

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:

DAVID PARDO
Marion County Public Defender Agency
Indianapolis, Indiana

STEVE CARTER
Attorney General of Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

TYRONE BRADSHAW,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)
)

No. 49A02-0801-CR-40

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant W. Hawkins, Judge
The Honorable Nancy Broyles, Magistrate
Cause No.49G05-0603-FB-38009

October 9, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Tyrone Bradshaw appeals the sentence imposed by the trial court following remand from this court, contending that the trial court's oral sentencing statement and the Abstract of Judgment (the "Abstract") conflict; the habitual offender enhancement was improper; and the trial court failed to give him full credit for the time he was imprisoned awaiting re-sentencing. Concluding there is no error in the habitual offender enhancement and that the trial court properly gave Bradshaw credit for only those days he was incarcerated awaiting his original sentencing, we affirm Bradshaw's sentence. However, we also conclude that the Abstract contains scrivener's errors that should be corrected, and we remand for the trial court to correct those errors.

Facts and Procedural History

The facts behind Bradshaw's conviction and original sentence were recounted in detail in our opinion in Bradshaw v. State, No. 49A02-0606-CR-510, 2007 WL 1191586 (Ind. Ct. App., Apr. 24, 2007), trans. denied. Briefly, Bradshaw slapped his girlfriend, robbed his girlfriend's friend of \$800 at gunpoint, and then struck the friend on the head with the gun. Bradshaw was charged with unlawful possession of a firearm by a serious violent felon, a Class B felony; robbery, a Class B felony; battery, a Class C felony; carrying a handgun without a license, a Class C felony; and battery, a Class A misdemeanor. Bradshaw waived his right to a jury trial on those charges. Subsequently, the State filed an information alleging Bradshaw was an habitual offender. All counts were tried to the court. The trial court found Bradshaw guilty on all counts and entered judgments of conviction for unlawful possession of a firearm by a serious violent felon;

robbery as a Class C felony; and two counts of battery, one count as a Class A misdemeanor and one count as a Class B misdemeanor. The trial court also determined Bradshaw was an habitual offender. The trial court sentenced Bradshaw to ten years for unlawful possession of a firearm, enhanced by fifteen years for Bradshaw's status as an habitual offender; four years for robbery; one year for Class A misdemeanor battery; and 180 days for Class B misdemeanor battery. The trial court ordered that the sentences run concurrently for an aggregate sentence of twenty-five years. In addition, the sentence was ordered to be served concurrent with the sentence Bradshaw received in a separate case ("Case 18067"). On appeal, we held that Bradshaw did not knowingly, voluntarily, and intelligently waive his right to a jury trial on the habitual offender determination because he signed the jury waiver prior to the filing of the habitual offender information. See Bradshaw, 2007 WL 1191586 at *3. Accordingly, we reversed the habitual offender determination, vacated the sentence enhancement, and remanded to the trial court.¹

On remand, the trial court scheduled the habitual offender determination for trial. Bradshaw waived a jury trial, and the trial court found Bradshaw to be an habitual offender following a bench trial. By agreement, Bradshaw's sentencing hearing was held immediately following his trial. Before announcing the sentence, the trial court stated, "I'm certainly under no order from any Court of Appeals to look at anything other than the habitual offender enhancement." Transcript of November 29, 2007, Habitual Phase at 20. The trial court enhanced Bradshaw's sentence for unlawful possession of a firearm by a serious violent felon by thirteen years due to the habitual offender

¹ Bradshaw also appealed the sufficiency of the evidence supporting his robbery conviction. As to that issue, we held there was sufficient evidence. See id. at *4.

determination. The Abstract shows that Bradshaw was convicted of unlawful possession of a firearm by a serious violent felon as a Class B felony, robbery as a Class B felony, one count of battery as a Class C felony, and one count of battery as a Class A misdemeanor. The Abstract also shows that the sentences for all counts in this case are to be served concurrent with each other, but consecutive to the sentence in Case 18067. Bradshaw now appeals.

Discussion and Decision

I. Errors in Abstract of Judgment

Bradshaw first contends that the Abstract must be corrected, as it incorrectly classifies the crimes of which he was convicted and erroneously orders his sentence to be served consecutive to his sentence in Case 18067. The State concedes that the Abstract does not reflect the class of crime of which Bradshaw was actually convicted and agrees that there is a discrepancy as to the consecutive or concurrent nature of this sentence in relation to the sentence in Case 18067. Bradshaw urges us to remand and order the trial court to correct the Abstract. The State has no objection to remand.² We therefore remand to the trial court to correct the Abstract to reflect that Bradshaw was convicted of

