MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Gary Wayne Lafferty,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

September 14, 2023

Court of Appeals Case No. 23A-CR-10

Appeal from the Henry Circuit Court 3

The Honorable David L. McCord, Judges

Trial Court Cause No. 33C03-2112-F6-471

Memorandum Decision by Judge Felix
Judges Crone and Brown concur.

Felix, Judge.

Statement of the Case

[1] Gary Wayne Lafferty appeals his sentence following his guilty plea to operating a vehicle while intoxicated ("OVWI"), enhanced to a Level 6 felony, and his admission to being an habitual vehicular substance offender ("HVSO"). He argues that the trial court erred by imposing the HVSO enhancement as a separate count. We affirm the sentence but remand for the correction of technical errors on the abstract of judgment.

Facts and Procedural History

[2] On December 14, 2021, the State charged Lafferty in a 5-count charging information as follows: Count 1, intimidation, a Class A misdemeanor; Count 2, resisting law enforcement, a Class A misdemeanor; Count 3, operating a vehicle while intoxicated endangering a person, a Class A misdemeanor; Count 4, public intoxication, a Class B misdemeanor; and Count 5, disorderly conduct, a Class B misdemeanor. (App. Vol. II at 11-13.) The information also included unnumbered counts raising the OVWI to a Level 6 felony and alleged Lafferty to be an HVSO under Indiana Code Section 9-30-15.5-2. (*Id.* at 11-13, 37.)

[3] Pursuant to a plea agreement, Lafferty pled guilty to OVWI endangering a person, a Level 6 felony, and admitted he is an HVSO. (App. Vol. II at 62.) The plea agreement also provides in relevant part:

> [T]he State agrees that if the Court accepts this agreement, the Court shall sentence defendant as follows:
>
> Count 3 and Operation a Vehicle While Intoxicated Enhanced to a Level 6 Felony – Court costs. $200.00 Counter-measure fee. The state [sic] recommends the Defendant be sentenced to two (2) years to the Indiana Department of Corrections [sic].
>
> Habitual Vehicular Substance Offender – The state [sic] recommends the Defendant be sentenced to four (4) years to the Indiana Department of Corrections [sic].
>
> The Court will be free to assess any sentence within the range of possibilities greater than the recommended sentence. The parties agree that the additional sentence over the recommended sentence will be suspended.
>
> The Defendant will be free to advocate a lesser sentence and the Court will be free to impose a sentence lesser than the State's recommended sentence; and may use any sentence options to include imprisonment, treatment as a Class A Misdemeanor, direct commitment to Community Corrections to include in-home detention or work release, or suspend any or all with formal probation.

[4] *Id.*

[5] At the sentencing hearing, the trial court sentenced Lafferty to two years for OVWI endangering a person, a Level 6 felony, and added six years for the HVSO enhancement with two years suspended to probation to be served consecutively to a sentence imposed in another cause. (App. Vol. II at 95.)

[6] Other than showing the HVSO as a separate count, the amended Abstract of Judgment correctly reflects the sentence. (App. Vol. II at 103). Lafferty now appeals his sentence.

Discussion and Decision

[7] Under I.C. Section 9-30-15.5-2, "[t]he court shall sentence a person found to be an 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). The "to be added" language in the HVSO statute is equivalent to the "attach" language in Indiana's habitual offender statute, which provides in relevant part:

> Habitual offender is a status that results in an enhanced sentence. It is not a separate crime and does not result in a consecutive sentence. The court shall attach the habitual offender enhancement to the felony conviction with the highest sentence imposed and specify which felony count is being enhanced.

I.C. § 35-50-2-8(j).

[8] Here, Lafferty argues that the trial court erred by sentencing him for the HVSO enhancement as a separate count or offense instead of using the HVSO status sentence to enhance the sentence for the OVWI conviction. Lafferty is correct that habitual vehicular substance offender status "does not constitute a separate crime nor result in a separate sentence." Appellant's Br. at 8 (quoting *Kilgore v.*

State, 922 N.E.2d 114, 120 (Ind. Ct. App. 2010) (internal quotation marks omitted), *trans. denied*). However, as described in his Statement of the Facts, Lafferty identifies and cites to the amended Abstract of Judgment to support his allegation that the trial court erred by sentencing on the HVSO enhancement as a separate offense or count. *Id.* at 7.

[9] We agree with the State that the amended Abstract of Judgment is not our focus in this sentencing appeal. In such cases, we review the sentencing order as opposed to the abstract if the two differ:

> As a general rule, when we are faced with a discrepancy between a sentencing order and an abstract of judgment, we conclude that the sentencing statement rather than the abstract of judgment controls. This is so because an abstract of judgment is distinct from a written sentencing order and is not the "judgment of conviction." *Robinson v. State*, 805 N.E.2d 783, 794 (Ind. 2004). It is a "form issued by the Department of Correction and completed by trial judges for the convenience of the Department." *Id.* at 792. In contrast, a valid written judgment meets the statutory criteria of Indiana Code section 35-38-3-2.

McElroy v. State, 865 N.E.2d 584, 588-89 (Ind. 2007).

[10] An abstract of judgment is a "form issued by the [DOC] and completed by trial judges for the convenience of the Department." *Robinson v. State*, 805 N.E.2d at 794. When the sentencing court's intent is unambiguous, it is appropriate to remand for correction of clerical errors. *Skipworth v. State*, 68 N.E.3d 589, 593 (Ind. Ct. App. 2017).

[11] Here, the amended Abstract of Judgment incorrectly identifies the HVSO enhancement as a separate count or offense with a separate sentence to be served consecutively to the OVWI sentence, App. Vol. II at 103, but the sentencing order from which Lafferty appeals correctly sets out the proper sentence: two years for OVWI, a Level 6 felony, plus an additional six years for the HVSO enhancement with two years of the enhancement suspended, *Id.* at 95. The sentence is also to be served consecutively to a separate cause. *Id.* Therefore, we affirm Lafferty's sentence.

[12] As Lafferty notes on appeal, the amended abstract identifies the sentence for OVWI as Count 6 while the sentencing order identifies the OVWI offense as Count 3 (with the enhancement to a Level 6 felony as alleged in the unnumbered count on the information). "Enhancements should NOT be entered as separate counts on the case, but should be answered within the Sentencing section of the Abstract of Judgment." INcite Offender Mgmt. Sys./Abstract of Judgment Application User Manual at 16 (July 1, 2022 ed.). Nevertheless, because the sentencing order controls, *see McElroy v. State*, 865 N.E.2d at 588, any error in the abstract is not a basis for appeal.

[13] The inconsistent reference to the count number for the underlying offense and the erroneous use of a count number for the HVSO enhancement are merely technical errors. We affirm the sentencing order but remand for correction of the abstract of judgment in accordance with this opinion.

[14] Affirmed and remanded with instructions.

Crone, J., and Brown, J., concur.