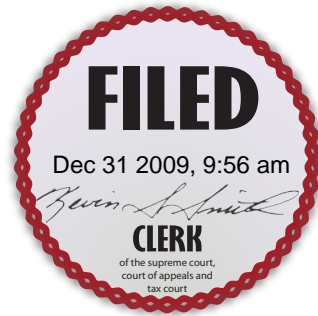


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JERRY TURNER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No.49A02-0908-PC-770

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
The Honorable Stanley E. Kroh, Master Commissioner
Cause Nos. 49G03-0508-FB-138822
49G03-0508-PC-138822

December 31, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Jerry Turner appeals the post-conviction court's denial of his petition for post-conviction relief. Turner raises one issue, which we revise and restate as whether the post-conviction court erred in determining that Turner waived his argument regarding his habitual offender charge.¹ We affirm.

The relevant facts as discussed in Turner's direct appeal are as follows:

¹ Turner also argues that the trial court erred in determining that Turner's claim in his original petition for ineffective assistance of counsel, which Turner withdrew from the petition before final disposition, was withdrawn with prejudice. Turner states that he withdrew his claim for ineffective assistance of counsel because the Public Defender, Tim Miller, could not be located. Turner then argues that because "[t]he unavailability of [Public Defender Miller] was through no fault of Turner," and that "Turner exercised the requisite due diligence to attempt to locate and bring [Miller] into court to testify with regard to Turner's allegations of ineffectiveness of counsel," he should have the opportunity to subsequently pursue his ineffective assistance of counsel claim. Appellant's Brief at 6.

As the State points out in its brief, "it is this Court, and not the post-conviction court, that has the ability to authorize successive petitions." State's Brief at 7. We observe that the Indiana Rules of Post-Conviction Remedies make clear that:

All grounds for relief available to a petitioner under this rule must be raised in his original petition. Any ground finally adjudicated on the merits or not so raised and knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the petitioner has taken to secure relief, may not be the basis for a subsequent petition, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original petition.

Ind. Post-Conviction Rule 1(8); see also Neeley v. State, 269 Ind. 588, 591, 382 N.E.2d 714, 716 (1978), overruled on other grounds by German v. State, 428 N.E.2d 234, 237 (Ind. 1981)) (noting that the policy behind the Post-Conviction Rules is for a petitioner to present all of his claims in one petition "to avoid a multiplicity of post-conviction petitions").

Under Ind. Post-Conviction Rule 1(12), a defendant may "request a second, or successive, Petition for Post-Conviction Relief by completing a properly and legibly completed Successive Post-Conviction Relief Rule 1 Petition Form in substantial compliance with the form appended to this Rule." Ind. Post-Conviction Rule 1(12)(a). That form is to be sent "to the Clerk of the Indiana Supreme Court, Indiana Court of Appeals, and Tax Court." Id. This court will authorize the filing of a second or successive petition "if the petitioner establishes a reasonable possibility that the petitioner is entitled to post-conviction relief." Ind. Post-Conviction Rule 1(12)(b).

Here, Turner has not followed the Ind. Post-Conviction Rule 1(12) procedures, and therefore we need not address whether Turner should be allowed to bring a second petition on his potential ineffective assistance claim.

At approximately 1:00 a.m. on February 24, 2000, Arnold Curry, Jr. was visiting with relatives at his aunt's home in Indianapolis. After leaving the residence, Curry got into his car and made a call on his cellular phone. Just then, Marlon Coleman and Prentis Shelton approached Curry on foot, demanded that he hand over all his money and jewelry, and climbed into the car after brandishing a revolver and a shotgun. As Coleman drove Curry's car away from the scene, with Shelton holding a gun to Curry's head, a white Grand Am followed them and pulled alongside as the two cars stopped on a nearby side street. Turner, who was a passenger in the Grand Am, conversed briefly with Coleman and Shelton and then followed them to a nearby location. Coleman and Shelton ordered Curry out of the car and began, along with Turner, to kick and beat Curry, as he lay helpless on the ground. The men then stripped Curry to his underwear, duct-taped his hands behind his back, and shoved him into the trunk of Curry's car. Curry's cousin witnessed the abduction and phoned police, who soon thereafter stopped both vehicles and rescued Curry from the trunk. Turner fled the scene on foot and managed to elude capture. However, police arrested him at a gas station a few days later after Curry identified Turner from a photo lineup.