² The State does claim that the issue is waived because it was available after Bradshaw's first sentencing hearing, but nonetheless has no objection to remand. The error in classifying the crimes was made following the first sentencing hearing, but as the State notes, it appears to be a scrivener's error, as the trial court was quite clear in its oral sentencing statement about the classification of each of the crimes for the purpose of entering judgment and imposing sentence. See Transcript of May 24, 2006, Sentencing at 183-84 ("I think the robbery should be reduced to a C [felony] . . . I believe [the Class D felony battery] should be reduced to a class A misdemeanor . . . [and] conviction [on the Class A misdemeanor battery] will be entered as a class B misdemeanor."). The discrepancy in the consecutive/concurrent nature of the sentence in relation to Case 18067 did not arise until after the second sentencing hearing, so it cannot be waived for failure to raise it in the first appeal. Moreover, the State urges us to remand so the trial court can "clarify whether the Defendant's sentences in the instant matter are concurrent or consecutive to the sentence in [Case 18067]." Brief of Appellee at 8. As the trial court at the second sentencing hearing acknowledged that its charge was to address only the habitual offender enhancement, and as the trial court did not state any reason supporting the imposition of this sentence consecutive to the sentence in Case 18067, we conclude that a scrivener's error is responsible for this discrepancy in the Abstract, as well.

robbery as a Class C felony, battery as a Class A misdemeanor, and battery as a Class B misdemeanor. We also direct the trial court to correct the Abstract to show that the sentences for these convictions are concurrent with each other and also concurrent with the sentence in Case 18067.

II. Habitual Offender Enhancement

Indiana Code section 35-50-2-8 provides that a person is an habitual offender if that person “has accumulated two (2) prior unrelated felony convictions.” To prove Bradshaw was an habitual offender, the State presented evidence regarding three prior felonies alleged to have been committed by Bradshaw: 1) a 1997 conviction for auto theft, a Class D felony; 2) a 1998 conviction for auto theft, a Class C felony; and 3) a 2003 conviction for escape, a Class C felony.

Bradshaw first contends that the State failed to establish beyond a reasonable doubt that he is the “Tyrone Bradshaw” convicted of escape in 2003. We find it unnecessary to address this issue because Bradshaw also contends, and the State concedes, that even assuming the escape conviction was proved by sufficient evidence, it could not be used as a predicate offense to support an enhancement to Bradshaw’s unlawful possession of a firearm by a serious violent felon sentence. “[A] defendant convicted of unlawful possession of a firearm by a serious violent felon may not have his or her sentence enhanced under the general habitual offender statute by proof of the same felony used to establish that the defendant was a ‘serious violent felon.’” Sweatt v. State, 887 N.E.2d 81, 84 n.1 (Ind. 2008) (quoting Mills v. State, 868 N.E.2d 446, 452 (Ind. 2007)). Thus, the escape conviction cannot be used as a predicate offense for an

habitual offender enhancement of Bradshaw's unlawful possession of a firearm by a serious violent felon sentence as it would result in an impermissible double enhancement.

As the State notes, however, the State alleged three predicate offenses in the habitual offender information. The two additional prior felonies alleged and proved by the State are a 1997 conviction for auto theft as a Class D felony and a 1998 conviction for auto theft as a Class C felony due to the prior conviction.³ See Ind. Code § 35-43-4-2.5(b). Bradshaw argues that they cannot be used as the two predicate offenses for an habitual offender finding because they are not "unrelated," that is, the 1997 Class D felony conviction forms the basis for elevating the 1998 auto theft conviction to a Class C felony. Although there would be cause for concern if Bradshaw was currently being sentenced for the Class C felony auto theft and the Class D felony auto theft was being used as a predicate offense to further enhance the Class C felony auto theft sentence, see Goodman v. State, 863 N.E.2d 898, 904-05 (Ind. Ct. App. 2007), trans. denied, that is not the situation we have here. The habitual offender statute provides:

- (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.

Ind. Code § 35-50-2-8(c). The "unrelated" requirement is a temporal one – "unrelated" means that the commission of the second offense was subsequent to the conviction and

³ Bradshaw does not contest the sufficiency of the evidence proving these two convictions.

sentence upon the first offense. Gibson v. State, 661 N.E.2d 865, 868 (Ind. Ct. App. 1996); cf. Erickson v. State, 438 N.E.2d 269, 273 (Ind. 1982) (“The term ‘unrelated felony’ does not mean a felony of unlike kind, but must be interpreted to mean a felony not related to the instant felony in the sense that it is not connected to it as part of the *res gestae* of the instant crime.”).

