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ATTORNEY FOR APPELLANT:

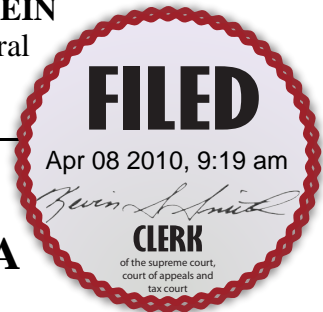
RANDY M. FISHER
Leonard, Hammond, Thoma & Terrill
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JODI KATHRYN STEIN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**



RONALD G. MAHON,
Appellant- Defendant,

vs.

STATE OF INDIANA,
Appellee- Plaintiff,

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No. 90A02-0912-CR-1197

APPEAL FROM THE WELLS CIRCUIT COURT
The Honorable Patrick R. Miller, Special Judge
Cause No. 90C01-0412-FD-80

April 8, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Ronald Mahon was convicted, following a guilty plea, of operating a vehicle with an alcohol concentration of at least 0.15, a Class D felony, and found to be an habitual substance offender. Mahon appeals his sentence, raising the issues of whether the trial court abused its discretion in sentencing him and whether his sentence is inappropriate in light of the nature of the offense and his character. The State cross-appeals, raising one issue which we find dispositive and restate as: whether Mahon's sentence is authorized by statute. Concluding the trial court erred by imposing a separate sentence upon the habitual substance offender finding and by suspending Mahon's sentence below the statutory minimum, we reverse and remand.

Facts and Procedural History

On September 22, 2004, Mahon drove a vehicle while having an alcohol concentration of 0.22 gram per 210 liters of breath. The State charged Mahon with operating a vehicle with an alcohol concentration of at least 0.15, a Class D felony because Mahon had a prior conviction in November 2000,¹ and alleged he was an habitual substance offender. On November 27, 2007, Mahon pled guilty to the Class D felony charge and admitted being an habitual substance offender. Sentencing was left to the trial court's discretion. The trial court held a sentencing hearing on September 25, 2009,² after which it issued the following sentencing order:

The Court . . . now sentences [Mahon] to the Indiana Department of Correction for a period of 3 years as to the crime of Operating A Vehicle

¹ See Ind. Code §§ 9-30-5-1(b), 9-30-5-3(a)(1).

² During the nearly two years between the guilty plea and Mahon's sentencing, the case chronology shows two continuances of the sentencing hearing, an appointment of a special judge, and Mahon's filing and then retracting a motion to withdraw his guilty plea.

With .15 Gram Or Greater Blood Alcohol Content as charged in Count II of the Information and 3 years as to Habitual Substance Offender The Court suspends 2 years of the 3 years [sic] sentence on the Operating A Vehicle With .15 Gram or Greater Blood Alcohol Content charge and also suspends 2 years of the 3 year sentence on the Habitual Substance Offender charge. The Court orders the sentence imposed as to Count II and the sentence imposed as to Habitual Substance Offender to be served consecutively with one another.

Appellant's Appendix at 182-83. Mahon and the State both appeal his sentence.

Discussion and Decision

I. Sentence as Habitual Substance Offender

Initially the State raises the issue of whether the trial court erred by imposing a separate sentence upon the habitual substance offender finding rather than enhancing Mahon's Class D felony sentence. Pursuant to statute, the State "may seek to have a person sentenced as a habitual substance offender for any substance offense by alleging . . . that the person has accumulated two (2) prior unrelated substance offense convictions." Ind. Code § 35-50-2-10(b). "Substance offense" means a Class A misdemeanor or a felony in which the possession, use, abuse, delivery, transportation, or manufacture of alcohol or drugs is a material element of the crime, and includes an offense under Indiana Code chapter 9-30-5. Ind. Code § 35-50-2-10(a)(2). Mahon admitted having two prior unrelated substance offense convictions: "Operating While Intoxicated, a Class D Felony" in March 1984, and "Operating While Intoxicated, a Class A Misdemeanor" in November 1988. Appellant's App. at 81.

Sentencing for habitual substance offenders is governed by Indiana Code section 35-50-2-10(f), which states the trial court "shall sentence a person found to be a habitual substance offender to an additional fixed term of at least three (3) years but not more than

eight (8) years imprisonment, to be added to the term of imprisonment imposed under [Indiana code chapters] 35-50-2 or [] 35-50-3.”³ Thus, an habitual substance offender finding neither constitutes a separate crime nor results in a separate sentence, but rather results in a sentence enhancement imposed upon the defendant’s substance offense conviction. Reffett v. State, 844 N.E.2d 1072, 1074 (Ind. Ct. App. 2006) (citing Greer v. State, 680 N.E.2d 526, 527 (Ind. 1997)).

