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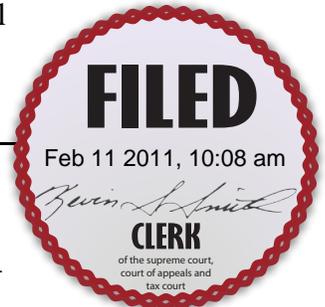
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**IN THE
COURT OF APPEALS OF INDIANA**

KENNETH L. DUCKWORTH, JR.,)

Appellant-Defendant,)

vs.)

No. 35A04-1009-CR-543)

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE HUNTINGTON SUPERIOR COURT
The Honorable Jeffrey R. Heffelfinger, Judge
Cause No. 35D01-1002-FA-56

February 11, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Kenneth L. Duckworth, Jr. appeals the trial court's finding that he is an habitual offender, following his three convictions for dealing in a controlled substance, one as a Class A felony and two as Class B felonies. Duckworth raises a single issue for our review, namely, whether the trial court applied the proper legal standard when it found him to be an habitual offender.

We affirm.

FACTS AND PROCEDURAL HISTORY

In 2005, Duckworth was convicted of possession of a controlled substance, as a Class D felony. In 2006, he pleaded guilty to possession of marijuana, as a Class A misdemeanor. Duckworth did not receive the assistance of counsel before pleading guilty to that misdemeanor.

On July 6, 2010, Duckworth pleaded guilty to three charges for drug dealing. However, he maintained his right to a trial on the State's additional allegation that he was an habitual offender. On July 28, the court held a bench trial on the State's habitual offender allegation, at which the State introduced evidence of Duckworth's 2005 and 2006 convictions. Duckworth admitted the prior convictions but asserted that, because he did not have counsel when he pleaded guilty to the 2006 misdemeanor, that conviction could not be used to support the instant habitual offender allegation. The trial court disagreed, stating:

[A]ttacking the [2006] conviction is a collateral [attack,] which is improper. [T]he proper way to raise it would be through a Petition for Post-Conviction Relief alleging that the guilty plea was invalid. [T]hat is the proper way to . . . attack the underlying conviction. Simply because a

conviction on its face [shows] that he did not have counsel . . . does not make it invalid.

Transcript at 67. The court then found Duckworth to be an habitual offender. This appeal ensued.

DISCUSSION AND DECISION

On appeal, Duckworth argues that the trial court improperly considered his 2006 conviction when it found him to be an habitual offender. As this court has discussed:

Indiana subscribes to the general rule that the “alleged invalidity of predicate felony convictions may not be challenged during habitual offender proceedings when the prior final judgments are regular on their face.” Edwards v. State, 479 N.E.2d 541, 547 (Ind. 1985) (citations omitted).

The habitual offender hearing is not the proper forum to contest the validity of these prior convictions. The proper procedure to challenge this type of predicate conviction is for the accused to set aside the predicate conviction in a direct attack through appeal or post-conviction relief in the court of conviction.

Id. (citation omitted). However, where the conviction is constitutionally invalid, a defendant may challenge the predicate felony [or Class A misdemeanor] conviction in an habitual offender proceeding. Id.

The conviction will be deemed constitutionally invalid only when the following criteria are satisfied:

(1) The court records reflecting the proceedings which led to the prior conviction, on their face, must raise a presumption that the conviction is constitutionally infirm; and (2) [t]he apparent constitutional infirmity must be of the type which undermines both the integrity and reliability of the determination of guilt.

Id. Also, “[w]here the conviction is based upon a guilty plea, the infirmity must affect that part of the guilty plea which constitutes the admission of guilt.” Id.

Maffett v. State, 766 N.E.2d 765, 768-69 (Ind. Ct. App. 2002) (some alterations original), trans. denied.

That is, as the trial court here stated, the general rule is that prior convictions should be challenged through our post-conviction rules. But there is a narrow exception to that rule in habitual offender proceedings if a predicate conviction is based on “clear facial error.” See id.; see also Robinson v. State, 805 N.E.2d 783, 788 (Ind. 2004). It is the defendant’s burden to raise as a defense the asserted invalidity of a prior conviction and of producing evidence in support of his defense. Brown v. State, 683 N.E.2d 600, 605 (Ind. Ct. App. 1997), trans. denied.

Here, the State presented evidence that Duckworth had two prior, drug-related convictions. Duckworth’s only challenge to that evidence is the fact that his 2006 misdemeanor conviction was obtained by a guilty plea, which he entered into without the advice of counsel. But the mere fact that Duckworth did not have counsel when he pleaded guilty does not raise a presumption that that conviction is constitutionally infirm. As the trial court stated, “[s]imply because a conviction on its face [shows] that he did not have counsel . . . does not make it invalid.” Transcript at 67. As such, Duckworth cannot meet his burden of showing that that prior conviction is constitutionally invalid, and the trial court did not err in relying on that conviction to support the habitual offender finding.

Affirmed.

DARDEN, J., and BAILEY, J., concur.