Bradshaw was sentenced for Class D felony auto theft on August 14, 1997, and he committed Class C felony auto theft on February 26, 1998. He was sentenced for Class C felony auto theft on July 24, 1998, and committed the instant offenses on January 24, 2006. Thus, the State proved that Bradshaw committed two unrelated felony offenses as defined by Indiana Code section 35-50-2-8(c). We do not agree with Bradshaw that section 35-50-2-8(c) provides only a minimum standard for unrelatedness or that it is, at best, ambiguous. We also decline Bradshaw’s invitation to revisit our decision in Olatunji v. State, 788 N.E.2d 1268 (Ind. Ct. App. 2003), trans. denied, in which we held that “a conviction enhanced from a misdemeanor [to] a felony may serve as a predicate habitual offender felony, as may be a felony that was used to enhance the misdemeanor offense to a felony.” Id. at 1273 (predicate offenses were attempted robbery, a Class C felony, and carrying a handgun without a license, which had been elevated from a Class A misdemeanor to a Class D felony because of the attempted robbery conviction). In any event, Olatunji is distinguishable from this case. Olatunji addressed a misdemeanor elevated to a felony because of a prior felony conviction also serving as a predicate offense, whereas this case concerns a felony elevated to a higher class of felony because of a prior felony conviction. Even without enhancement of the 1988 auto theft

conviction because of the 1987 auto theft conviction, Bradshaw would still have two felony convictions.

Because the State proved two unrelated prior felonies, there is no error in the habitual offender enhancement.⁴

III. Credit Time

Finally, Bradshaw argues that the trial court failed to give him full credit for the time he was imprisoned awaiting re-sentencing. The trial court gave Bradshaw credit for eighty-four days that he was confined before his original sentencing in May of 2006, but did not give him any additional credit time for the time he was confined at the Indiana Department of Correction (“DOC”) awaiting re-sentencing in November of 2007.

⁴ Bradshaw contends, and again the State agrees, that we must reverse and remand the habitual offender finding because it would be improper to enhance the unlawful possession of a firearm by a serious violent felon sentence because of the 2003 escape conviction and the trial court did not specify which of the predicate offenses it relied on to enhance Bradshaw’s sentence. In Waye v. State, 583 N.E.2d 733 (Ind. 1991), the State had alleged three prior convictions: two felonies that were not disputed, and one charge of escape pursuant to a statute (now repealed) that gave the trial court discretion to order sentence as a Class D felony or a Class A misdemeanor. The statute provided that “any person convicted under the misdemeanor penalty of this chapter shall thereupon and thereafter be considered as a misdemeanant for all purposes.” Ind. Code § 35-21-8-1 (1976). Waye was convicted and sentenced as a Class A misdemeanor, and the court concluded that it was “obliged to consider the escape conviction as a misdemeanor conviction for purposes of the habitual offender proceedings here.” 583 N.E.2d at 734. Although noting that “more than two prior unrelated felony convictions may be proven in an habitual offender determination with the additional convictions considered to be ‘harmless surplusage[.]’” id. at 734, the court determined that the habitual offender finding had to be vacated because although one of the defendant’s convictions was not qualified as a felony, the jury had been instructed that it was a felony and rendered a general verdict, id. at 734-35. Here, the escape conviction was clearly a felony conviction and there was no jury. If any of Bradshaw’s other convictions had been enhanced for the habitual offender finding, the escape conviction could have served as a predicate offense. Moreover, Bradshaw’s habitual offender proceeding was tried to the court, and the court is presumed to know and correctly apply the law – in this case, the law regarding double enhancements. See Thurman v. State, 793 N.E.2d 318, 321 (Ind. Ct. App. 2003). Thus, we presume the trial court did not rely on the escape conviction when enhancing Bradshaw’s unlawful possession of a firearm by a serious violent felon sentence. See Tr. of May 24, 2006, Sentencing Hearing at 179 (“I did strike the escape conviction from the habitual offender charge. I did not use that as one of the underlyings because of double jeopardy concerns that the escape was used both for the possession by a serious violent felon and for the habitual offender.”). Moreover, there would be little point in our remanding for the trial court to make a specific statement of which predicate offenses it relied on at the second habitual offender proceeding when we have already decided herein that the escape conviction cannot be used to enhance the unlawful possession of a firearm by a serious violent felon sentence and that the two auto theft convictions are unrelated for purposes of being used as predicate offenses; the trial court would merely restate what we have already held: the two auto theft convictions support an habitual offender determination and the resulting enhancement. There is no prejudice to Bradshaw in our simply doing the same.

The trial court determines the initial credit time when a defendant is sentenced. Members v. State, 851 N.E.2d 979, 982 (Ind. Ct. App. 2006). Modification of credit time thereafter is the responsibility of the DOC. Id. Bradshaw has been properly confined at the DOC since his May 2006 sentencing and any credit time earned since then is to be determined by the DOC. The trial court did not err in awarding credit time for only those days Bradshaw served awaiting his original sentencing.

Conclusion

There is no error in the trial court's determination that Bradshaw is an habitual offender or in the enhancement of Bradshaw's unlawful possession of a firearm by a serious violent felon sentence due to that determination, nor is there error in the trial court's award of pre-sentencing credit time. However, there are scrivener's errors in the Abstract that should be corrected.

Affirmed and remanded.

NAJAM, J., and MAY, J., concur.