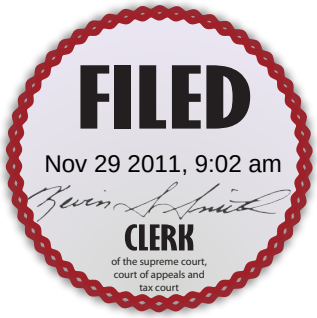

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IN THE
COURT OF APPEALS OF INDIANA

JOSEPH SIMMONS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 40A01-1104-PC-186
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JENNINGS CIRCUIT COURT
The Honorable John A. Westhafer, Special Judge
Cause No. 40C01-1012-PC-3

November 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Joseph Simmons appeals the denial of his petition for post-conviction relief. We affirm.

Issue

Simmons raises one issue, which we restate as whether the post-conviction court properly concluded that his 1998 guilty plea to Class C felony operating a motor vehicle with BAC of .10% or greater causing death was not involuntary.

Facts

In 1998, the State charged Simmons with Class C felony operating a motor vehicle while intoxicated causing death, Class C felony operating a motor vehicle with BAC of .10% or greater causing death, Class C felony reckless homicide, Class A infraction driving while suspended, and Class A misdemeanor driving while suspended with prior conviction. Simmons pled guilty to Class C felony operating a motor vehicle with BAC of .10% or greater causing death, the remaining charges were dismissed, and Simmons was sentenced to eight years.

At the time of Simmons's 1998 guilty plea, Indiana Code Section 9-30-5-3 provided that a drunk driving offense was a Class D felony if the person had a previous conviction of operating while intoxicated and the previous conviction occurred within the five years immediately preceding the present offense. In 2008, Indiana Code Section 9-30-5-3 was amended to include a subsection that in part made it a Class C felony to operate while intoxicated or with a BAC of at least .08% with a previous conviction of

operating while intoxicated causing death. Prior to this amendment, no such offense existed.

In 2010, Simmons was charged with several alcohol related offenses for an August 11, 2010 incident. The charges included Class C felony operating a motor vehicle while intoxicated with prior conviction for operating while intoxicated causing death. Simmons was eventually convicted of that count and sentenced to eight years.

On December 29, 2010, Simmons filed a petition for post-conviction relief arguing that his 1998 guilty plea was not voluntary because, had he known his next drunk driving offense would be a Class C felony, he would not have pled guilty or could have pled guilty to another charge like reckless homicide. Simmons's petition for post-conviction relief was denied, and Simmons now appeals.

Analysis

Simmons contends that the post-conviction court improperly denied his petition. "The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence." Kubsch v. State, 934 N.E.2d 1138, 1144 (Ind. 2010). Because a petitioner appealing the denial of post-conviction relief is appealing from a negative judgment, to prevail on appeal, the 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. Further, although we do not defer to a post-conviction court's legal conclusions, the 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.

Simmons argues that his 2010 conviction would not have been elevated to a Class C felony based on the 2008 amendment if he had pled guilty to reckless homicide instead of operating a motor vehicle with BAC of .10% or greater causing death in 1998. Other than the assertion in his post-conviction relief petition, however, Simmons does not direct us to any evidence indicating the State had offered him the opportunity to plead guilty to reckless homicide. Assuming such a plea was offered, we address Simmons's contention that had he "known of the ex post facto application of the modified sentence enhancement statute he would not have entered the plea. It was thus, involuntary." Appellant's Br. p. 7. Simmons also argues that, as a result of the 2008 amendment, he "was in essence for the second time tried, convicted and sentenced for causing the death of a young woman." Id. at 9.

As an initial matter, Simmons recognizes that a trial court generally is not required to inform the defendant of the possible collateral consequences of his or her plea as long as the defendant has knowledge and understands the penalty or range of penalties for the commission of the specific act to which he or she pleads guilty. See Owens v. State, 437 N.E.2d 501, 504 (Ind. Ct. App. 1982). We reject any suggestion that Simmons was not "fully informed of the potential future consequences of his conviction[.]" Appellant's Br. p. 7. Surely, neither defense counsel nor the trial court could have anticipated the 2008 amendment so as to have been required to advise Simmons of the consequences when he pled guilty in 1998.

As for Simmons's ex post facto claim, the United States and Indiana constitutions prohibit ex post facto laws. See U.S. Const. art. I, § 10; Ind. Const. art. I, § 24. "The ex

post facto analysis is the same for both constitutional provisions." Teer v. State, 738 N.E.2d 283, 287 (Ind. Ct. App. 2000), trans. denied. The legislature may not enact any law that "'imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'" Id. (citations omitted). Our focus is not on whether a legislative change produces some sort of disadvantage, but on whether any such change alters the definition of criminal conduct or increases a penalty by which a crime is punishable. Id.

