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IN THE
COURT OF APPEALS OF INDIANA

LYNDAL E. JONES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 55A01-0701-CR-53
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MORGAN SUPERIOR COURT
The Honorable Jane Spencer Craney, Judge
Cause No. 55D03-0607-FC-182

December 19, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Lyndal E. Jones appeals his convictions and sentence for class C felony operating a motor vehicle after forfeiture of license for life, class D felony operating a motor vehicle while intoxicated endangering a person, and class B misdemeanor disorderly conduct, as well as his habitual substance offender finding and sentence enhancement. We affirm in part and remand in part.

Issues

Jones raises three issues, which we restate as follows:

I. Whether the trial court violated his right to a speedy trial;

II. Whether the trial court erred in allowing the State to amend the charging information to add a habitual substance offender ("HSO") charge; and

III. Whether the trial court properly imposed the HSO sentence enhancement.

Facts and Procedural History[1]

Jones was arrested in Morgan County on July 2, 2006. On July 3, 2006, the State charged Jones with count 1, operating a motor vehicle after forfeiture of license for life, a class C felony;[2] count 2, operating a vehicle while intoxicated endangering a person, a class

[1] We direct Jones's counsel's attention to Indiana Appellate Rule 50(A)(2), which provides that an appellant's appendix "shall contain a table of contents[.]" We direct the court reporter's attention to Appellate Rule 28(A)(6), which provides that the transcript "shall be bound using any method which is easy to read and permits easy disassembly for copying." The binding prongs for volume 1 of the transcript were much too short to keep the volume in one piece for easy reading.

[2] Ind. Code § 9-30-10-17.

A misdemeanor;[3] count 3, operating a vehicle with a blood alcohol content of .15 or more, a class A misdemeanor;[4] and count 4, disorderly conduct, a class B misdemeanor.[5]

At the initial hearing on that date, Jones asked to be represented by counsel. Magistrate Robert Lybrook found Jones indigent and appointed a public defender to represent him. Jones orally requested a speedy trial. Magistrate Lybrook told Jones that he would have to make such a request through counsel. Jones then requested to proceed pro se until a "fast and speedy jury trial [could be] set up[.]" Tr. at 358. Magistrate Lybrook essentially denied Jones's request and reiterated that Jones would have to make a speedy trial request through counsel. The trial court set the omnibus date for August 28, 2006, and the trial date for November 8, 2006, outside the seventy-day speedy trial period of Indiana Criminal Rule 4(B).[6] Jones did not object, and his counsel neither filed a motion for speedy trial nor objected to the setting of the trial date outside the seventy-day period.

On August 18, 2006, the State notified Jones that it would file an HSO charge if he did not accept a plea offer. Jones did not accept a plea offer, and on November 2, 2006, the

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[3] Ind. Code § 9-30-5-2(b).

[4] Ind. Code § 9-30-5-1(b).

[5] Ind. Code § 35-45-1-3(a)(2).

[6] *See* Ind. Criminal Rule 4(B)(1) ("If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion, except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during such seventy (70) calendar days because of the congestion of the court calendar.").

State filed an HSO charge, which ultimately would be designated as count 7.[7] Count 7 alleged that Jones had been convicted of class D felony operating while intoxicated in August 1998 and again in January 2000. After a hearing on November 6, 2006, Judge Jane Spencer Craney[8] overruled Jones's counsel's objection to the addition of count 7 and granted his request for a continuance until November 28, 2006. On November 16, 2006, the State moved to amend the charging information to add counts 5 and 6 as class D felony enhancements to counts 2 and 3 respectively, based on Jones's December 2001 conviction for class D felony operating while intoxicated.[9] At a pretrial hearing on November 20, 2006, the trial court granted the State's motion to amend over Jones's objection. At a pretrial hearing on November 27, 2006, the trial court granted Jones's request to proceed pro se and appointed his counsel as standby counsel.

On November 28, 2006, Jones represented himself at trial on counts 1 through 4. The jury found him guilty as charged. Jones then made a request to be represented by counsel, which the trial court granted. Through counsel, Jones waived his right to a jury trial on counts 5 through 7 and admitted to the corresponding allegations. The trial court found Jones guilty of counts 5 and 6 and found him to be an HSO as alleged in count 7.

