

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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### ATTORNEY FOR APPELLANT

Jan B. Berg  
Indianapolis, Indiana

### ATTORNEYS FOR APPELLEE

Theodore E. Rokita  
Attorney General of Indiana  
Indianapolis, Indiana

J.T. Whitehead  
Deputy Attorney General  
Indianapolis, Indiana

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## IN THE COURT OF APPEALS OF INDIANA

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David Didier,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff*

October 12, 2022

Court of Appeals Case No.  
22A-CR-573

Appeal from the Marion Superior  
Court

The Honorable Jennifer Harrison,  
Judge

Trial Court Cause No.  
49D20-1907-F4-029236

**May, Judge.**

[1] David Didier appeals the trial court’s enhancement of his sentence for Level 4 felony unlawful possession of a firearm by a serious violent felon (“SVF-PF”)<sup>1</sup> after finding him to be a habitual offender.<sup>2</sup> He raises two issues for our review, which we consolidate and restate as whether the trial court erred as a matter of law by using two of Didier’s past felony convictions to find the habitual offender enhancement applied to him. We affirm.

## Facts and Procedural History

[2] In February 1997, Didier was convicted of Class C felony burglary<sup>3</sup> under cause number 49G01-9608-CF-112363 (“Cause 112363”). In May 2003, Didier was convicted of Class C felony battery resulting in serious bodily injury<sup>4</sup> under cause number 49G05-0203-FC-060928 (“Cause 060928”). As a result of this felony, Didier qualified as a serious violent felon (“SVF”).<sup>5</sup> In April 2018, Didier was convicted of Level 4 felony SVF-PF under cause number 49G20-1710-F4-040008 (“Cause 040008”). As part of Didier’s sentence in Cause 040008, the trial court ordered him to serve two years on home detention through Marion County Community Corrections (MCCC). As conditions of home detention, Didier agreed to consent to unannounced searches of his

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<sup>1</sup> Ind. Code § 35-47-4-5(c) (2020).

<sup>2</sup> Ind. Code § 35-50-2-8 (2017).

<sup>3</sup> Ind. Code § 35-43-2-1 (1982).

<sup>4</sup> Ind. Code § 35-42-2-01 (2001).

<sup>5</sup> Ind. Code § 35-47-4-5(b)(4)(A) (2020).

residence to ensure his compliance with the terms of home detention, to abstain from drug use, and to not possess any firearms or ammunition.

[3] On July 25, 2019, MCCC staff, accompanied by officers from the Indianapolis Metropolitan Police Department, searched Didier's residence. During the search, officers discovered a handgun and methamphetamine, and the officers arrested Didier. On July 26, 2019, the State charged Didier under cause number 49G20-1907-F4-029236 ("Cause 029236") with Level 4 felony SVF-PF, Level 4 felony possession of methamphetamine,<sup>6</sup> and Level 6 felony escape.<sup>7</sup> The State also filed an information alleging Didier qualified for a habitual offender sentencing enhancement. In addition, the State moved in Cause 040008 to revoke Didier's placement in community corrections.

[4] In early February 2022, Didier and the State entered into a plea agreement in Cause 029236 in which Didier agreed to plead guilty to Level 4 felony SVF-PF, and in exchange, the State agreed to dismiss the charges of Level 4 possession of methamphetamine and Level 6 felony escape. With respect to sentence, the plea agreement stated:

**Count I: Total sentence of four (4) years, all terms open to argument. Firearms recovered in this case to be destroyed.**

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<sup>6</sup> Ind. Code § 35-48-4-6.1 (2014).

<sup>7</sup> Ind. Code § 35-44.1-3-4(b) (2014).

**\$200.00 “safe school” fee mandated by Indiana Code 33-37-5-18. All other terms OPEN to argument by the parties.**

**Habitual Offender Enhancement to be argued to the Bench:  
Parties stipulate to Prior Convictions under Cause No.(s).: 49G01-9608-CF-112363 and 49G20-1710-F4-040008, as well as Defendant’s identification, but leave relevance and appropriateness of application OPEN to argument.**

(App. Vol. II at 84) (emphases and formatting in original).

