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ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER

Attorney General of Indiana

Deputy Attorney General
Indianapolis, Indiana

JAMES WALSH,)
)
Appellant-Defendant,)
)
vs.) No. 52A05-0911-CR-667
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

June 24, 2010

FRIEDLANDER, Judge

James Walsh pleaded guilty to Burglary,¹ a class B felony, and admitted to being a Habitual Offender.² The trial court sentenced Walsh to twenty years for the burglary conviction and enhanced that sentence by ten years for the habitual offender adjudication. On appeal, Walsh argues that the sentence imposed is inappropriate. In response, the State argues that this appeal should be dismissed for lack of jurisdiction because Walsh's challenge to his sentence is not cognizable on direct appeal following a guilty plea wherein the sentence was fixed.

We reverse and remand.

On July 19, 2001, the State charged Walsh with burglary as a class B felony and filed a second count alleging Walsh to be a habitual offender. Pursuant to a written plea agreement, Walsh pleaded guilty as charged and admitted to being a habitual offender. The plea agreement provided that Walsh would be sentenced to twenty years for the burglary conviction and also to a consecutive thirty-year term for the habitual offender determination with twenty years of the sentence suspended to probation.³ In accordance with the plea agreement, the trial court entered the habitual offender enhancement as a separate, consecutive sentence.

¹ Ind. Code Ann. § 35-43-2-1 (West, Westlaw through 2009 1st Special Sess.).

² Ind. Code Ann. § 35-50-2-8 (West, Westlaw through 2009 1st Special Sess.).

³ “Where a criminal defendant receives an enhanced sentence under the habitual offender statute, such sentence may not be suspended.” *Reffett v. State*, 844 N.E.2d 1072, 1074 (Ind. Ct. App. 2006). This language, however, explicitly refers to the portion of the sentence imposed pursuant to the habitual offender statute. Thus, while the trial court was required to order the habitual offender enhancement to be fully executed, the general sentencing guidelines apply to the trial court's sentence for the underlying conviction. Therefore, the trial court did have the authority to suspend the sentence for the underlying conviction. See *Howard v. State*, 873 N.E.2d 685 (Ind. Ct. App. 2007).

In February 2009, Walsh filed a petition for post-conviction relief challenging his conviction and sentence. The post-conviction court denied the petition as to Walsh's challenge to the burglary conviction but found that Walsh had been improperly sentenced. Specifically, the post-conviction court noted it was error to impose a separate, consecutive sentence for the habitual offender enhancement.⁴ The post-conviction court ordered that Walsh be resentenced. On November 5, 2009, Walsh was resentenced to twenty years for the burglary conviction, enhanced by ten years for the habitual offender determination, for a total sentence of thirty years.⁵

On appeal, Walsh argues that the thirty-year sentence is inappropriate. The State responds arguing that Walsh's claim is not cognizable on a direct appeal from a guilty plea pursuant to an agreement that provided for a fixed sentence.

We begin by noting that where a plea agreement includes a defendant's agreement to a specific sentence, such defendant may not challenge the sentence by means of a direct appeal. *Sholes v. State*, 878 N.E.2d 1232 (Ind. 2008); *Allen v. State*, 865 N.E.2d 686 (Ind. Ct. App. 2007). Direct-appeal challenges to sentences following guilty pleas have been permitted only in "open pleas," that is, for sentences following plea agreements under which the trial court exercised sentencing discretion. *See, e.g., Kling v. State*, 837 N.E.2d 502 (Ind. 2005); *Gutermuth v. State*, 817 N.E.2d 233 (Ind. 2004); *Collins v. State*, 817 N.E.2d 230 (Ind.

⁴ A habitual offender finding does not constitute a separate crime nor does it result in a separate sentence. *Hendrix v. State*, 759 N.E.2d 1045 (Ind. Ct. App. 2002). Rather it results in a sentence enhancement imposed upon the conviction of a subsequent felony. *Id.*

⁵ The trial court adopted the sentence recommended by the State at the resentencing hearing.

2004); *Tumulty v. State*, 666 N.E.2d 394 (Ind. 1996).

Here, Walsh's plea agreement called for a specific sentence, i.e., a twenty-year sentence for his burglary conviction and a thirty-year sentencing enhancement for the habitual offender determination that was to be served consecutive to the burglary sentence. As correctly determined by the post-conviction court, the trial court erred in imposing a separate, consecutive sentence for the habitual offender adjudication. In order to rectify such error, the sentencing order simply had to be corrected to reflect that Walsh was sentenced to twenty years for his burglary conviction and that such sentence was *enhanced* by thirty years for the habitual offender adjudication. *See Barrett v. State*, 834 N.E.2d 169 (Ind. Ct. App. 2005). The trial court was without authority to enter a sentence different than that provided for in the plea agreement, even if it was to Walsh's benefit.

We therefore reverse the sentence imposed by the trial court and remand with instructions to correct the sentencing order and abstract of judgment to reflect that the thirty-year sentence for the habitual offender adjudication serves to enhance the twenty-year burglary sentence. Pursuant to the plea agreement, twenty years of the sentence shall be suspended to probation.

Judgment reversed and remanded with instructions.

KIRSCH, J., and ROBB, J., concur.