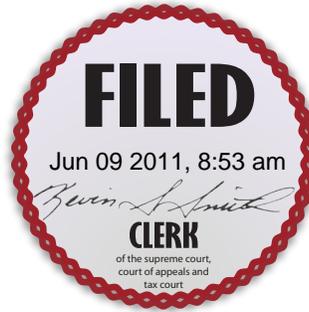


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

BRUCE W. GRAHAM
Graham Law Firm P.C.
Indianapolis, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

WILLIAM D. HARMON JR.,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)
)

No. 79A05-1007-CR-473

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Carl E. Van Dorn, Senior Judge
Cause No. 79D02-0907-FA-15

June 9, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

William D. Harmon Jr. was convicted of one count of conspiracy to commit dealing in a narcotic drug, five counts of dealing in a narcotic drug or cocaine, four counts of possession of a narcotic drug or cocaine, and of being a habitual offender. He asserts that his convictions for dealing and possession violate double jeopardy principles because the offenses involved the same drugs. He also asserts that his conviction for conspiracy to commit dealing violates double jeopardy principles because the same overt acts used to establish the conspiracy conviction were used to establish the dealing convictions. Further, he challenges his habitual offender adjudication on two grounds, claiming that his prior dealing conviction is not “unrelated” to his current dealing convictions as required by Indiana Code Section 35-50-2-8 and that the trial court committed fundamental error in failing to hold an initial hearing on the habitual offender charge. Lastly, he claims that the trial court abused its discretion in admitting evidence of his prior dealing conviction, which the State introduced to rebut his claim of entrapment. On appeal, he argues that the prior conviction is inadmissible because it is too temporally remote to be probative of his predisposition to commit the offense.

The State concedes that Harmon’s double jeopardy claims have merit. We agree that his convictions for possession and conspiracy to commit dealing fall afoul of the prohibition against double jeopardy and vacate those convictions. We uphold his habitual offender conviction, concluding that the requirements of Section 35-50-2-8 are satisfied and that the failure to hold an initial hearing did not result in fundamental error. However, the trial court failed to attach the habitual offender enhancement to a single conviction, and we remand for

it to do so. Finally, we conclude that the temporal remoteness of Harmon's prior conviction goes to the weight, not the admissibility, of the evidence, and therefore the trial court did not abuse its discretion in admitting the evidence. Accordingly, we affirm in part, vacate in part, and remand.

Facts and Procedural History

All relevant events occurred in Lafayette. On July 15, 2009, a confidential informant reported to Lafayette Police Detective Brad Curwick that a person named "Bear" was selling heroin and provided Bear's telephone number. Tr. at 90. Detective Curwick called Bear and arranged to buy \$60 worth of heroin. On the morning of July 16, 2009, Detective Curwick met Bear at Ironwood Apartments, a family housing complex, and Bear sold Detective Curwick .3 grams of heroin.¹

Later that day, Detective Curwick called Bear again and asked whether Bear had more heroin and any crack cocaine. Bear did not have any crack cocaine but said he would try to get some. Bear told the detective to go to Bar Barry Liquor Store and meet Bear's "boy" in a green SUV. *Id.* at 123. Detective Curwick drove to the liquor store and pulled up next to a green SUV. He then gave the individual in the green SUV, later identified as Jamal Stewart, \$40 in exchange for .15 grams of heroin. A surveillance video showed Bear thereafter leaving the liquor store, getting into the driver's seat of the green SUV, and driving away. From the video, the police were able to identify Bear as Harmon.

On July 17, 2009, Detective Curwick called Harmon and asked about purchasing

¹ For each buy Detective Curwick was wired and used photocopied money.

crack and heroin. After numerous phone calls, on July 20, 2009, Detective Curwick met Harmon at Ironwood Apartments and gave him \$60 for .47 grams of heroin and \$100 for .45 grams of crack cocaine.

On July 27, 2009, Detective Curwick called Harmon and asked for \$40 worth of heroin. They met at Ironwood Apartments, and Harmon sold the detective .25 grams of heroin for \$40. Through his interaction with Harmon, Detective Curwick noted that Harmon was familiar with narcotic street slang and was able to obtain crack and heroin quickly, indicating that Harmon was well acquainted with the drug trade.