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[7] *See* Ind. Code § 35-50-2-10(b) ("The state may seek to have a person sentenced as a habitual substance offender for any substance offense by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated substance offense convictions.").

[8] Judge Spencer Craney presided at all proceedings after the initial hearing. Hereafter, we refer simply to "the trial court."

[9] *See* Ind. Code § 9-30-5-3(1) ("A person who violates section 1 or 2 of this chapter commits a Class D felony if … the person has a previous conviction of operating while intoxicated that occurred within the five (5) years immediately preceding the occurrence of the violation of section 1 or 2 of this chapter[.]").

At the sentencing hearing on January 4, 2007, the trial court merged counts 3 and 6 into counts 2 and 5. The court sentenced Jones to eight years of incarceration for count 1, to three years of incarceration for counts 2 and 5, to one hundred eighty days of incarceration for count 4, and to one year of incarceration for count 7. The court ordered the sentence for counts 2 and 5 served concurrent with the sentence for count 1. The court ordered the sentence for count 4 served consecutive to the sentence for count 1. Finally, the court ordered the sentence for count 7 served consecutive to the sentences for counts 1 and 4, for an aggregate sentence of nine and one-half years. This appeal ensued.

Discussion and Decision

I. Denial of Right to Speedy Trial

"The right of an accused to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and by Article I, Section 12 of the Indiana Constitution." *Clark v. State*, 659 N.E.2d 548, 551 (Ind. 1995). "[T]he provisions of Indiana Criminal Rule 4 implement the defendant's speedy trial right." *Id.* As mentioned *supra*, Jones requested a speedy trial at the initial hearing, but the trial court denied his request because it had already appointed counsel to represent him. Jones then requested to proceed pro se for the purpose of "set[ting] up" a speedy trial, but the trial court denied his request. Tr. at 358. On appeal, Jones makes a twofold argument: (1) the trial court should have granted his request to proceed pro se; and (2) the trial court should have granted his request for a speedy trial.

Initially, we observe that "once counsel is appointed, a defendant speaks to the court through counsel." *Jenkins v. State*, 809 N.E.2d 361, 367 (Ind. Ct. App. 2004) (citation, quotation marks, and alterations omitted), *trans. denied*. "[I]t is within the trial court's

discretion to accept and respond to *pro se* motions filed by a defendant who is represented by counsel." *Driver v. State*, 725 N.E.2d 465, 471 (Ind. Ct. App. 2000). That said, a defendant has a right to self-representation pursuant to the Sixth Amendment to the United States Constitution. *Stroud v. State*, 809 N.E.2d 274, 279 (Ind. 2004) (citing *Faretta v. California*, 422 U.S. 806, 821 (1975)). "However, a defendant must first clearly and unequivocally assert his right of self-representation before claiming that such a right has been denied." *Dobbins v. State*, 721 N.E.2d 867, 871 (Ind. 1999). A request to proceed pro se

> must be sufficiently clear that if it is granted, the defendant should not be able to turn about and urge that he was improperly denied counsel. If the rule were otherwise, trial courts would be in a position to be manipulated by defendants clever enough to record an equivocal request to proceed without counsel in the expectation of a guaranteed error no matter which way the trial court rules.

Id. (citations and quotation marks omitted).

At the start of the initial hearing in this case, Jones asked the trial court to appoint counsel to represent him. The court found Jones indigent and granted his request. Jones then requested a speedy trial. The court replied, "Well, now that you've got a lawyer, you've got to do it through your lawyer, Mr. Lauer." Tr. at 355. Jones expressed dissatisfaction with Lauer. The following colloquy occurred:

> THE COURT: I'm not sure what you're talking about but I've never had a complaint about Mr. Lauer in thirteen years except for just now.
>
> THE DEFENDANT: Sir, I've complained about Greg Lauer so many times, it's pathetic, sir.
>
> THE COURT: You must be pretty hard to please.
>
> THE DEFENDANT: Uh, just pretty much like people get a hold of me when I write them or whatever, sir.

[The court then questioned Jones about his understanding of his constitutional rights.]

Q And do you have any questions regarding your rights?

