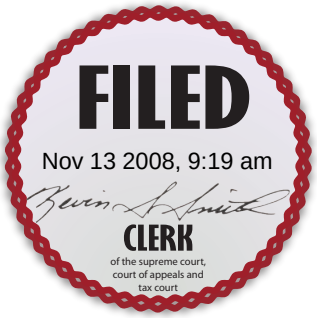

PRO SE APPELLANT:

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Pendleton, Indiana

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IN THE
COURT OF APPEALS OF INDIANA

LENN IVY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0804-PC-208
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
The Honorable W. T. Robinette, Master Commissioner
Cause No. 49G03-0408-FB-155928

November 13, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Following his conviction for Class B felony burglary, Lenn Ivy appeals the denial of his petition for post-conviction relief. Specifically, he contends that his trial counsel was ineffective for failing to object to or successfully move for the dismissal of his habitual offender enhancement. Because Ivy suffered no prejudice from any of the errors he alleges regarding the habitual offender adjudication, his ineffectiveness claim fails. We therefore affirm the post-conviction court.

Facts and Procedural History

On August 27, 2004, Kellie Nolan observed a man she did not recognize pacing across the street from her Speedway, Indiana, home. The man was standing in front of a house owned by David Sears. She saw the man walk up to Sears's front door and knock or ring the doorbell. After receiving no answer, the man walked around to the south side of Sears's home where she could no longer see him. Nolan then called the police.

Speedway officers arrived at the scene and discovered that the rear door of Sears's house had been recently kicked in. They observed a man matching the description Nolan had given attempting to leave through the rear door. When the officers confronted him, the man retreated back into the house and the officers dispatched a canine unit to apprehend him. The officers then handcuffed the individual and later identified him as Ivy.

Sears then arrived on the scene and told officers that he did not recognize Ivy and had not given him permission to enter the home. Sears searched the home and reported

that some items had been moved and that four $20 bills had been removed from the bedroom. In the search incident to arrest, officers found four $20 bills on Ivy's person.

Three days later, the State charged Ivy with burglary as a Class B felony;[1] theft as a Class D felony;[2] and resisting law enforcement as a Class A misdemeanor.[3] On October 5, 2004, the State filed notice that it was seeking a habitual offender enhancement. In order to prepare a defense to the habitual offender enhancement, Ivy requested and received a continuance of his trial date.

On May 11, 2005, Ivy, represented by counsel, pled guilty under a written plea agreement to burglary as a Class B felony and the habitual offender enhancement. The State dropped the theft and resisting law enforcement charges. The trial court sentenced Ivy to six years on the burglary count enhanced by ten years based on Ivy's habitual offender status, for a total of sixteen years.

Ivy appealed, *pro se*, challenging the sufficiency of the factual basis for the habitual offender charge. In an unpublished memorandum decision, this Court dismissed the appeal because a challenge to a habitual offender adjudication after a guilty plea may only be raised in post-conviction proceedings. *Ivy v. State*, 862 N.E.2d 332, No. 49A02-0603-CR-167, *3 (Ind. Ct. App. Feb. 28, 2007).

Ivy, still *pro se*, subsequently filed a petition for post-conviction relief. Following a hearing, the post-conviction court entered findings of fact and conclusions of law and denied relief. Ivy now timely appeals.

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[1] Ind. Code § 35-43-2-1(1).

[2] Ind. Code § 35-43-4-2(a).

[3] Ind. Code § 35-44-3-3(a).

Discussion and Decision

Ivy contends that the post-conviction court erred in denying his petition for post-conviction relief. Specifically, Ivy argues that his trial counsel was ineffective for failing to object to or move for the dismissal of the habitual offender enhancement on grounds that the State did not timely file the enhancement, that the State failed to file a formal amendment to the original charging information, and that the State based the enhancement on an improper 1988 conviction. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Id.* To prevail on appeal from the denial of post-conviction relief, a petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 643-44. Further, the post-conviction court in this case made findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). Although we do not defer to the post-conviction court's legal conclusions, "'[a] post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made.'" *Id.* (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000), *reh'g denied*).