On July 31, 2009, the State charged Harmon with the following: Count I, class A felony conspiracy to commit dealing in a narcotic drug;² Count II, class A felony dealing in a narcotic drug;³ Count III, class A felony dealing in a narcotic drug; Count IV, class B felony possession of a narcotic drug;⁴ Count V, class A felony dealing in a narcotic drug; Count VI, class B felony possession of a narcotic drug; Count VII, class A felony dealing in cocaine; Count VIII, class B felony possession of cocaine; Count IX, class A felony dealing in a narcotic drug; and Count X, class B felony possession of a narcotic drug. On November 4, 2009, the State filed its notice of intent to file an information alleging that Harmon was a habitual substance offender and a habitual offender. On April 5, 2010, the State filed Count XI, habitual substance offender, and Count XII, habitual offender. A hearing on the new

² Ind. Code §§ 35-48-4-1 and 35-41-5-2.

³ Ind. Code § 35-48-4-1 (dealing in cocaine or narcotic drug).

⁴ Ind. Code § 35-48-4-6 (possession of cocaine or narcotic drug).

charges was set for April 23, 2010, but the record does not indicate that it was held.

A jury trial on Counts I through X was held from May 25 through 27, 2010. Harmon raised an entrapment defense in his opening statement. To rebut Harmon's claim of entrapment, the State submitted evidence of Harmon's 1997 Wisconsin conviction for possession with intent to deliver a controlled substance. Over Harmon's objection, the trial court admitted the evidence. Harmon testified regarding the entrapment defense. However, the jury found him guilty as charged.

Harmon waived his right to a jury trial for Counts XI and XII. On June 30, 2010, the trial court found that Harmon was not a habitual substance offender but was a habitual offender. The habitual offender adjudication was based on the following prior unrelated felony convictions as alleged in the charging information: Harmon's 1997 conviction in Wisconsin for possession with intent to deal a narcotic drug; and his 2002 and 2003 robbery convictions in Kentucky and Tennessee respectively, which were based on offenses occurring May 2, 2002.

On July 15, 2010, the trial court entered judgments of conviction on Counts I through X and sentenced Harmon to an aggregate sentence of thirty years. The trial court ordered that the sentences for Counts II, III, V, VII, and IX would be enhanced by the habitual offender finding by thirty years, for an aggregate sentence of sixty years. Appellant's App. at 63, 68. The trial court ordered fifty years of the sentence to be executed and ten years to be suspended to probation. Harmon appeals.

Discussion and Decision

I. Double Jeopardy

Harmon argues, and the State concedes, that his convictions for dealing in a narcotic drug/cocaine and possession of a narcotic drug/cocaine violate double jeopardy principles. He does not specify whether his claim is based on Article 1, Section 14 of the Indiana Constitution or Indiana Code Section 35-38-1-6. We observe that the matter can be resolved pursuant to statute. Section 35-38-1-6 provides, “Whenever: (1) a defendant is charged with an offense and an included offense in separate counts; and (2) the defendant is found guilty of both counts; judgment and sentence may not be entered against the defendant for the included offense.”

“Possession of a narcotic drug is an inherently included lesser offense of dealing that drug, and a defendant generally may not be convicted and sentenced separately for dealing and possessing the same drug.” *Johnson v. State*, 659 N.E.2d 242, 245 (Ind. Ct. App. 1995). However, “separate convictions for dealing and possession are sustainable when the defendant deals a portion of a drug and retains the rest, if the dealing and possession charges are specifically based only on the respective quantities.” *Id.*

Here, as the State acknowledges, “[t]here is no evidence in the record that [Harmon] possessed heroin or cocaine on July 16th, 20th, or 27th in addition to the amounts he delivered during the controlled buys.” Appellee’s Br. at 11. Where the same drug supports both possession pursuant to Section 35-48-4-6 and dealing pursuant to Section 35-48-4-1, possession is a lesser included offense of dealing. *Harrison v. State*, 901 N.E.2d 635, 643

(Ind. 2006). Therefore, Harmon may not be convicted and sentenced on both the greater and lesser offenses. Accordingly, we vacate Harmon's convictions for possession of a narcotic drug and for possession of cocaine, specifically Counts IV, VI, VIII, and X.