A Uh, the only thing is, sir, is the fast and speedy jury trial I need filed today sir or …

THE COURT: I've told you that law requires that now that you have a lawyer …

THE DEFENDANT: I'm going to fire my lawyer right now sir, and I need you to do it for me. I'm not meaning to piss you off sir, I've messed with Greg Lauer too long and he messes me over every time sir.

[The court admonished Jones for cursing.]

THE COURT: Now you don't want a lawyer appointed, is that right?

THE DEFENDANT: Not Greg Lauer, sir.

THE COURT: Are you going to represent yourself?

THE DEFENDANT: … too many changes of venue, too many ordeals going on. (indiscernible) all the ordeals, sir.

THE COURT: Okay, are you then going to be representing yourself?

THE DEFENDANT: No sir.

THE COURT: Who's going to represent you?

THE DEFENDANT: I'll represent myself until I go to the next jury trial or whatever it is sir, I mean a fast and speedy jury trial set up sir.

THE COURT: Who's going to represent you?

THE DEFENDANT: You tell me sir, because me and Greg don't get along.

THE COURT: Mr. Lauer's the only one I have under contract to do OWI's, so it's either him or no one and I don't care if you get along with him or not.

THE DEFENDANT: (indiscernible) counsel.

THE COURT: Pardon me?

THE DEFENDANT: Nothing sir. That's all I needed on the record sir.

THE COURT: Okay …

THE DEFENDANT: Thank you.

THE COURT: You've got it. You've got Mr. Lauer for a lawyer, there's no speedy trial until he asks for it.

Id. at 355-58.

Based on this record, we conclude that Jones's request to proceed pro se was far from unequivocal and that he therefore waived his right to represent himself. That being the case, the trial court was within its discretion to deny Jones's pro se request for a speedy trial. *Driver*, 725 N.E.2d at 471. Furthermore, neither Jones nor his counsel objected to the trial setting beyond the seventy-day limit of Criminal Rule 4(B). "[A] defendant must maintain a position reasonably consistent with his request for a speedy trial and must object, at his earliest opportunity, to a trial setting that is beyond the seventy-day time period." *Foster v. State*, 795 N.E.2d 1078, 1086 (Ind. Ct. App. 2003), *trans. denied* (2004). Once a trial date is set beyond the limits set forth in Criminal Rule 4(B), "the defendant must file a timely objection to the trial date or waive his right to a speedy trial. Accordingly, the defendant's failure to object timely will be deemed acquiescence in the setting of that date." *Id*. (citation omitted). As such, Jones waived his right to a speedy trial.

II. Amendment of Charging Information

Jones contends that the trial court erred in allowing the State to amend the charging information to include count 7, the HSO allegation.[10] In November 2006, when the State filed the allegation, Indiana Code Section 35-34-1-5 provided in pertinent part,

> (b) The indictment or information may be amended in matters of substance or form, and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant, at any time up to:
> (1) thirty (30) days if the defendant is charged with a felony; or
> (2) fifteen (15) days if the defendant is charged only with one
> (1) or more misdemeanors;
> before the omnibus date.
> (c) Upon motion of the prosecuting attorney, the court may, at any time before, during, or after the trial, permit an amendment to the indictment or information in respect to any defect, imperfection, or omission in form which does not prejudice the substantial rights of the defendant.
> (d) Before amendment of any indictment or information other than amendment as provided in subsection (b) of this section, the court shall give all parties adequate notice of the intended amendment and an opportunity to be heard. Upon permitting such amendment, the court shall, upon motion by the defendant, order any continuance of the proceedings which may be necessary to accord the defendant adequate opportunity to prepare his defense.
> (e) 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 the trial.

In *Fajardo v. State*, 859 N.E.2d 1201 (Ind. 2007), which was decided after Jones's trial and sentencing, our supreme court sought to clarify the difference between amendments of form and substance for purposes of Indiana Code Section 35-34-1-5.[11] The State initially charged Fajardo with class C felony child molesting. Over Fajardo's objection, the trial court

[10] Jones does not appeal the addition of counts 5 and 6 to the charging information.