Turner v. State, 755 N.E.2d 194, 197 (Ind. Ct. App. 2001), trans. denied.

On February 28, 2000, the State charged Turner with: Count I, kidnapping as a class A felony; Count II, robbery as a class B felony; and Count III, criminal confinement as a class B felony. On May 5, 2000, the State filed a Motion to Extend the Omnibus Date. The trial court granted the State's motion, and it extended the omnibus date, which had been originally set for April 20, 2000, until the date of the final pretrial conference. A pretrial conference was held on June 14, 2000, but on June 19, 2000, the matter was "continued due to congested Court Calendar." Appellant's Appendix at 11. On June 21, 2000, the State filed a Motion to Add Count adding a count of habitual offender, which the trial court granted. The habitual offender count alleged in pertinent part:

[T]hat on or about February 24, 2000, Jerry Turner had accumulated two prior unrelated felony convictions in violation of I.C. 35-50-2-8, specifically: on or about November 6, 1995, in Warren County Circuit Court, Commonwealth of Kentucky, Jerry Turner was convicted of Possession of a Controlled Substance, and on or about August 19, 1997, in Marion County Superior Court Criminal Division 18, Jerry Turner was convicted of Possession of Cocaine or Narcotic Drug.

Appellant's Appendix at 26 n.1. The final pretrial conference was then held on August 9, 2000.

A jury trial was held on October 16 and 17, 2000, and the jury found Turner guilty on Counts I-III. On October 17, 2000, Turner pled guilty to the habitual offender count. On November 15, 2000, the trial court sentenced Turner to twenty years for Count I, kidnapping as a class A felony, and enhanced the sentence by thirty years for the habitual offender charge, for a total sentence of fifty years executed in the Department of Correction. The trial court vacated Counts II and III "under the theory that they were part of the same course of conduct as count I." Id. at 26.

Turner brought a direct appeal and presented three issues for review: (1) whether the State presented sufficient evidence to support his kidnapping conviction; (2) whether the trial court's jury instruction on accomplice liability constituted fundamental error; and (3) whether the trial court erred when it imposed \$125 in costs and a \$1,000 public defender reimbursement fee. Turner, 755 N.E.2d at 196-197. This court affirmed the trial court on the first two issues and reversed and remanded on the costs and fees issue. Id. at 201.

On April 16, 2002, Turner filed *pro se* a petition for post-conviction relief. On May 1, 2002, the State Public Defender filed an appearance on Turner's behalf. On May 22, 2003, the public defender filed a withdrawal of appearance, which was granted on June 12, 2003. On October 29, 2003, the trial court granted Turner's motion to withdraw his petition without prejudice.

In December of 2003, Turner again filed *pro se* a petition for post-conviction relief and requested representation.² The Public Defender filed notices of non-representation on January 26 and 29, 2004.

On June 12, 2006, Turner, by private counsel, filed a verified amended petition for post-conviction relief and made the following claims: A) ineffective assistance of trial counsel; B) violation of speedy trial right; C) improper habitual offender enhancement; D) Brady violations by the State; and E) unreasonable sentence. The State answered Turner's amended petition on July 14, 2006, "denying the material allegations and asserting affirmative defenses of waiver and *res judicata*." Appellant's Appendix at 27. A hearing on Turner's petition was continued several times while Turner attempted to locate the Public Defender who represented him at his jury trial, Tim Miller.

On October 28, 2008, the post-conviction court held a post-conviction hearing. At the hearing, Turner withdrew issues A, B, D, and E from the petition and proceeded exclusively on issue C alleging an improper habitual offender enhancement. On February 24, 2009, both Turner and the State filed Proposed Findings of Fact and

² This filing was noted by the post-conviction court in its Findings of Fact and Conclusions of Law; it is not reflected in the chronological case summary, however.

Conclusions of Law. On March 19, 2009, the post-conviction court issued Findings of Fact and Conclusions of Law and denied Turner's petition.

