds that statutory cap for the fee and reverse and remand the matter to the court for entry of the $200 alcohol and drug countermeasure fee.

[19] Affirmed in part, reversed and remanded in part.

Crone, J., and Altice, J., concur.