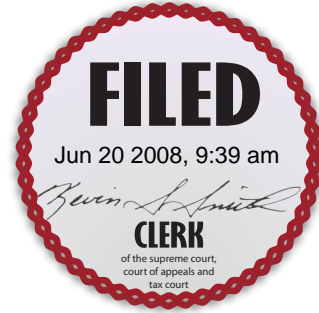


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DUANE L. BOYLES)
)
 Appellant-Petitioner,)
)
 vs.) No. 57A03-0710-PC-461
)
 STATE OF INDIANA,)
)
 Appellee-Respondent.)

APPEAL FROM THE NOBLE CIRCUIT COURT
The Honorable G. David Laur, Judge
Cause No. 57C01-0603-FC-16

June 20, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Duane Boyles appeals the denial of his petition for post-conviction relief (“PCR petition”), which challenged the habitual offender enhancement of his sentence for Class C felony operating a motor vehicle with a lifetime suspension. We reverse and remand.

Issue

The sole restated issue is whether Boyles is entitled to post-conviction relief after entering a plea agreement with an illegal sentencing provision.

Facts

On March 17, 2006, the State charged Boyles with Class C felony operating a motor vehicle with a lifetime suspension, Class D felony operating a motor vehicle as an habitual traffic violator (“HTV”), and Class D infraction failure to use a seatbelt. On April 21, 2006, the State added an allegation that Boyles was an habitual offender under the general habitual offender statute. On August 10, 2006, Boyles, who was represented by counsel, pled guilty to the Class C felony operating with a lifetime suspension charge and to being an habitual offender. The State dismissed the HTV and seatbelt charges. The trial court imposed a sentence of four years with two suspended for the Class C felony, enhanced by four years for the habitual offender admission.

On July 5, 2007, Boyles filed a pro se PCR petition. In it, he claimed that the habitual offender enhancement was an illegal sentence, that he received ineffective assistance of counsel, and that his plea was unintelligent. On August 22, 2007, the post-conviction court denied relief on the basis that the habitual offender enhancement was not illegal. On September 10, 2007, Boyles filed a notice of appeal.

On September 11, 2007, after reviewing Boyles's notice of appeal, the deputy prosecutor handling Boyles's case wrote him a letter indicating that Boyles was correct regarding the illegality of the habitual offender enhancement. The letter concluded:

My proposal is that we submit a Motion to Reconsider the PCR motion that you filed and which was denied in August. We would agree to the motion and agree to revoke the Habitual Felon enhancement and the sentence that went with it. The conviction for Operating a Vehicle After Lifetime Suspension would stay in place.

App. p. 15. Thus, on September 17, 2007, Boyles filed a motion to reconsider. The State filed a response that stated in part, "the State will not object to that portion of the sentence enhanced under I.C. 35-50-2-8 being vacated, so long as the remainder of the sentence remains intact." *Id.* at 16. On October 2, 2007, the post-conviction court denied the motion to reconsider. After we granted Boyles permission to file a belated brief, this case is now before us for decision.

Analysis

Post-conviction proceedings provide defendants the opportunity to raise issues not known or available at the time of the original trial or direct appeal. *Stephenson v. State*, 864 N.E.2d 1022, 1028 (Ind. 2007), cert. denied. "In post-conviction proceedings, the defendant bears the burden of proof by a preponderance of the evidence." *Id.* We review factual findings of a post-conviction court under a "clearly erroneous" standard but do not defer to any legal conclusions. *Id.* We will not reweigh the evidence or judge the credibility of the witnesses and will examine only the probative evidence and reasonable inferences therefrom that support the decision of the post-conviction court. *Id.*

Operating a vehicle with a lifetime suspension is criminalized by Indiana Code Section 9-30-10-17. The general habitual offender statute states in part, “The state may not seek to have a person sentenced as a habitual offender for a felony under this section if . . . the offense is an offense under IC 9-30-10-16 or IC 9-30-10-17” Ind. Code § 35-50-2-8(b)(2). There is no question here that enhancement of Boyles’s sentence for Class C felony operating a vehicle with a lifetime suspension under the general habitual offender statute was illegal. The post-conviction court erred in concluding otherwise.