The post-conviction court found that the allegations contained in parts A, B, D, and E, which had been withdrawn by Turner, were withdrawn with prejudice. The court also found that "[d]uring the plea hearing to the habitual phase, following the jury's verdict, the record indicate[d] that the parties and the court all agreed that the omnibus date had been extended to August 9, 2000." Id. at 28. The court found that the reason for extending the omnibus date was to provide "an extension . . . to allow the parties to engage in plea negotiations which will determine whether the habitual offender enhancement may be filed." Id. Finally, the post-conviction court found that the record from the guilty plea hearing contained the following colloquies:

THE COURT: All right. Do you understand if there were a trial on the habitual offender information you would've had the right to appeal your conviction as being an habitual offender, and if you are indigent your appeal would've been at public expense?

TURNER: Yes.

THE COURT: Like I told you before, you are not waiving your right to appeal the decision of the jury on Counts One, Two, and Three, just the habitual offender, do you understand that?

MR. TURNER: Yes.

* * * * *

THE COURT: Understanding all your legal rights and the questions I've asked you, do you still wish to plead guilty to being an habitual offender?

TURNER: Yes.

THE COURT: Have you had sufficient time to talk to Mr. Miller about this?

TURNER: Yes.

* * * * *

THE COURT: Now, Mr. Turner, you've heard the factual basis as read by the Deputy Prosecutor, are these things true?

TURNER: Yes.

Id. at 28-29 (internal citations omitted).³

The post-conviction court then entered Conclusions of Law on Turner's claim for an improper habitual offender enhancement. First, the court concluded that "[w]hen Turner entered a plea of guilty to the habitual offender charge, he gave up the right to challenge said charge as untimely filed or as improperly charged." Id. at 30. The court, citing the colloquies listed in its Findings of Fact, concluded that:

The court conducted a thorough guilty plea hearing regarding the habitual count "When a defendant pleads guilty he [] cannot question pre-trial orders after a guilty plea is entered." [Cornelious] v. State, 846 N.E.2d 354, 357 (Ind. Ct. App. 2006), trans. denied (citing Branham v. State, 813 N.E.2d 809, 811 ([Ind. Ct. App. 2004])). Issues related to the trial court's extension of the omnibus date or the trial court's finding that the habitual charge was filed timely was waived by Turner when he pled guilty to that charge.

Id. at 30 (footnote omitted). The post-conviction court also concluded that even though Turner did not plead guilty under a plea agreement, "the court did consider Turner's admission of guilt in [Turner's] favor." Id. at 31. The post-conviction court noted that the trial court listed Turner's guilty plea as a mitigating factor, and it noted that "Turner received the minimum sentence of 20 years on the underlying A felony kidnapping conviction, where he could have received 50 years on that A felony alone." Id. The post-

³ The record does not include a copy of the transcript from the guilty plea hearing.

conviction court concluded that “Turner received a more favorable outcome than he could have, had he not chosen to plead guilty to the habitual offender count. By doing so, he relinquished the right to later challenge the propriety of the habitual offender sentence. See Mills [v. State], 868 N.E.2d [446, 453 (Ind. 2007)].” Id.

Next, the post-conviction court concluded that “[e]ven if the merits of Turner’s claim were properly before this Court, said claim would nonetheless fail. The facts show that the habitual offender charge in Turner’s case was both timely-filed and legally sound.” Id. at 31. First, on the issue of timing, the court concluded that in lieu of the fact that the omnibus date had been extended to August 9, 2000, “the State filed the habitual offender information on June 21, 2000 – more than 40 days before the omnibus date” Id. at 31-32.

Second, the post-conviction court concluded that “Turner’s habitual offender charge was legally sound; [Turner] has not shown otherwise.” Id. at 33. The court noted that:

In his Petition, Turner cites to the current habitual offender statute, IC 35-50-2-8, as amended in July of 2001. Said version of the statute would be inapplicable to any analysis here. Along with the amendment in July of 2001, P.L.166-2001, Sec.5, provides: “IC 35-50-2-8, as amended by this act, applies only if the offense for which the state seeks to have the person sentenced as a habitual offender was committed after June 30, 2001.” In his Petition, Turner argues that the rule of *lenity* should apply; however, it does not.

