

Leroy Hall (“Hall”) was found guilty by jury in Marion Superior Court of Class B felony rape, Class B felony attempted rape, three counts of Class D felony criminal confinement, Class D felony intimidation, three counts of Class A misdemeanor battery, and Class A misdemeanor criminal mischief. In addition, Hall pled guilty to a habitual offender allegation. He now appeals his sentence, raising the following restated issues:

- I. Whether the State improperly amended the charging information to include a habitual offender allegation;
- II. Whether the trial court erred in imposing sentence on the habitual offender adjudication; and,
- III. Whether his aggregate sentence is appropriate in light of the nature of the offense and character of the offender.

Concluding that the State properly amended the charging information by including a habitual offender count, but that the trial court erred in imposing sentence, we affirm and remand for resentencing.

Facts and Procedural History

In January 2006, Hall began a romantic relationship with K.H. and the two agreed to marry. On June 16, 2006, K.H. told Hall that she needed time to think and to evaluate their relationship. The following day, K.H.’s children asked to see Hall for Father’s Day, so Hall, K.H., and her four children went to dinner together. K.H. then drove Hall home. K.H. again told Hall that she needed time to think, but Hall pleaded with her to continue the relationship.

Over the next three days, Hall called K.H. repeatedly at work and home. On June 21, 2006, K.H. went to a friend’s house after work in order to avoid Hall. She returned to her sister’s home, where she and her children were staying, around 1:30 a.m. and

discovered Hall on the couch. Hall immediately began questioning K.H. about where she had been. As K.H. got herself ready for bed, Hall continued pleading with her to continue their relationship. K.H. sat on a loveseat while Hall sat on the couch. Hall then got on his knees, approached K.H. on the loveseat, and then pulled her to the floor. K.H. was unable to get away from Hall who forced her legs above her head, told her not to yell or scream, and raped her. The next morning as K.H. got in her car to go to work, Hall apologized to her.

K.H. worked both her jobs that day and returned to her friend's house. She arrived at her sister's home around 5:00 a.m. the next morning and found Hall asleep on the living room floor. In an effort to avoid a confrontation with Hall, K.H. went upstairs to her bedroom to sleep. She awoke a short time later to find a naked Hall on her bed. Hall flipped K.H. onto her back and attempted to force intercourse with her. K.H. told Hall no and struggled to free herself. Hall then squeezed K.H.'s neck and told her to "shut up" and "be quiet." Tr. p. 126. K.H. gasped for air as she told Hall that she would call the police. Hall replied, "I don't care, I've been in jail before." Tr. p. 131. K.H.'s sister knocked on her bedroom door in order to wake her for work. This distracted Hall so that K.H. was able to get up.

K.H. left for work with her sister and called police to make sure that Hall had left the home. K.H. sought a protective order which was issued the following Monday. Hall continued to call K.H. both at home and work. K.H. asked her employer to follow her home in case Hall was there waiting at her. As K.H. went to unlock her car, she saw Hall "ducked down" in the back seat. Tr. p. 142. K.H. immediately got into her employer's

car and called police from her employer's cell phone. Hall approached the car, but left before the police arrived.

After finding a safe place for her children to stay, K.H. returned to her own home with a male relative and immediately noticed that things were not as she had left them. She stepped outside into the yard and called Hall's name. Hall then came out of the house and backed K.H. up against the side of the house. Hall put his hand around K.H.'s neck, told her that he was going to have her, that he was going to kill her if they were not together, and that she needed to say goodbye to her children. Tr. p. 156. After K.H.'s relative intervened, Hall picked up two fallen tree limbs and threw one of them at K.H. Hall was later apprehended by police and found in possession on K.H.'s driver's license and cell phone.

On July 18, 2006, the State charged Hall with two counts of Class B felony rape, three counts of Class D felony criminal confinement, two counts of Class D felony intimidation, and three counts of Class A misdemeanor criminal mischief. The State later amended the charging information to include counts of Class B felony attempted rape and Class A misdemeanor criminal mischief. On August 29, 2006, the State filed a notice of filing habitual offender and habitual offender information. At a pre-trial conference on September 5, 2006, the State filed a motion to add the habitual offender allegation, which the trial court granted.

A jury trial commenced on September 25, 2006. While the jury deliberated, Hall agreed to plead guilty to the habitual offender enhancement in exchange for the sentencing enhancement being capped at two times the advisory sentence for the highest

felony conviction. The jury acquitted Hall of one count of rape and one count of intimidation, but found him guilty on the remaining charges. The trial court sentenced Hall to fifteen years for Class B felony rape with a thirty-year habitual offender enhancement, two years for each Class D felony criminal confinement conviction, two years for Class D felony intimidation, one year for each Class A misdemeanor battery conviction, fifteen years for Class B felony attempted rape, and one year for Class A misdemeanor criminal mischief. The court ordered that the sentences for rape, criminal confinement, and attempted rape be served consecutively for an aggregate sentence of sixty-two years. Hall now appeals.

I. Habitual Offender Information

Hall argues that his habitual offender adjudication must be vacated because “the State never moved to amend the information with the habitual offender allegation.” Br. of Appellant at 16. Hall seems to argue that the State was required to somehow “amend” the charging information rather than simply “add” a habitual offender count. Hall’s argument is unavailing. Indiana Code section 35-34-1-5(e) (2004) provides that:

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

See e.g. Johnican v. State, 804 N.E.2d 211, 214 (Ind. Ct. App. 2004) (discussing amending of information by adding habitual offender count). As noted above, at the preliminary hearing held on September 5, 2006, the State filed a motion to add the habitual offender count, which the trial court granted.

Moreover, we note that Hall pleaded guilty to being a habitual offender and the merits of that conviction are not available for review on direct appeal. See Tumulty v. State, 666 N.E.2d 394, 395 (Ind. 1996) (“One consequence of pleading guilty is restriction of the ability to challenge the conviction on direct appeal.”).

II. Habitual Offender Enhancement

Hall also argues, and the State concedes, that Hall’s plea agreement limited the habitual offender enhancement to two times the advisory term of the highest level felony for which he was convicted. Therefore, we remand to the trial court for imposition of a twenty-year enhancement to Hall’s fifteen-year sentence for rape, which will reduce Hall’s aggregate sentence to fifty-two years.

III. Inappropriate Sentence

Finally, Hall contends that his sentence is inappropriate. Appellate courts have the constitutional authority to revise a sentence if, after consideration of the trial court’s decision, the court concludes the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B) (2007). As for the nature of the offenses, Hall raped, attempted to rape, and generally terrorized K.H. over the span of several days. Hall’s character is evidenced by his prior felony convictions for rape, sexual battery, and theft. Under the facts and circumstances before us, we cannot conclude that his aggregate fifty-two year sentence is inappropriate.

Affirmed and remanded for imposition of a twenty-year habitual offender enhancement.

NAJAM, J., and BRADFORD, J., concur.