However, our supreme court has made it clear that the mere fact a plea agreement provided for an illegal sentence does not necessarily mean the agreement must be voided or the illegal sentence removed. In Lee v. State, 816 N.E.2d 35 (Ind. 2004), the court overruled cases from this court that had held an illegal sentencing provision in a plea agreement renders the agreement void. The court held, “where a defendant enters a plea of guilty knowingly, intelligently, and voluntarily, there is no compelling reason to set aside the conviction on grounds that the sentence is later determined to be invalid.” Lee, 816 N.E.2d at 39.

The court continued, “Under some circumstances, the appropriate remedy to address an illegal sentence like the one here is to sever the illegal sentencing provision from the plea agreement” Id. at 40. The defendant in Lee was not entitled to this relief, however, because “[a] defendant ‘may not enter a plea agreement calling for an illegal sentence, benefit from that sentence, and then later complain that it was an illegal sentence.’” Id. (quoting Collins v. State, 509 N.E.2d 827, 833 (Ind. 1987)). Put another way, “[D]efendants who plead guilty to achieve favorable outcomes give up a plethora

of substantive claims and procedural rights” Id. (quoting Davis v. State, 771 N.E.2d 647, 649 n.4 (Ind. 2002)). In a subsequent case applying Lee, our supreme court held that because a defendant “received a significant benefit from her plea agreement,” she was not entitled to challenge an illegal sentencing provision in the agreement. Stites v. State, 829 N.E.2d 527, 529 (Ind. 2005).

We cannot perceive what benefit or favorable outcome Boyles received from his plea agreement, nor does the State claim that he received any. The State dismissed the Class D felony HTV charge, but that was merely a lesser-included offense of the Class C felony lifetime suspension charge. Dismissal of the Class D infraction seatbelt charge can hardly be called a “significant benefit” in the context of this case. Rather, Boyles pled guilty to the most serious charge he was facing, plus an illegal habitual offender enhancement. It also is highly relevant, in our view, that the deputy prosecutor handling Boyles’s case informed the post-conviction court that he believed it was appropriate to vacate the habitual offender enhancement. It is clear to us that this is a circumstance contemplated by Lee in which it is proper to remedy the illegal sentencing provision in the plea agreement simply by excising it.

On appeal, the State again concedes that Boyles’s habitual offender enhancement is illegal and that he is entitled to relief of some kind, but posits that he must file a motion to correct sentence, rather than a post-conviction relief petition. We disagree. Post-Conviction Rule 1(1)(a)(3) permits any person convicted of or sentenced for a crime to file a PCR petition claiming “that the sentence exceeds the maximum authorized by law, or is otherwise erroneous” Our supreme court has noted that this provision is

“markedly similar” to the motion to correct sentence statute, Indiana Code Section 35-38-1-15. State ex rel. Gordon v. Vanderburgh Circuit Court, 616 N.E.2d 8, 9 (Ind. 1993). Thus, motions to correct erroneous sentence are equivalent to PCR petitions for procedural purposes. See id. We see no reason to delay relief to Boyles in this case by forcing him to file a motion to correct erroneous sentence that makes arguments identical to those in his PCR petition, which the State has conceded are correct. This is especially true, given that it appears Boyles already has served most if not all of his sentence for the Class C felony and will have his incarceration improperly extended by the habitual offender enhancement.¹

Conclusion

The post-conviction court erred in denying Boyles’s PCR petition. We reverse and remand with instructions that the habitual offender enhancement of Boyles’s sentence be vacated. We also urge the trial court to inform the Department of Correction of this change in Boyles’s sentence at the earliest opportunity after certification of this opinion.

Reversed and remanded.

CRONE, J., and BRADFORD, J., concur.

¹ The State notes that our supreme court has held, “a motion to correct sentence may only be used to correct sentencing errors that are clear from the face of the judgment imposing the sentence in light of the statutory authority.” Robinson v. State, 805 N.E.2d 783, 787 (Ind. 2004). Based on this holding, the State contends that Boyles’s sentence is facially illegal and must be raised in a motion to correct sentence. Robinson did not hold facially illegal sentences must be challenged by a motion to correct sentence, but instead reaffirmed (but clarified) cases holding that post-conviction proceedings are “preferred” for raising collateral claims of sentencing error. See id. Robinson simply narrowed the type of claims that may be raised through a motion to correct sentence; it did not also narrow the type of claims that may be raised in a PCR petition.