Id. at 32 (footnote omitted).

The issue is whether the post-conviction court erred in determining that Turner waived his argument regarding his habitual offender charge. Turner appears to argue that his conviction for being a habitual offender “constituted fundamental error because, under the plain meaning of the statute . . . the enhancement was based upon two (2) invalid prior unrelated felonies . . . and/or because the habitual offender information was late filed by the State of Indiana.” Appellant’s Brief at 6.

In reviewing a post-conviction court’s denial of a petition for post-conviction relief, the petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Further, the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Ind. Post-Conviction Rule 1(6). Id. “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. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

Initially, we note that Turner did not frame the issue as one of fundamental error in his petition. Based on the claim raised in Turner's petition, the post-conviction court correctly concluded that, because Turner pled guilty to the habitual offender count, he waived for review the trial court's rulings on pretrial orders. See Cornelious v. State, 846 N.E.2d 354, 357 (Ind. Ct. App. 2006), trans. denied. On appeal, Turner framed the issue as whether that the trial court's grant of the State's pretrial motion amending Turner's charging information and adding a count for being an habitual offender was fundamental error.

Generally "[t]he fundamental error doctrine provides a vehicle for the review of error not properly preserved for appeal." Ortiz v. State, 766 N.E.2d 370, 375 (Ind. 2002). "Fundamental error is 'permitted to preserve certain egregious claims of error even if they were not objected to or were available but not raised on appeal.'" Latta v. State, 743 N.E.2d 1121, 1132 (Ind. 2001) (quoting Baird v. State, 688 N.E.2d 911, 916 (Ind. 1997), reh'g denied, cert. denied by 525 U.S. 849, 119 S. Ct. 122 (1998)). "Ordinarily, however, fundamental error analysis has no application in postconviction proceedings." Id. The exception is "an extremely narrow one, available only 'when the record reveals clearly blatant violations of basic and elementary principles [of due process], and the harm or potential for harm [can]not be denied.'" Canaan v. State, 683 N.E.2d 227, 236 n.6 (Ind. 1997) (quoting Warriner v. State, 435 N.E.2d 562, 563 (Ind. 1982)), reh'g denied, cert. denied by 524 U.S. 906, 118 S. Ct. 2064 (1998). The Indiana Supreme

Court has, regarding the fundamental error doctrine's applicability in post-conviction proceedings, stated that:

While concerns over due process do sometimes merit invocation of a fundamental error exception to the contemporaneous objection rule on direct appeal, we think its availability as an exception to the waiver rule in post-conviction proceedings is generally limited to those circumstances we set forth in Bailey v. State, 472 N.E.2d 1260, 1263 (Ind. 1985): “[D]eprivation of the Sixth Amendment right to effective assistance of counsel, or . . . an issue demonstrably unavailable to the petitioner at the time of his [or her] trial and direct appeal.”

Id.

Turner essentially raises a two-pronged argument as to why the habitual offender enhancement was error: (1) “under the plain meaning of the statute . . . the enhancement was based upon two invalid prior unrelated felonies . . . [; and (2)] because the habitual offender information was late filed by the State of Indiana.” Appellant’s Brief at 6. Here, Turner does not develop an argument and the record does not reveal that the trial court erred in granting the State’s motion to add a count for being an habitual offender on the basis that the habitual offender information was filed late by the State was “demonstrably unavailable” to Turner at the time of his direct appeal. Consequently, Turner’s claim is unavailable on post-conviction relief and is waived. See Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002) (holding that it was error to review the fundamental error claim in the post-conviction proceeding).

Also, near the end of Turner's brief, he appears to recast his argument regarding fundamental error as an ineffective assistance of counsel claim. Specifically, Turner states:

There were no extensive plea negotiations in Turner's case and, likewise, there was valid cause or agreement to extend the originally set omnibus date; as such, Miller should have objected to the State's filing of the [motion to add a count for habitual offender] and Miller's failure rendered his assistance to Turner ineffective.