Here, the trial court treated Mahon’s habitual substance offender finding as a separate conviction and imposed a separate “consecutive[]” sentence. Appellant’s App. at 183. This was erroneous. See Reffett, 844 N.E.2d at 1074. Upon remand and resentencing, the trial court’s sentencing order and abstract of judgment should show that Mahon’s habitual substance offender finding is attached to his Class D felony conviction, the sentence for which is to be enhanced accordingly. See Bauer v. State, 875 N.E.2d 744, 747 (Ind. Ct. App. 2007) (remanding with instructions “to show that [defendant’s] habitual offender finding is attached to an underlying conviction and to enhance the sentence for that conviction accordingly”), trans. denied.

II. Suspension of Sentence

Next the State raises the issue of whether the trial court illegally suspended four years of Mahon’s six-year sentence. The minimum sentence for a Class D felony is six months. Ind. Code § 35-50-2-7(a). As noted above, and subject to exceptions the trial court did not find applicable, the minimum term of enhancement for an habitual

³ The trial court “may” reduce the minimum term of enhancement to as low as one year under circumstances outlined in Indiana Code sections 35-50-2-10(f)(1) and 35-50-2-10(f)(2). Here, the trial court found reducing the minimum enhancement to one year “would not be appropriate” because of Mahon’s extensive criminal history including alcohol-related offenses beyond the predicates necessary for the enhancement. Transcript at 26; see Ind. Code § 35-50-2-10(g) (in deciding whether to grant a reduction, trial court may consider aggravating and mitigating circumstances set forth in Indiana Code sections 35-38-1-7.1(a) and 35-38-1-7.1(b)).

substance offender is three years under Indiana Code section 35-50-2-10(f). Adding these terms together, the minimum sentence for a Class D felony conviction enhanced by an habitual substance offender finding is three and one-half years. Young v. State, 901 N.E.2d 624, 626 (Ind. Ct. App. 2009), trans. denied. Although the trial court generally has discretion to “suspend any part of a sentence for a felony,” Ind. Code § 35-50-2-2(a), the trial court may suspend only that part of the sentence in excess of the minimum where the felony is “an offense under [Indiana Code chapter] 9-30-5 . . . and the person who committed the offense has accumulated at least two (2) prior unrelated convictions under [Indiana Code chapter] 9-30-5,” Ind. Code § 35-50-2-2(b)(4)(R).⁴

Here, because Mahon is sentenced as an habitual substance offender for an underlying Class D felony, his statutory minimum sentence is three and one-half years. See Young, 901 N.E.2d at 626. Further, because Mahon’s Class D felony conviction is under Indiana Code chapter 9-30-5 and Mahon has two prior unrelated convictions under the same chapter, this minimum term is non-suspendible. See Bauer, 875 N.E.2d at 750 (applying non-suspension rule of Indiana Code section 35-50-2-2(b)(4)(R) to the three and one-half year minimum term for Class D felony enhanced by habitual substance offender finding). Therefore, under the habitual substance offender and non-suspension statutes, the minimum executed time Mahon must serve is three and one-half years.⁵ The

⁴ At the time Mahon committed his offense, this non-suspension rule was codified in the same language at Indiana Code section 35-50-2-2(b)(4)(Q) (2004).

⁵ The State directs us to authority from this court holding no part of the enhancement imposed upon an habitual substance offender finding can be suspended. Reffett, 844 N.E.2d at 1074; see Howard v. State, 873 N.E.2d 685, 690-91 (Ind. Ct. App. 2007) (same under general habitual offender statute). However, other panels of this court have held a trial court may suspend habitual offender and habitual substance offender enhancements, subject to the statutory non-suspension rules. See Kilgore v. State, ___N.E.2d___, 2010 WL 743040, at *5 (Ind. Ct. App., Mar. 4, 2010); Bauer, 875 N.E.2d at 749. We need not decide which line of cases is correct, because under either, the trial court lacks authority to suspend Mahon’s sentence below three and one-half years.

trial court suspended four years of Mahon's six-year sentence, resulting in an executed term of only two years. This was error. Because of the errors in the trial court's sentencing of Mahon, we reverse the sentence and remand for resentencing in accordance with this opinion.⁶

Conclusion⁷

Mahon's sentence is not authorized by statute because the trial court imposed a separate sentence upon the habitual substance offender finding and suspended Mahon's sentence below the minimum of three and one-half years. Mahon's sentence is therefore reversed, and we remand the case to the trial court for resentencing in accordance with this opinion.

Reversed and remanded.

BAKER, C.J., and BAILEY, J., concur.

⁶ Had the trial court known the minimum executed portion of Mahon's sentence was three and one-half years, it may have exercised its discretion to impose only this executed sentence rather than the six-year, partially suspended sentence it did impose. Therefore, we decline the State's invitation to simply remand with instructions that three and one-half years of Mahon's six-year sentence be executed.

⁷ Because we conclude the sentence was not authorized by statute and therefore remand for resentencing, we need not reach the issues of whether the trial court abused its discretion in sentencing Mahon and whether his sentence is inappropriate.