Harmon further asserts that his conviction for conspiracy to commit dealing in a narcotic drug violates the state constitutional prohibition against double jeopardy found in Article I, Section 14. Again, the State agrees.

In *Richardson v. State*, 717 N.E.2d 32, 49-50 (Ind. 1999), our supreme court set forth a two-part test for determining whether two convictions are permissible under Indiana's double jeopardy clause. Under *Richardson*, "two or more offenses are the 'same offense' ... if, with respect to *either* the statutory elements of the challenged crimes *or* the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." *Id.* at 49. In considering the actual evidence presented at trial, we will reverse one of the convictions if there is "a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense." *Id.* at 53.

"[A] defendant may be convicted of both conspiracy to commit a felony and commission of the underlying felony." *Johnson v. State*, 749 N.E.2d 1103, 1108 (Ind. 2001). However, a "double jeopardy violation occurs where the same evidence used to prove the overt act committed in furtherance of the conspiracy also proves the commission of the underlying crime." *Id.* Here, the State concedes that "the same evidence that was used to

prove [Harmon] dealt in a narcotic drug with Jamal Stewart late in the day on July 16, 2009, was also used to prove the overt acts of the conspiracy charge.” Appellee’s Br. at 12. Accordingly, we vacate the conviction for Count I, class A felony conspiracy to commit dealing in a narcotic drug.

II. Habitual Offender Finding

Harmon contends that the trial court erred in finding that he was a habitual offender.

Indiana Code Section 35-50-2-8 provides in relevant part,

(a) Except as otherwise provided in this section, the state may seek to have a person sentenced as a habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated felony convictions.

(b) The state may not seek to have a person sentenced as a habitual offender for a felony offense under this section if:

(1) the offense is a misdemeanor that is enhanced to a felony in the same proceeding as the habitual offender proceeding solely because the person had a prior unrelated conviction;

(2) the offense is an offense under IC 9-30-10-16 or IC 9-30-10-17; or

(3) all of the following apply:

(A) The offense is an offense under IC 16-42-19 or IC 35-48-4.

(B) The offense is not listed in section 2(b)(4) of this chapter.

(C) *The total number of unrelated convictions that the person has for:*

(i) dealing in or selling a legend drug under IC 16-42-19-27;

(ii) dealing in cocaine or a narcotic drug (IC 35-48-4-1);

(iii) dealing in a schedule I, II, III controlled substance (IC 35-48-4-2);

(iv) dealing in a schedule IV controlled substance (IC 35-48-4-3);

and

(v) dealing in a schedule V controlled substance (IC 35-48-4-4);
does not exceed one (1).

(c) A person has accumulated two (2) prior unrelated felony convictions for purposes of this section only if:

(1) the second prior unrelated felony conviction was committed after sentencing for the first prior unrelated felony conviction; and

(2) the offense for which the state seeks to have the person sentenced as a habitual offender was committed after sentencing for the second prior unrelated felony conviction.

(d) A conviction does not count for purposes of this section as a prior unrelated felony conviction if:

(1) the conviction has been set aside;

(2) the conviction is one for which the person has been pardoned; or

(3) all of the following apply:

(A) The offense is an offense under IC 16-42-19 or IC 35-48-4.

(B) The offense is not listed in section 2(b)(4) of this chapter.

(C) *The total number of unrelated convictions that the person has for:*

(i) dealing in or selling a legend drug under IC 16-42-19-27;

(ii) dealing in cocaine or a narcotic drug (IC 35-48-4-1);

(iii) dealing in a schedule I, II, III controlled substance (IC 35-48-4-2);

(iv) dealing in a schedule IV controlled substance (IC 35-48-4-3);
and

(v) dealing in a schedule V controlled substance (IC 35-48-4-4);
does not exceed one (1).

(Emphases added.)

