APPELLANT PRO SE:

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IN THE COURT OF APPEALS OF INDIANA

ERIC COBB,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0804-CR-373
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jeffrey L. Marchal, Judge Pro Tempore
Cause No. 49G06-0508-FA-115453

December 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Eric Cobb appeals his sentence for burglary as a class A felony,[1] criminal confinement as a class B felony,[2] and being an habitual offender.[3] Cobb raises four issues, which we consolidate and restate as whether the trial court violated the terms of Cobb's plea agreement when it enhanced Cobb's sentence for criminal confinement as a class B felony by ten years for Cobb's status as an habitual offender.[4]

We affirm.

The relevant facts follow. In August 2005, the State charged Cobb with: Count I, burglary as a class A felony; Count II, robbery as a class B felony; and Count III, criminal confinement as a class D felony. Later, the State also charged Cobb with Count IV, being an habitual offender, and Count V, criminal confinement as a class B felony.[5]

Cobb pled guilty to Count I, burglary as a class A felony, Count IV, being an habitual offender, and Count V, criminal confinement as a class B felony, and the State

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[1] Ind. Code § 35-43-2-1 (2004).

[2] Ind. Code § 35-42-3-3 (2004) (subsequently amended by Pub. L. No. 70-2006, § 1 (eff. July 1, 2006)).

[3] Ind. Code § 35-50-2-8 (Supp. 2005).

[4] Cobb appears to argue that his guilty plea was not knowingly, intelligently, or voluntarily entered. However, a direct appeal is not the proper vehicle for pursuing this claim. It is well-settled that "[a] conviction based upon a guilty plea may not be challenged by . . . direct appeal." Tumulty v. State, 666 N.E.2d 394, 395 (Ind. 1996) (citing Crain v. State, 261 Ind. 272, 301 N.E.2d 751 (1973)). "The proper venue for challenging a plea agreement is the filing [of] a petition for post-conviction relief, thereby triggering a procedure in which the facts can be litigated." Mapp v. State, 770 N.E.2d 332, 334 (Ind. 2002) (relying on Tumulty, 666 N.E.2d at 395).

[5] The record does not contain the charging information for Counts IV and V.

dismissed the remaining charges.[6] The plea agreement stated in part that the State "will make the following recommendation as [sic] the sentence to be imposed: Parties agree that habitual will attach to crim. confine / FB. Cap of 50 years on executed portion of sentence." Appellant's Appendix at 2.

On February 21, 2006, the trial court sentenced Cobb to thirty years for Count I, burglary as a class A felony, with ten years suspended, and enhanced by ten years for the habitual offender enhancement. The trial court sentenced Cobb to twenty years for Count V, criminal confinement as a class B felony, and ordered that this sentence be served concurrently with the sentence for Count I.[7] Thus, the trial court sentenced Cobb to a sentence of forty years with a total executed sentence of thirty years.

On March 3, 2006, the trial court held a resentencing hearing.[8] The trial court then sentenced Cobb to thirty years for Count I, burglary as a class A felony, with no part of

[6] The record does not contain a transcript for the guilty plea hearing.

[7] The State indicates that the trial court ordered the sentences for Count I and Count V to be served consecutively at the February 21, 2006 sentencing hearing; however, the record reveals that the trial court ordered that these sentences be served concurrently. At the sentencing hearing, the trial court stated, "As to Count One, the Court is imposing a sentence of thirty years in the Indiana Department of Correction. . . . Now, as to Count Five, this may be tricky when we're dealing with the abstract, Bobby, but let's see how this goes. He receives a ten year executed term, and that will be *concurrent* to [sic] Count One." Transcript at 22 (emphasis added). The chronological case summary reveals the following entry for February 21, 2006, "Count 005 to run *concurrently* with Count 001." Appellant's Appendix at 22.

[8] The record does not include a transcript of the resentencing hearing.

Cobb argues that the trial court is bound by the initial plea agreement, but he suggests that he "signed a document abolishing the first plea agreement" at the resentencing hearing. Appellant's Brief at

the sentence suspended and twenty years for Count V, criminal confinement as a class B felony, enhanced by ten years for the habitual offender enhancement. The trial court ordered that the sentences for Counts I and V be served concurrently. Thus, the trial court sentenced Cobb to a total executed sentence of thirty years.[9]

The sole issue is whether the trial court violated the terms of Cobb's plea agreement when it enhanced Cobb's sentence for criminal confinement as a class B felony by ten years for Cobb's status as an habitual offender. "'A plea agreement is contractual in nature, binding the defendant, the State and the trial court.'" Addington v. State, 869 N.E.2d 1222, 1223 (Ind. Ct. App. 2007) (quoting Debro v. State, 821 N.E.2d 367, 372 (Ind. 2005)). "If the trial court accepts a plea agreement, it shall be bound by its terms." Ind. Code § 35-35-3-3(e).

Cobb appears to argue that the trial court erred by enhancing Count V by ten years due to the habitual offender enhancement and argues that the habitual offender enhancement should have run concurrently under the plea agreement. However, the plea agreement did not require that the trial court impose a concurrent sentence. Rather, the plea agreement stated in part that the State "will make the following recommendation as the sentence to be imposed: Parties agree that habitual will attach to crim. confine / FB.

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13. However, Cobb does not cite to the record, and our review of the record does not reveal such a document.

[9] We note that Cobb filed a petition to file a belated appeal, which the trial court granted.

Cap of 50 years on executed portion of sentence." Appellant's Appendix at 2. Because the plea agreement did not require that the trial court impose the enhancement as a concurrent sentence, we conclude that the trial court did not violate the plea agreement.[10]

For the foregoing reasons, we affirm the trial court's sentence.

Affirmed.

ROBB, J. and CRONE, J. concur

[10] We note that Ind. Code § 35-50-2-8(h), which governs habitual offenders, provides that "[t]he court *shall sentence a person found to be a habitual offender to an additional fixed term* that is not less than the advisory sentence for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense." (Emphasis added). Thus, the enhancement could not be served concurrently.