

## 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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## IN THE COURT OF APPEALS OF INDIANA

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Travis Andrew Swiderek,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

August 8, 2022

Court of Appeals Case No.  
21A-CR-2920

Appeal from the  
Fayette Circuit Court

The Honorable  
J. Steven Cox, Special Judge

Trial Court Cause No.  
21C01-1910-F4-750

**Molter, Judge.**

- [1] Travis Andrew Swiderek was charged with twenty-six counts, including multiple charges of Level 5 child exploitation, Level 5 felony possession of child

pornography, and Level 6 felony voyeurism. He later pleaded guilty to three counts of Level 5 felony child exploitation and two counts of Level 5 felony possession of child pornography with the sentencing open to the trial court's discretion. The trial court sentenced Swiderek to five years on each of his convictions with all of the sentences to run consecutively for an aggregate sentence of twenty-five years.

- [2] On appeal, Swiderek argues his sentence violated Indiana's prohibition against double jeopardy because he was given consecutive sentences. But a double jeopardy challenge is a challenge to the underlying conviction, and our Supreme Court has held that a defendant may not appeal a conviction based on a guilty plea. We therefore dismiss this appeal.

### **Facts and Procedural History**

- [3] Between August 2016, and June 2018, Swiderek used a hidden camera in his bathroom to capture video images of three victims, all twelve or thirteen years old, as they were naked in the shower. Each image was captured with a different time stamp and involved a different victim. Between July 1, 2016, and February 14, 2019, Swiderek was in possession of six images on a USB drive showing images of sexual conduct between different children and adult men. During that same time period, Swiderek possessed on his laptop hundreds of images depicting children with their genitals exposed, children masturbating, children submitting to intercourse with adult men, and children performing oral sex on adult men. Some of these images were of children that appeared to be significantly younger than twelve years of age.

- [4] The State charged Swiderek with twenty-six separate counts as a result. Counts I through XII charged Swiderek with Level 5 felony child exploitation. Counts XIII through XVIII charged him with Level 5 felony possession of child pornography. Counts XIX through XXVI charged Swiderek with Level 6 felony voyeurism.
- [5] Swiderek eventually pleaded guilty to three counts of Level 5 felony child exploitation (Counts I, II, and VIII) and two counts of Level 5 felony possession of child pornography (Counts XIII and VIII). At the change of plea hearing, the trial court advised Swiderek that by pleading guilty, he would be giving up his right to directly appeal his convictions. At a later sentencing hearing, after hearing evidence and argument, the trial court sentenced Swiderek to five years for each of his five convictions to be served consecutively for an aggregate sentence of twenty-five years, with three years suspended to probation. Swiderek now appeals.

## **Discussion and Decision**

- [6] Swiderek argues his consecutive sentences for Counts I, II, and VIII (child exploitation) violate the Indiana Constitution's prohibition against double jeopardy because, he contends, his conduct in placing a hidden camera in the shower was a single criminal act or transaction violating a single statute, which cannot result in multiple convictions under *Powell v. State*, 151 N.E.3d 256 (Ind. 2020). Likewise, he argues the consecutive sentences for Counts XIII and XIV (child pornography) violate double jeopardy because he contends that conduct also reflects a single criminal act violating a single statute.

[7] However, by pleading guilty, Swiderek waived his right to assert a double jeopardy challenge through a direct appeal. Our Supreme Court has made it clear that “one consequence of pleading guilty is restriction of the ability to challenge the conviction on direct appeal.” *Tumulty v. State*, 666 N.E.2d 394, 395 (Ind. 1996). “A conviction based upon a guilty plea may not be challenged by motion to correct errors and direct appeal.” *Id.* Instead, “[s]eeking post-conviction relief pursuant to Indiana Post Conviction Rule 1 is the proper vehicle for challenging the validity of a guilty plea.” *Collins v. State*, 740 N.E.2d 143, 146 (Ind. Ct. App. 2000) (citing *Jones v. State*, 675 N.E.2d 1084, 1090 (Ind. 1996)).

[8] It makes no difference that Swiderek frames his appeal as a challenge to the trial court’s decision to impose consecutive sentences rather than as a challenge to the underlying convictions. Either way, the convictions are what give rise to a double jeopardy issue, and Swiderek cannot directly appeal those convictions. After all, while Swiderek’s complaint is that his sentences are consecutive, the double jeopardy analysis is the same regardless of whether sentences are concurrent or consecutive, and the remedy for a double jeopardy violation is to vacate any underlying duplicative conviction. *See McIntire v. State*, 717 N.E.2d 96, 101 (Ind. 1999) (vacating the defendant’s intimidation and criminal recklessness convictions on double jeopardy grounds where the sentences for those offenses were to be served concurrently with longer sentences for criminal confinement and burglary). He therefore cannot claim on a direct appeal that sentences stemming from his guilty plea violated double jeopardy. *See Games v.*

*State*, 743 N.E.2d 1132, 1135 (Ind. 2001) (“Games waived his right to challenge his sentence on double jeopardy grounds when he entered his plea agreement.”); *Griffin v. State*, 540 N.E.2d 1187, 1188 (Ind. 1989) (explaining that a guilty plea waives an argument that consecutive sentences violate double jeopardy); *Weaver v. State*, No. 21A-CR-2424, 2022 WL 2125758, at \*4 (Ind. Ct. App. June 14, 2022) (“Turning to Weaver’s argument, we note that, just as a defendant can waive the right to raise a double jeopardy claim on direct appeal when he pleads guilty to two offenses which might violate the prohibition against double jeopardy, Weaver, by pleading guilty, has waived his right to challenge the trial court’s imposition of separate sentences for the dealing and the reckless homicide convictions on grounds that dealing is a lesser included offense of reckless homicide.”); *Collins*, 740 N.E.2d at 146 (dismissing a challenge to the trial court’s decision to impose consecutive sentences because that is necessarily a challenge to the underlying convictions).

[9] Because Swiderek’s double jeopardy challenge cannot be brought on direct appeal, we dismiss his appeal without prejudice to his ability to present his claim in a petition for post-conviction relief. See *Yost v. State*, 150 N.E.3d 610, 613 (Ind. Ct. App. 2020).

[10] Dismissed.

Mathias, J., and Brown, J., concur.