Subsections 35-50-2-8(b)(3)(C) and -8(d)(3)(C) require that a person have a total of two unrelated *dealing* convictions. In addition to his current dealing conviction,⁵ Harmon has a 1997 Wisconsin conviction for possession with intent to deal a narcotic drug. Harmon contends that his current dealing conviction is not unrelated to his prior dealing conviction. The holding in *Peoples v. State*, 929 N.E.2d 750 (Ind. 2010) dictates otherwise.

The circumstances in the case at bar are identical to those in *Peoples*. In *Peoples*, the defendant pled guilty to dealing cocaine. He was found to be a habitual offender based on two prior felony convictions from Illinois, one for forgery and the other for dealing cocaine. He appealed his habitual offender finding, arguing that the current offense of dealing cocaine could not be included in determining the total number of unrelated convictions he had for dealing drugs under Subsections 8(b)(3)(C) or 8(d)(3)(C). Our supreme court disagreed, concluding that “while a single felony drug conviction is not enough to qualify a person for habitual offender status, a second such conviction is, be it a prior conviction or the instant offense.” *Id.* at 754.

Nevertheless, Harmon maintains that his argument differs from that raised in *Peoples*, in that *Peoples* addressed whether the instant dealing conviction must be a *prior* conviction, whereas his argument is that the instant conviction is not an *unrelated* dealing offense. Specifically, Harmon argues that he has only “one unrelated conviction for dealing” because he “was not sentenced at the time the court entered judgment of conviction on the instant

⁵ Harmon was convicted of five counts of dealing in a narcotic drug or cocaine, but the trial court did not attach the habitual offender enhancement to a single current conviction as required. We discuss this in greater detail at the end of this section.

dealing offenses.” Appellant’s Br. at 18. Harmon’s argument is misguided. He relies on Subsection 35-50-2-8(c), but that provision does not support his argument.

Subsection 35-50-2-8(c) sets forth the criteria for determining when a person has accumulated two prior unrelated *felony* convictions. Subsection 35-50-2-8(c)(1) requires that “the second prior unrelated felony conviction was committed after sentencing for the first prior unrelated felony conviction.” Here, Harmon’s first prior felony conviction is his 1997 Wisconsin conviction for possession with intent to deal a narcotic drug. His second prior unrelated felony conviction is either his 2002 or 2003 robbery conviction for offenses that he committed on May 2, 2002. Harmon committed the May 2, 2002, offenses after sentencing for his 1997 Wisconsin conviction. Subsection 35-50-2-8(c)(2) requires that the current offense “was committed after sentencing for the second prior unrelated felony conviction.” Here, the current offenses occurred on July 16, 20, and 27, 2009. He was sentenced for his Kentucky robbery conviction on October 10, 2002, and he was sentenced on his Tennessee robbery conviction on April 24, 2003. Thus, he committed the current offenses after he was sentenced for his robbery convictions. The requirements of Subsection 35-50-2-8(c) are satisfied. Harmon has accumulated two prior unrelated felony convictions.

Contrary to Harmon’s contention, Subsection 35-50-2-8(c) does not require that Harmon be sentenced for the instant dealing offense before it can be included in determining his total number of unrelated dealing offenses under Subsections 8(b)(3)(C) or 8(d)(3)(C). We conclude that pursuant to the decision in *Peoples*, the trial court committed no error in finding that Harmon was a habitual offender.

The State points out that when the trial court imposed the habitual offender enhancement, it stated that it was attaching the enhancement to the sentences for Counts II, III, V, VII, and IX. Appellant's App. at 63, 68. This was improper. "In the event of simultaneous multiple felony convictions and a finding of habitual offender status, trial courts must impose the resulting penalty enhancement upon only one of the convictions and must specify the conviction to be enhanced." *Davis v. State*, 935 N.E.2d 1215, 1218 (Ind. Ct. App. 2010). Therefore, we remand for the trial court to specify the conviction to which the habitual offender enhancement attaches. In addition, the State notes that the trial court suspended ten years of Harmon's aggregate sentence without identifying which individual sentences it was suspending. The trial court should address this on remand as well.

