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IN THE
COURT OF APPEALS OF INDIANA

Scott Afanador,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

January 28, 2022

Court of Appeals Case No. 21A-CR-1000

Appeal from the Lawrence Superior Court

The Honorable John M. Plummer III, Judge

Trial Court Cause Nos.
47D01-1911-F2-2116
47D01-2008-F5-1189

May, Judge.

[1] Scott Afanador appeals following his conviction of Level 5 felony automobile theft[1] and the finding that he is a habitual offender.[2] Afanador argues the elevation of his automobile theft conviction from a Level 6 to a Level 5 felony based on his prior conviction of automobile theft, and the further enhancement of his sentence for that elevated conviction due to his habitual offender status, resulted in an improper double enhancement. To reach this conclusion, Afanador cites the definition of "unrelated felony" in the habitual offender statute, Indiana Code § 35-50-2-8(f), which provides that felonies are "unrelated" only if a subsequent offense is committed after conviction of and sentencing for an earlier offense, and Afanador points out that he was convicted of the prior automobile theft used to enhance his conviction on the same day that he was convicted of one of the predicate felonies for his habitual offender enhancement, such that those two prior crimes are not "unrelated" under the definition provided in the habitual offender statute.

[2] The State, in contrast, argues the double enhancement of Afanador's conviction is not improper because his prior automobile theft conviction did not arise as part of the same *res gestae* as either of the predicate felonies for his habitual offender enhancement. In support, the State cites *Dye v. State*, 984 N.E.2d 635 (Ind. 2013) (hereinafter "*Dye II*"), which held the State could not "support Dye's habitual offender finding with a conviction that arose out of the same *res*

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[1] Ind. Code § 35-43-4-2(2)(C).

[2] Ind. Code § 35-50-2-8.

gestae that was the source of the conviction used to prove Dye was a serious violent felon." *Id*. at 630.

[3] Afanador's argument is a request that we expand our Indiana Supreme Court's pronouncement in *Dye II* of the circumstances that cause a double enhancement to be improper. If such expansion is to occur, we believe it lies within the province of our Supreme Court to modify *Dye II*, and we accordingly affirm Afanador's double enhancement.

Facts and Procedural History

[4] On January 25, 2002, Afanador was convicted of Forgery, a Class C felony, in Monroe Circuit Court under cause number 53C05-0002-CF-00065 ("Predicate-1 Forgery"). On July 14, 2012, Afanador committed the offense of carrying a handgun without a license, a Class C felony. He was charged in Monroe Circuit Court under cause number 53C05-1207-FB-000669, and he was convicted and sentenced on November 26, 2019 ("Predicate-2 Handgun"). In July of 2017, Afanador committed Level 6 felony automobile theft. He was charged in Monroe Circuit Court under cause number 53C05-1707-F6-000726, and he was convicted and sentenced on November 26, 2019 ("Predicate-3 Auto Theft"). Of particular importance to this appeal is the fact that, although the criminal act underlying Predicate-2 Handgun occurred five years before the criminal act underlying Predicate-3 Auto Theft, the trial court entered the convictions and sentences for Predicate-2 Handgun and Predicate-3 Auto Theft on the same day in 2019.

[5] Afanador was arrested in Lawrence County on November 4, 2019, and charged with Level 2 felony dealing in methamphetamine,[3] Level 3 felony possession of methamphetamine,[4] and Level 6 felony possession of a syringe[5] under cause number 47D01-1911-F2-002116 ("Cause 2116").[6] The State also filed notice of its intent to seek a habitual offender sentencing enhancement. The trial court eventually released Afanador on his own recognizance to await trial.

[6] During the early morning hours of August 6, 2020, Sergeant Lonnie Johnson of the Lawrence County Sheriff's Department responded to a complaint that a suspicious vehicle was parked outside a house on State Road 150 in Bedford, Indiana. The homeowner called 911 after she saw someone exit the vehicle and knock on her door. She did not answer the door, and the person walked back to the vehicle and started honking the horn. Sergeant Johnson found Afanador driving the suspicious vehicle. Sergeant Johnson learned the vehicle had been reported stolen from a Bloomington parking lot two days earlier, and he arrested Afanador. Security camera footage from the parking lot confirmed that someone who looked like Afanador had stolen the vehicle.

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[3] Ind. Code § 35-48-4-1.1.

[4] Ind. Code § 35-48-4-6.1.

[5] Ind. Code § 16-42-19-18.

[6] While the State also initially charged Afanador with Class B misdemeanor possession of marijuana pursuant to Indiana Code section 35-48-4-11, that charge was subsequently dismissed.