- [5] The trial court then held a hearing on February 28, 2022, in which Didier pled guilty pursuant to the terms of the plea agreement, and the court held argument regarding whether Didier qualified for the habitual offender enhancement. Didier argued Cause 040008 was related to the instant offense, and therefore, the State could not rely upon the conviction in Cause 040008 to enhance Didier’s sentence. The trial court rejected Didier’s argument and found Didier qualified for the habitual offender enhancement. In Cause 029236, the trial court sentenced Didier to a term of four years executed in the Indiana Department of Correction, and the trial court enhanced the sentence by an additional eight years because of the habitual offender enhancement, for a total sentence of twelve years. The trial court also revoked Didier’s community corrections placement in Cause 040008 and ordered Didier to serve the remaining six years of that sentence in the Indiana Department of Correction.

## Discussion and Decision

- [6] Didier argues the trial court erred as a matter of law in finding he qualified for the habitual offender enhancement. He contends the trial court's use of Cause 112363 as a predicate felony was erroneous because he was a juvenile when he committed the felonious act, even though he was subsequently waived to adult court and convicted. He also argues the trial court's use of Cause 040008 as a predicate felony to support the habitual offender enhancement in the instant case resulted in an impermissible double enhancement because the two cases are not "unrelated" as required by the habitual offender statute. *See* Ind. Code § 35-50-2-8. Because Didier presents pure questions of law, we review the trial court's ruling de novo. *See Ramirez v. Wilson*, 901 N.E.2d 1, 2 (Ind. Ct. App. 2009) (applying de novo review to questions of law), *trans. denied*.
- [7] There are three types of statutes used to enhance the penalties imposed on recidivist offenders: progressive-penalty statutes, specialized habitual offender statutes, and the general habitual offender statute. *Afanador v. State*, 181 N.E.3d 462, 466 (Ind. Ct. App. 2022), *trans. denied*. "A double enhancement issue comes about when more than one of these statutes is applied to the defendant at the same time. Double enhancements are impermissible unless there is explicit legislative direction authorizing them." *Id.* (internal citation and quotation marks omitted). However, Didier's sentence was enhanced only under the general habitual offender statute, Indiana Code 35-50-2-8, and therefore, the issue before us is whether he qualified for an enhanced sentence pursuant to that statute.

[8] Indiana Code section 35-50-2-8(b) provides:

A person convicted of murder or of a Level 1 through Level 4 felony is a habitual offender if the state proves beyond a reasonable doubt that:

(1) the person has been convicted of two (2) prior unrelated felonies; and

(2) at least one (1) of the prior unrelated felonies is not a Level 6 felony or a Class D felony.

Indiana Code section 35-50-2-8(f) clarifies how to calculate unrelated felonies for the purpose of the habitual offender enhancement:

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.

[9] The first predicate felony the trial court relied upon to support the habitual offender finding was Didier's conviction of Class C felony burglary in Cause 112363. The burglary charge started as a delinquency petition, but following a waiver hearing, the juvenile court waived Didier to adult court. Didier argues his "[b]urglary conviction for acts that occurred when Didier was 17 years old can't be used to support a habitual offender determination." (Appellant's Br. at 12.) However, we faced a similar situation in *Polk v. State*, 783 N.E.2d 1253 (Ind. Ct. App. 2003), *trans. denied*. In *Polk*, the defendant was a juvenile when he committed the acts that formed the basis of the predicate felonies supporting the habitual offender finding, but in each case, he was waived to adult court and pled guilty. *Id.* at 1261. We rejected Polk's argument that his adult convictions for acts committed as a juvenile could not be predicate felonies because he was asking us to exempt a class of offenses that the legislature had not chosen to exempt from being predicate felonies in the habitual offender statute. *Id.* at 1262. Likewise, Didier's conviction in Cause 112363 is not exempted from being used as a predicate felony for habitual offender enhancement purposes.

[10] The second predicate felony the trial court relied upon to support the habitual offender finding was Didier's conviction of Level 4 felony SVF-PF in Cause 040008. Didier argues the trial court erred in relying on this predicate felony to support the habitual offender finding because Cause 040008 and the instant case

arose from the same *res gestae*.<sup>8</sup> In *Mills v. State*, our Indiana Supreme Court held that “a defendant convicted of unlawful possession of a firearm by a serious violent felon may not have his or her sentence enhanced under the general habitual offender statute by proof of the same felony used to establish that the defendant was a ‘serious violent felon.’” 868 N.E.2d 446, 452 (Ind. 2007). In *Dye v. State*, our Indiana Supreme Court clarified that this rule also applied to felonies that were part of the same *res gestae* as the offense that resulted in the defendant’s categorization as a SVF. 984 N.E.2d 625, 630 (Ind. 2013) (“In sum, 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.”). The Court explained:

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.* at 629 (internal citation, quotation marks, and brackets omitted).