III. Habitual Offender Hearing

Harmon also asserts that the trial court erred in failing to hold an initial hearing on the habitual offender charge. He acknowledges that he did not object to the lack of a hearing. *See Costello v. State*, 643 N.E.2d 421, 422 (Ind. Ct. App. 1994) ("The failure of the record to show either an arraignment or plea, or both, will not invalidate a conviction unless the record shows the defendant objected, before the trial commenced, to the lack of arraignment or plea.").

When a claim has been waived by the defendant's failure to lodge an objection, our review is limited to the assessment of whether fundamental error occurred. *Vest v. State*, 930 N.E.2d 1221, 1224 (Ind. Ct. App. 2010).

The fundamental error exception is extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or

potential for harm is substantial, and the resulting error denies the defendant fundamental due process. The error claimed must either make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process.

Id. (citations and quotation marks omitted).

Harmon claims that the failure to hold an initial hearing is fundamental error because the habitual offender count was filed after the time period for filing had run. Harmon is correct that

[a]n amendment of an indictment or information to include a habitual offender charge ... must be made not later than ten (10) days after the omnibus date. However, upon a showing of good cause, the court may permit the filing of a habitual offender charge at any time before the commencement of the trial.

Ind. Code § 35-34-1-5(e).

The omnibus date in this case was September 21, 2009. However, the State did not file its notice of intent to file habitual substance offender and habitual offender charges until November 4, 2009, and did not actually file the charges until April 23, 2010. The State was late and did not demonstrate good cause. That said, Harmon has failed to show prejudice. The failure to hold a hearing did not prevent him from objecting that the amendments were late. The amendments were filed a month before trial and the notice of intent was filed six months before trial, so Harmon had an opportunity to prepare a defense. We conclude that no fundamental error occurred.

IV. Admission of Prior Conviction

Lastly, Harmon asserts that the trial court abused its discretion in admitting evidence of his 1997 Wisconsin conviction for possession with intent to deliver a controlled substance.

The decision to admit or exclude evidence is a matter within a trial court's sound discretion. *Carpenter v. State*, 786 N.E.2d 696, 702 (Ind. 2003). "An abuse of discretion in this context occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law." *Id.* at 703. "[W]e will not reverse the trial court's decision unless it represents a manifest abuse of discretion that results in the denial of a fair trial." *Id.* at 702.

At trial, Harmon attempted to convince the jury that he was a victim of State entrapment. The entrapment defense is defined in Indiana Code Section 35-41-3-9, which provides:

(a) It is a defense that:

(1) the prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and

(2) the person was not predisposed to commit the offense.

(b) Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

"Once a defendant indicates that he intends to rely on the defense of entrapment and establishes police inducement, the burden shifts to the State to demonstrate the defendant's predisposition to commit the crime." *Ferge v. State*, 764 N.E.2d 268, 271 (Ind. Ct. App. 2002). To prove the defendant's predisposition, the State is permitted to adduce evidence of prior convictions relating to the crime. *Allen v. State*, 518 N.E.2d 800, 802 (Ind. 1988). Harmon claims that his 1997 conviction was too old to be probative of his predisposition. We observe that "[w]hether a defendant was predisposed to commit the crime charged is a

question for the trier of fact.” *Dockery v. State*, 644 N.E.2d 573, 577 (Ind. 1994). “The fact that a substantial time has passed goes to the weight of evidence, not to its admissibility.” *Allen*, 518 N.E.2d at 802.

In *Allen*, the defendant’s prior conviction occurred seven years prior to the crime charged. The *Allen* court held, “We find no error here arising from temporal remoteness, a consideration properly left to the finder of fact.” *Id.* In the case at bar, the prior conviction may be more remote, but we believe *Allen* still controls.⁶ Accordingly, we conclude that the trial court did not abuse its discretion in admitting evidence of Harmon’s prior conviction.

Affirmed in part, vacated in part, and remanded.

NAJAM, J., and ROBB, C.J., concur.

⁶ Harmon cites Indiana Evidence Rule 609(b) to support his argument that his 1997 conviction is too temporally remote. *See* Ind. Evidence Rule 609(b) (stating that generally evidence of prior conviction is not admissible if more than ten years has elapsed since the date of conviction). However, that rule addresses the reliability of evidence for purposes of impeachment, not to show predisposition when the entrapment defense has been raised.