Appellant's Brief at 13. This argument was contained in Turner's petition as section II.A.3, which Turner withdrew at the evidentiary hearing. To the extent that Turner argues on appeal that he received ineffective assistance of counsel, we conclude that Turner's claim is waived because he did not present this claim to the post-conviction court. See Walker v. State, 843 N.E.2d 50, 57 (Ind. Ct. App. 2006) (holding that a claim which was in defendant's amended petition for post-conviction relief but abandoned at the post-conviction hearing was unavailable to be argued on appeal and was consequently waived), reh'g denied, trans. denied.

We will attempt to address Turner's remaining argument to the extent that Turner suggests that the issue was demonstrably unavailable. Turner argues that, under the "plain meaning" of the habitual offender statute, his sentence enhancement was improper. Specifically, Turner argues that his habitual offender enhancement violated Ind. Code § 35-50-2-8(d), which provides in pertinent part:

A conviction does not count for purposes of this section as a prior unrelated felony conviction if:

* * * * *

- (3) all of the following apply:
 - (A) The offense is an offense under IC 16-42-19 or IC 35-48-4.
 - (B) The offense is not listed in section 2(b)(4) of this chapter.
 - (C) The total number of unrelated convictions that the person has for:
 - (i) dealing in or selling a legend drug under IC 16-42-19-27;
 - (ii) dealing in cocaine or a narcotic drug (IC 35-48-4-1);
 - (iii) dealing in a schedule I, II, III controlled substance (IC 35-48-4-2);
 - (iv) dealing in a schedule IV controlled substance (IC 35-48-4-3); and
 - (v) dealing in a schedule V controlled substance (IC 35-48-4-4);does not exceed one (1).

Turner's habitual offender sentence enhancement was based upon two offenses for possession of controlled substance which are governed by Ind. Code § 35-48-4. Thus, Turner argues that Ind. Code § 35-50-2-8(d)(3) "specifically excluded [his convictions for possession of a controlled substance] from use as prior unrelated felony convictions under Indiana's Habitual Offender statute." Appellant's Brief at 10.

However, as the post-conviction court pointed out in its Conclusions of Law, Turner's argument is based upon the current version of the statute which was not in effect when the underlying offense, kidnapping as a class A felony, was committed. The habitual offender statute was amended by Pub. L. 166-2001. Section 5 of Pub. L. 166-2001 states that "IC 35-50-2-8, as amended by this act, applies only if the offense for

which the state seeks to have the person sentenced as a habitual offender was committed after June 30, 2001.” The kidnapping offense was committed on February 24, 2000. Thus, Turner’s habitual offender sentence enhancement was governed by the earlier version of the statute. The relevant portion of the applicable version of the habitual offender statute provided:

- (b) After a person has been convicted and sentenced for a felony committed after sentencing for a prior unrelated felony conviction, the person has accumulated two (2) prior unrelated felony convictions. However, a conviction does not count for purposes of this subsection, if:
 - (1) it has been set aside; or
 - (2) it is one for which the person has been pardoned.

Ind. Code § 35-50-2-8 (1998). Thus, under the applicable version of the habitual offender statute, there were no exceptions for drug possession offenses from being used to determine if a person was an habitual offender.

Turner also appears to argue for the rule of *lenity* to apply. Turner argues that “[t]he statute at issue herein is not specific, ambiguous, and subject to dual interpretation; as such, the rule of lenity applies and the Habitual Offender statute should be interpreted in favor of Turner.” Appellant’s Brief at 10. The rule of lenity requires that criminal statutes be strictly construed against the State. Mask v. State, 829 N.E.2d 932, 936 (Ind. 2005). Where there is ambiguity, it must be resolved against the penalty. State v. Downey, 770 N.E.2d 794, 797 (Ind. 2002). Here, however, not only does Turner not reference the applicable statute in making his argument, but also Turner does not suggest

specifically what is ambiguous about *either* statute, nor can we discern such an ambiguity. See Ind. Appellate Rule 46(A)(8)(a). Accordingly, the rule of *lenity* is inapplicable.

For the foregoing reasons, we affirm the post-conviction court's denial of Turner's petition for post-conviction relief.

Affirmed.

MATHIAS, J., and BARNES, J., concur.