[7] The State charged Afanador with Level 6 felony automobile theft under cause number 47D01-2008-F5-001189 ("Cause 1189"). The State also alleged the offense should be elevated to a Level 5 felony pursuant to Indiana Code section 35-43-4-2(2)(C) because of Afanador's Predicate-3 Auto Theft conviction. The State then filed notice of its intent to seek a habitual offender sentencing enhancement.

[8] Back in Cause 2116, the trial court held a four-day jury trial from November 30, 2020, to December 3, 2020. At the conclusion of the trial, the jury returned a verdict of guilty on all counts. The State moved to dismiss its allegation that Afanador qualified for the habitual offender sentencing enhancement in Cause 2116, and the trial court dismissed the charge.

[9] Then, in Cause 1189, the trial court held a three-day jury trial from March 29, 2021, to March 31, 2021. The jury found Afanador guilty of Level 6 felony automobile theft. Afanador waived his right to a jury trial on each of the enhancements. The State submitted a certified copy of the judgment of conviction for Predicate-3 Auto Theft, which the trial court used to elevate Afanador's instant automobile theft conviction to a Level 5 felony. As to the habitual offender allegation, the State submitted two judgments of conviction. The first was for Predicate-1 Forgery and the second was for Predicate-2 Handgun. The trial court found Afanador to be a habitual offender.

[10] The trial court held a combined sentencing hearing for Cause 2116 and Cause 1189 on April 27, 2021. In Cause 2116, the trial court sentenced Afanador to a

term of twenty-two years for his Level 2 felony dealing methamphetamine conviction, with two years suspended to probation, and a concurrent term of two-and-a-half years for his Level 6 felony illegal possession of a syringe conviction.[7] In Cause 1189, the trial court sentenced Afanador to a term of five years for his Level 5 felony automobile theft conviction, and the trial court enhanced Afanador's sentence by a period of four years because of the habitual offender finding. The trial court ordered Afanador's sentence in Cause 1189 to run consecutive to his sentence in Cause 2116, for an aggregate term of thirty-one years, with two years suspended to probation.

Discussion and Decision

[11] Afanador's arguments herein concern only Cause 1189, in which his conviction of automobile theft was elevated to a Level 5 felony and his sentence therefor was enhanced by a habitual offender finding. He argues he received an impermissible double enhancement because his Predicate-2 Handgun conviction and his Predicate-3 Auto Theft conviction are not "unrelated" in the context of Indiana's enhancement law and, therefore, the convictions cannot be used simultaneously to support two sentence enhancements on a single conviction. (Appellant's Br. at 13.) The State asserts the two sentence enhancements were permissible because "[t]he two prior convictions Afanador

[7] The trial court vacated Afanador's conviction of possession of methamphetamine because of double jeopardy concerns.

argues were related were based on crimes committed five years apart, charged under two different cause numbers, and had none of the same operative facts." (Appellee's Br. at 7.)

[12] Because the parties present a pure question of law, we review the trial court's ruling de novo. *Ramirez v. Wilson*, 901 N.E.2d 1, 2 (Ind. Ct. App. 2009), *trans. denied*. We thus review the issue without affording any deference to the trial court's decision. *Shaffer v. State*, 795 N.E.2d 1072, 1076 (Ind. Ct. App. 2003). The General Assembly bears primary responsibility for determining appropriate criminal penalties, *Hazelwood v. State*, 3 N.E.3d 39, 42 (Ind. Ct. App. 2014), *reh'g denied*, 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) ("*Dye-I*"), *aff'd on reh'g*, 984 N.E.2d 625 (Ind. 2013). Indiana's general habitual offender statute states:

> The state may seek to have a person sentenced as a habitual offender for a felony by alleging . . . the person has accumulated the required number of prior unrelated felony convictions in accordance with this section.

Ind. Code § 35-50-2-8(a). "Specialized habitual offender statutes authorize sentencing enhancements where the defendant has been convicted of a certain number of similar offenses." *Dye I,* 972 N.E.2d at 857. Progressive-penalty statutes "elevate the level of an offense (with a correspondingly enhanced sentence) where the defendant previously has been convicted of a particular

offense." *Id.* A double enhancement issue comes about when "more than one of these statutes is applied to the defendant at the same time." *Id.* Double enhancements are impermissible "unless there is explicit legislative direction authorizing them." *Id.* at 856.