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<sup>8</sup> “Res gestae” is defined as: “The events at issue, or other events contemporaneous with them.” RES GESTAE, Black’s Law Dictionary (11<sup>th</sup> ed. 2019).



[11] Initially, we note the factual distinctions between the instant offense and Didier's offense in Cause 040008. Critically, the two offenses are separated from each other in time. As we explained in *Afanador*,

for two convictions to qualify as unrelated felonies under the general habitual offender 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.”

181 N.E.3d at 467 (quoting *Toney v. State*, 715 N.E.2d 367, 369 (Ind. 1999)) (brackets in *Afanador*). While Didier was on probation in Cause 040008 when he committed the instant offense, the focus of our analysis for habitual offender purposes is when the predicate criminal offenses were committed and when conviction and sentence for each offense was entered. *See Gardner v. State*, 641 N.E.2d 641, 646 (Ind. Ct. App. 1994) (holding sequence of offenses and convictions supported habitual offender finding and testimony of probation officer adequately identified defendant). Didier committed Level 4 felony SVF-PF on October 14, 2017. He was convicted of that offense in Cause 040008 and sentenced on April 24, 2018. Didier committed the instant offense on July 25, 2019, and he was sentenced for the offense on February 28, 2022. The offenses represent different instances in which Didier illegally possessed a firearm, the offenses occurred on different days, and the State charged the offenses under separate cause numbers. Thus, the two offenses were not part of the same *res gestae*. *See Afanador*, 181 N.E.3d at 469 (holding two offenses were not part of

the same res gestae when they occurred on different days, involved different victims, and were assigned separate cause numbers).

[12] Both Didier’s convictions, herein and in Cause 040008, of SVF-PF relied on Didier’s conviction of battery resulting in serious bodily injury under Cause 060928 to categorize Didier as a SVF. However, we do not see this fact as rendering the two offenses related for purposes of the general habitual offender statute. In *Tuell v. State*, we held the State could pursue a sentence enhancement under a progressive penalty statute premised on one of the defendant’s previous convictions for driving after his privileges had been suspended for life, and the State could pursue a second sentence enhancement under the general habitual offender statute premised on the defendant’s three other convictions for driving after his privileges had been suspended for life. 118 N.E.3d 33, 38 (Ind. Ct. App. 2019). If a lifetime driving suspension does not render multiple convictions for separate acts of driving after privileges have been suspended for life related for sentence enhancement purposes, we do not see why a defendant’s SVF status should render his convictions for separate acts of possessing a firearm while a SVF related for purposes of the general habitual offender statute.

[13] Didier also argues: “In the chronological case summary, it is noted that [Cause 040008] was consolidated with the current case. Once that merger occurred, [Cause 040008] was no longer a prior unrelated felony.” (Appellant’s Br. at 10.) However, this argument misconstrues what it means for cases to be “unrelated” for purposes of the habitual offender statute. As the trial court

explained during the February 28, 2022, hearing, such consolidation was for the purpose of judicial economy. The trial court noted: “[W]e try to move all of [a defendant’s] cases into one courtroom so they become related in a different definition sense than what related means under the habitual law.” (Vol. II at 46.) As we observed in *Tuell*, “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.’*” 118 N.E.3d at 37 (emphasis in original). While Didier violated the same criminal statute in both the instant case and Cause 040008, the offenses were separate criminal transactions. Even though the instant case was consolidated with post-judgment proceedings in Cause 040008, Didier’s commission of his offense in the instant case came after he was sentenced in Cause 040008, and therefore, the two offenses are not “related” as that term is used in Indiana Code section 35-50-2-8(f). We therefore affirm the trial court. *See Shorter v. State*, 144 N.E.3d 829, 842 (Ind. Ct. App. 2020) (holding trial court did not err in finding defendant could be found both an SVF and a habitual offender because “the SVF conviction and the habitual-offender enhancement were based on unrelated predicate felonies”), *trans. denied*.

## Conclusion

[14] Even though Didier was a juvenile when he committed the act in Cause 112363, he was waived from juvenile court to adult court and convicted. Therefore, the conviction qualified as a predicate offense supporting the

habitual offender determination. In addition, Didier's offense in the instant case does not arise from the same *res gestae* as his offense in Cause 040008. The two offenses represent two different criminal transactions, and thus, Didier's conviction in Cause 040008 may be used to support the finding that he is a habitual offender in the instant case. We affirm the trial court's finding that Didier qualified for the habitual offender enhancement.

[15] Affirmed.

Crone, J., and Weissmann, J., concur.