In Simmons v. State, No. 40A05-1101-CR-10 (Ind. Ct. App. Oct. 31, 2011), we recently addressed Simmons's ex post facto challenge to the 2010 conviction on direct appeal. In rejecting Simmons's claim, we reasoned:[1]

> Simmons argues that elevating his conviction to a Class C felony based on a statute that was enacted after he committed his prior OWI is an ex post facto violation. Both this court and our supreme court have rejected similar arguments.
>
> In Funk v. State, 427 N.E.2d 1081 (Ind. 1981), the defendant claimed that the general habitual offender statute was an unconstitutional ex post facto law. Our supreme court gave short shrift to this argument, noting that the penalties provided for in the habitual offender statute were imposed only for future crimes. Id. at 1087. "That prior crimes are involved in an habitual offender prosecution does not change the fact [that] the penalty is imposed only for the last crime committed." Id. Thus, the court concluded that Funk was not being punished for having committed the prior crimes that occurred before the habitual offender enhancement statute went into effect; he was instead being punished for the crime committed after the effective date of the statute. Id.; see also Hall v. State, 273 Ind. 507, 517, 405 N.E.2d 530, 537 (1980) (rejecting defendant's claim that habitual offender statute was unconstitutional

[1] Simmons's also relies on Goldsberry v. State, 821 N.E.2d 447 (Ind. Ct. App. 2005). At issue in that case was whether a statute, which became effective after Goldsberry engaged in the relevant conduct, increased the penalty or imposed an additional punishment for Goldsberry's initial conduct. Goldsberry, 821 N.E.2d at 464. Unlike the case before us today, Goldsberry did not involve a subsequent criminal conviction and is not applicable here.

ex post facto law because the statute went into effect at least ten months before the defendant committed the crime for which he was convicted) (citing McDonald v. Massachusetts, 180 U.S. 311 (1900) (noting that since recidivist statutes impose punishment on only future crimes, they have no ex post facto implications)).

And in Teer, supra, the defendant was convicted for possession of firearm by a serious violent felon ("SVF"). On appeal, he claimed that the SVF statute was an improper ex post facto law because it criminalized otherwise legal behavior—the possession of a firearm—based only on the fact that he had committed certain felonies before the effective date of the SVF statute. We rejected this argument, noting that the SVF statute neither re-punished Teer for his prior crime nor enhanced the penalty for the prior crime. Teer, 738 N.E.2d at 288.

The same analysis holds true here. Simmons is not being re-punished for his prior crime, nor has the penalty for his prior crime been enhanced. He is simply being punished as a recidivist based upon his most recent act of OWI. And he is being punished under the version of the statute which was effective at the time he committed his most recent OWI. See Collins v. State, 911 N.E.2d 700, 708 (Ind. Ct. App. 2009) (noting general rule that the law in effect at the time the crime was committed is controlling), trans. denied.

Wallace v. State, 905 N.E.2d 371 (Ind. 2009) is distinguishable from the facts before us. In Wallace, the defendant had been tried, convicted, and served his sentence prior to the effective date of the Sex Offender Registry Act. When he refused to register as a sex offender, Wallace was charged and convicted of Class D failing to register as a sex offender. On appeal, our supreme court concluded that application of the sex offender registry requirement to Wallace was an ex post facto violation because it imposed additional burdens that acted as an additional punishment that went beyond that which could have been imposed at the time Wallace's crime had been committed. Id. at 384.

Here, however, Simmons is not being punished for his prior crime. He is being punished for the instant crime. Wallace had the additional punishment of registration imposed on him based solely on his prior conviction. Here, Simmons's current crime has simply been enhanced based upon his recidivism. We therefore conclude that the present case is controlled by Funk and that Simmons's conviction for Class C felony OWI does not constitute an ex post facto violation.

Simmons, No. 40A05-1101-CR-10 slip op. at 6-8.

Likewise, we conclude that the 2008 amendment did not impose additional punishment on Simmons for his 1998 conduct; instead, it elevated any drunk driving offense committed after July 1, 2008, to a Class C felony. Because the 2008 amendment is not an ex post facto violation, Simmons has not established that his guilty plea was involuntary. The denial of Simmons's petition for post-conviction relief was not clearly erroneous.

Conclusion

The post-conviction court properly denied Simmons's petition for post-conviction relief. We affirm.

Affirmed.

ROBB, C.J., and BRADFORD, J., concur.