To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel's performance was deficient and that he was prejudiced by that deficient performance. *Ben-Yisrayl*, 729 N.E.2d at 106 (citing *Strickland v.*

Washington, 466 U.S. 668, 687 (1984)). Failure to satisfy either prong will cause the claim to fail. *Grinstead v. State*, 845 N.E .2d 1027, 1031 (Ind. 2006). Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. *Id.* Our Supreme Court has stated on multiple occasions that if it is easier to dispose of an ineffective assistance of counsel claim on the ground of lack of sufficient prejudice rather than objective reasonableness of counsel's performance, that is the course that should be followed. *Wentz v. State*, 766 N.E.2d 351, 360 (Ind. 2002) (citing *Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999), *reh'g denied*), *reh'g denied*.

Ivy asserts that his trial counsel should have objected to the habitual offender enhancement on the grounds that the State did not timely file it and that the State failed to formally amend the original charging information. Ivy also argues that his trial counsel should have moved for dismissal of the habitual offender information because it was based on an improper conviction. Ivy claims that if his trial counsel had advised him that he had a meritorious defense to the habitual offender charge because of these reasons, he never would have pled guilty. His challenge, therefore, is that his counsel failed to use a defense or failed to mitigate a penalty and is reviewable on post-conviction review pursuant to *Segura v. State*, 749 N.E.2d 496, 507 (Ind. 2001). When a post-conviction claim of ineffective assistance of counsel relates to trial counsel's failure to raise a defense or mitigate a penalty, *Segura* requires that the prejudice from the omitted defense or failure to mitigate a penalty be measured by (1) evaluating the probability of success of the omitted defense at trial or (2) determining whether the utilization of the opportunity to mitigate a penalty likely would produce a better result for the petitioner.

Willoughby v. State, 792 N.E.2d 560, 563 (Ind. Ct. App. 2003) (citing *Segura*, 749 N.E.2d at 499), *trans. denied*.

I. State's Alleged Failure to File

As for the timeliness of the filing, Ivy argues that under *Fajardo v. State*, 859 N.E.2d 1201 (Ind. 2007), the State was required to file the habitual offender information before the omnibus date, which was October 1, 2004. *Fajardo* interpreted Indiana Code § 35-34-1-5(b), which governs when an indictment or information may be amended in matters of substance. However, Indiana has a specific statute for the filing of a habitual offender information. Indiana Code § 35-34-1-5(e) provides in pertinent part:

> An amendment of an indictment or information to include a habitual offender charge under IC 35-50-2-8, IC 35-50-2-8.5, or IC 35-50-2-10 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.

Ivy's omnibus date was set for October 1, 2004. Four days later, the State filed a "Notice of Filing Habitual Offender" and a habitual offender enhancement alleging that Ivy had five prior unrelated felony convictions. Appellant's App. 154-56. Accordingly, the habitual offender information was timely filed.

II. State's Failure to Formally Amend Charging Information

Next, Ivy contends that the State was required to file a formal motion to amend the original information along with filing the habitual offender information.[4] Ivy argues that

[4] We note that the CCS entry for the October 20, 2004, pretrial conference provides that "State files Motion to Add Count(s) 4 (H.I.). Motion granted." Appellant's App. p. 10. However, a review of the transcript for the October 20 pretrial conference reveals that although the trial court explained to Ivy that the State did file a notice of the habitual offender enhancement, the State did not actually move during the hearing to amend the original information to add the habitual offender information as Count 4. *Id.* at 130-35. Nor did the State file a formal written motion to amend. *Id.* at 84-85.

because Indiana Code § 35-34-1-5(e) contains the phrase "*amendment* of any indictment or information" the State is required to make a formal amendment to the original information when it files the habitual offender information. (Emphasis added). The purpose of requiring a motion to amend with notice to all parties is to provide the trial court with oversight of the process and to give parties the opportunity both to be heard on the merits regarding the proposed amendment and to consider possible responses. *Nash v. State*, 545 N.E.2d 566, 567 (Ind. 1989).