[13] In this case, Afanador's Level 6 felony auto theft conviction was elevated to a Level 5 felony by a progressive-penalty statute and then his sentence was enhanced by the habitual offender finding. Afanador's argument centers around the text of the general habitual offender statute, which provides that if the State seeks a habitual offender sentencing enhancement for a person convicted of a Level 5 felony, such as Afanador, the State must prove the person has two prior "unrelated" felony convictions. Ind. Code § 35-50-2-8(c). To determine whether convictions are "unrelated" for purposes of the general habitual offender enhancement, the statute directs:

> A person has accumulated two (2) or three (3) prior unrelated felony convictions for purposes of this section only if:
>
> (1) the second prior unrelated felony conviction was committed after commission of and sentencing for the first prior unrelated felony conviction;
>
> (2) the offense for which the state seeks to have the person sentenced as a habitual offender was committed after commission of and sentencing for the second prior unrelated felony conviction; and
>
> (3) for a conviction requiring proof of three (3) prior unrelated felonies, the third prior unrelated felony conviction was

> committed after commission of and sentencing for the second prior unrelated felony conviction.

Ind. Code § 35-50-2-8(f). Thus, for two convictions to qualify as unrelated felonies under the general habitual offender enhancement statute, "[t]he commission of the second felony must be subsequent to the sentencing of the first and the sentencing for the second felony must precede the commission of the principal felony for which the enhanced sentence is being sought." *Toney v. State*, 715 N.E.2d 367, 369 (Ind. 1999).

[14] For example, herein, the State alleged Afanador had three prior felonies: Predicate-1 Forgery, Predicate-2 Handgun, and Predicate-3 Auto Theft. Afanador committed, was convicted of, and received his sentence for Predicate-1 Forgery a decade before he committed either Predicate-2 Handgun or Predicate-3 Auto Theft. Therefore, Predicate-1 Forgery is "unrelated" as that term is defined in the habitual offender statute to both Predicate-2 Handgun and Predicate-3 Auto Theft. *See* Ind. Code § 35-50-2-8(f). The same cannot be said, however, about Predicate-2 Handgun and Predicate-3 Auto Theft because although Afanador committed Predicate-2 Handgun five years before he committed Predicate-3 Auto Theft, he was convicted of and sentenced for the two crimes on the same day. Consequently, the two offenses are not "unrelated" prior felonies pursuant to the definition provided in the habitual offender statute. *See id*.

[15] Accordingly, the State would be prohibited by the plain language of the general habitual offender statute from using both Predicate-2 Handgun and Predicate-3

Auto Theft to support Afanador's general habitual offender enhancement. *See Jackson v. State*, 546 N.E.2d 846, 847 (Ind. 1989) (habitual offender enhancement invalid when State failed to prove second predicate felony occurred after sentencing for the first predicate felony). The State did not, however, use Predicate-2 Handgun and Predicate-3 Auto Theft to support Afanador's general habitual offender enhancement. Instead, the State used Predicate-3 Auto Theft to support enhancing Afanador's sentence under the progressive penalty statute for repeat automobile thieves, and the State used Predicate-2 Handgun to support enhancing Afanador's sentence under the general habitual offender statute. Afanador nonetheless argues this was also impermissible.

[16] The State argues Afanador is incorrect that the definition of "unrelated" from the habitual offender statute controls the meaning of unrelated in the double enhancement context. According to the State, convictions are unrelated for double enhancement purposes if they were not part of the same *res gestae*. The State's argument is based on language from our Indiana Supreme Court in *Dye II*, 984 N.E.2d 635. To explain, we begin with *Dye I*.

[17] In *Dye-I*, the State charged Dye with unlawful possession of a firearm by a serious violent felon ("SVF"). 927 N.E.2d at 855. The State alleged Dye was a SVF by virtue of a 1998 conviction of attempted battery with a deadly weapon, and the State also alleged Dye was a habitual offender by virtue of a 1998 conviction of possession of a handgun within 1,000 feet of a school and a 1993 conviction of forgery. *Id*. at 855-56. The trial court agreed with the State, but

our Indiana Supreme Court subsequently vacated the habitual offender sentence enhancement. *Id*. at 858. The State then filed a petition for rehearing, which the Supreme Court granted. *Dye-II*, 984 N.E.2d at 627.

[18] On rehearing, the Court explained, "[a]lthough the habitual offender adjudication was not based on the same felony used to establish that Dye was a serious violent felon, it was based on a felony that was part of the same *res gestae*.[8]" *Id*. at 629 (italics in original). Dye's 1998 conviction of attempted battery with a deadly weapon and his 1998 conviction of possession of a handgun within 1,000 feet of a school were part of the same *res gestae* because they both stemmed from a single confrontation between Dye and an Elkhart police officer. *Id*. The Court articulated:

> Although *res gestae* is a term regularly used in Indiana's common law of evidence to denote facts that are part of the story of a particular crime, it also includes acts that are part of an uninterrupted transaction. And a crime that is continuous in its purpose and objective is deemed to be a single uninterrupted transaction.

Id. (internal quotation marks and citations omitted; italics in original). Thus, the Court held "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

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[8] "*Res gestae*" is defined as: "The events at issue, or other events contemporaneous with them." RES GESTAE, Black's Law Dictionary (11th ed. 2019).

source of the conviction used to prove Dye was a serious violent felon." *Id*. at 630 (italics in original) (cleaned up).

[19] In so holding, the Court cited with approval the observation of the dissenting Court of Appeals Judge who noted: "it is incongruous to hold that 'two offenses . . . [ ] so related they could not be used together for an habitual offender enhancement are, at the same time, so *unrelated that* they may support a double enhancement in the form of an SVF count and an habitual offender enhancement." *Id*. (quoting *Dye v. State*, 956 N.E.2d 1165, 1175 (Ind. Ct. App. 2011) (May, J., dissenting) (emphasis in original), *trans. granted*, *vacated*, 963 N.E.2d 1115 (Ind. 2012)). Afanador relies on this quotation to argue that because Afanador's Predicate-2 Handgun conviction and his Predicate-3 Auto Theft conviction cannot both be used to support a sentence enhancement under the general habitual offender statute, *see* Ind. Code § 35-50-2-8(f) (defining two crimes as "unrelated" if the second occurred after sentencing for the first), the use of both convictions to support simultaneous sentence enhancements resulted in an impermissible double enhancement of Afanador's sentence.

[20] However, Afanador's argument takes our Supreme Court's holding in *Dye-II* a step too far. For one, we note Indiana Code section 35-50-2-8(f) expressly states its definition of "unrelated" is intended for "purposes of this section"—the general habitual offender statute— "only." Yet, Afanador asks us to expand that definition beyond the general habitual offender context and apply it to all double enhancements. Second, it ignores the primary focus of *Dye-II*, which was that two offenses committed in the same episode of criminal conduct

could not be used to support double enhancement. 984 N.E.2d at 630; *see also Woodruff v. State*, 80 N.E.3d 216, 218 (Ind. Ct. App. 2017) (explaining *Dye-II* stands for the proposition that "there is a double enhancement issue when more than one of the types of statutes that authorize enhancements for repeat offenders are applied to the same proof of an 'uninterrupted transaction'"), *trans. denied*.

[21] Because we reject Afanador's application of the language of the habitual offender statute to the double enhancement context, we hold the trial court did not err in using Afanador's Predicate-3 Auto Theft conviction to enhance his offense under a progressive-penalty statute and his Predicate-2 Handgun conviction to enhance his sentence pursuant to Indiana's general habitual offender statute. The two predicate offenses are not part of the same *res gestae*. They occurred on different days, involved different victims, and were assigned separate cause numbers. (*See* App. Vol. III at 224-25 (information for Predicate-2 Handgun) & 192 (information for Predicate-3 Auto Theft)). The offenses share the same date of conviction but they are not part of the same *res gestae*. Consequently, we affirm Afanador's sentence in all respects. *See Light v. State*, 28 N.E.3d 1106, 1109 (Ind. Ct. App. 2015) (holding it was not an impermissible double enhancement for the trial court to both elevate defendant's operating a motor vehicle while privileges are forfeited for life offense to a Class C felony pursuant to a progressive penalty statute and enhance his sentence pursuant to Indiana's habitual substance offender statute).

Conclusion

[22] The plain language of the general habitual offender statute prohibited the State from using Afanador's Predicate-2 Handgun conviction and his Predicate-3 Auto Theft conviction to support an enhancement under that statute. However, the State was not prohibited from using the two offenses to support separate enhancements under different recidivist offender statutes because the two crimes were not part of the same *res gestae*. Therefore, the trial court did not err in using the Predicate-3 Auto Theft conviction to support elevating Afanador's automobile theft conviction to a Level 5 felony under the progressive penalty statute for repeat automobile thieves and relying upon Afanador's Predicate-2 Handgun conviction to enhance his sentence pursuant to Indiana's general habitual offender statute. Consequently, we affirm the trial court.

[23] Affirmed.

Vaidik, J., and Molter, J., concur.