We need not decide whether the State erred by failing to file a formal motion to amend because Ivy suffered no prejudice. *See id.* at 567. It is clear from the transcript of the October 20, 2004, pretrial conference that the prosecutor, the defendant, and defense counsel were all present when the trial court told Ivy that the State filed a notice on October 5, 2004, that it was seeking a habitual offender enhancement, informed Ivy which previous convictions the enhancement relied on, and explained the potential consequence to his sentence if he was found a habitual offender. Appellant's App. 131-33. Ivy, through counsel, then asked for and received a continuance to respond to the habitual offender information. The purposes of the motion to amend were therefore fulfilled, and the lack of a formal motion to amend did not prejudice Ivy's substantial rights. *See Nash*, 545 N.E.2d at 567. We cannot say that Ivy was prejudiced by any alleged procedural defect in the filing of the habitual offender information.

III. State's Improper Inclusion of 1988 Conviction

Finally, Ivy argues that his trial counsel was ineffective for failing to move for the dismissal of the habitual offender information. Specifically, he argues that his counsel

should have challenged the inclusion in the State's habitual offender information of a 1988 felony conviction that was not an unrelated prior felony conviction as required by statute.[5] However, Ivy does *not* contend that he did not have the requisite number of unrelated felony convictions to be found a habitual offender under Indiana Code § 35-50-2-8(a). It is apparent that even if Ivy's counsel erred in some way by failing to challenge the inclusion of the 1988 conviction in the habitual offender information, Ivy suffered no prejudice.

A defendant may be sentenced as a habitual offender if he has accumulated at least two prior unrelated felony convictions. Ind. Code § 35-50-2-8(a). The convictions are unrelated "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 [S]tate seeks to have the person sentenced as a habitual offender was committed after sentencing for the second prior unrelated felony conviction." *Id.* at -8(c).

More than two previous unrelated felony convictions may be proven during a habitual offender determination, and the additional convictions are "harmless

[5] Ivy also argues that the trial court erred by refusing at his post-conviction relief hearing to let him "refresh" his trial attorney's memory regarding the contents of the Presentence Investigation Report ("PSI"). However, Ivy's real argument is that the court should have allowed him to introduce portions of the PSI into evidence to demonstrate the convictions were not in the proper sequence. Ivy's argument is unavailing, as the court had already taken judicial notice of the entire report and permitted Ivy to use his own copy to question his trial counsel. Tr. p. 69-71.

We also note that Ivy has included a copy of the PSI on white paper in the Appellant's Appendix. *See* Appellant's App. p. 161-72. Indiana Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Administrative Rule 9(G)(1)(b)(viii) states that "all pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access" and "confidential." The inclusion of the PSI printed on white paper in the Appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part: "Every document filed in a case shall separately identify documents that are excluded from public access pursuant to Admin. R. 9(G)(1) as follows: (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked 'Not for Public Access' or 'Confidential.'"

surplusage." *Waye v. State*, 583 N.E.2d 733, 734 (Ind. 1991). In its habitual offender information, the State alleged that Ivy had *five* previous unrelated felony convictions: (1) a burglary conviction on February 25, 1988, (2) a theft conviction on May 22, 1995, (3) a theft conviction on May 2, 1997, (4) an auto theft conviction on August 3, 1999, and (5) an auto theft conviction on February 27, 2001. Appellant's App. p. 155. At his guilty plea hearing, Ivy acknowledged the 1995 theft conviction, the 1997 theft conviction, the 1999 auto theft conviction, and the 2001 auto theft conviction, but refused to acknowledge the 1988 conviction, saying "I never was convicted of February 25, 1988." *Id.* at 138. In Ivy's brief, he challenges only the propriety of including the 1988 burglary conviction, as the sentencing for that crime occurred in 1996, which was after the 1995 conviction for theft. Appellant's Br. p. 11. Thus, since Ivy does not challenge the propriety of the remaining four unrelated felony convictions, he fails to demonstrate that the outcome of his habitual offender adjudication would have been different had his attorney challenged the State's inclusion of the 1988 conviction. Because Ivy did not suffer prejudice from the errors he alleges, we affirm the decision of the post-conviction court.

Affirmed.

KIRSCH, J., and CRONE, J., concur.