[11] Effective May 8, 2007, Indiana Code Section 35-34-1-5 was amended to delete any mention of amendments to matters of form in subsection (b). The amended statute also provides that an information may be amended in matters of either substance or form at any time prior to trial if the amendment does not prejudice the defendant's substantial rights.

permitted the State to amend the charging information after the omnibus date to add one count of class A felony child molesting. A jury found Fajardo guilty as charged, and another panel of this Court affirmed his convictions. Our supreme court granted transfer. After surveying prior cases on the topic, the court explained,

> [T]he first step in evaluating the permissibility of amending an indictment or information is to determine whether the amendment is addressed to a matter of substance or one of form or immaterial defect. As noted above, an amendment is one of form, not substance, if both (a) a defense under the original information would be equally available after the amendment, and (b) the accused's evidence would apply equally to the information in either form. And an amendment is one of substance only if it is essential to making a valid charge of the crime.
>
> The amendment in this case changes a one-count information charging Child Molesting as a class C felony to a two-count information additionally charging Child Molesting as a class A felony. Both charged offenses involve conduct with the same girl, a child under fourteen years of age, and the essential differences between the two are the date of the offense and the accused's conduct, age, and intent. For the class C felony, alleged to have occurred during a two-year period after January 26, 2001, the defendant must have performed or submitted "to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person." Ind. Code § 35-42-4-3(b). For the class A felony charged in Count 2, alleged to have occurred at some point during a longer period, more than three years after January 26, 2001, the defendant must have been at least twenty-one years old and performed deviate sexual conduct, which is "an act involving: (1) a sex organ of one person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object." Ind. Code § 35-41-1-9.
>
> Applying the rule for distinguishing between amendments to matters of form and those of substance, we find that the addition of Count 2 charging a new separate offense constituted an amendment to matters of substance. The defendant's evidence addressed to disputing the occurrence of the original charge would not be "equally applicable" to dispute the date nor the specific conduct alleged in the separate additional charge sought to be added by the amendment. And because the amendment charges the commission of a separate crime, it also is unquestionably essential to making a valid charge of the crime, and thus it is not disqualified from being considered an amendment to a matter of substance.

> Because the challenged amendment in this case sought to modify the original felony information in matters of substance, it was permissible only up to thirty days *before* the omnibus date. Ind. Code § 35-34-1-5(b). The amendment was not sought by the State, however, until seven days *after* the omnibus date, and thus failed to comply with the statute. The defendant's objection should have been sustained and the amendment denied. The conviction and sentence for Count 2, Child Molesting as a class A felony, must be vacated.

Id. at 1207-08 (footnote and some citations omitted).

In this case, the State filed count 7 more than two months after the August 28, 2006, omnibus date. On appeal, Jones argues that "the amendment was, as in *Fajardo*, an allegation of a completely separate crime. HSO requires proof, elements, and evidence clearly different from the charges already properly filed against Jones. As such, the amendment was one clearly of substance rather than form" and therefore should not have been permitted later than ten days after the omnibus date. Appellant's Br. at 11. We disagree.

Initially, we observe that a habitual substance offender finding, like a habitual offender finding, "does *not* constitute a separate crime nor result in a separate sentence, but rather results in a sentence enhancement imposed upon the conviction of a subsequent felony." *Greer v. State*, 680 N.E.2d 526, 527 (Ind. 1997) (emphasis added). More to the point, Indiana Code Section 35-34-1-5(e) provides that "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."[12] Here, the State notified Jones's counsel in a letter dated August 18, 2006—ten days *before* the omnibus date—that it would file the HSO charge if Jones did not accept a plea offer. Once it became clear that Jones would not accept the plea offer, the State filed the HSO charge soon thereafter. Jones does not claim that the State lacked good cause for filing the HSO charge later than ten days after the omnibus date. Consequently, we affirm on this issue.

III. Habitual Substance Offender Enhancement

Finally, Jones contends, and the State concedes, that the trial court erred in ordering the HSO enhancement to be served consecutive to the sentences for counts 1 and 4. "[W]hen defendants are convicted of multiple offenses and found to be habitual offenders, trial courts must impose the resulting penalty enhancement upon only one of the convictions and must specify the conviction to be so enhanced." *McIntire v. State*, 717 N.E.2d 96, 102 (Ind. 1999). The trial court failed to do so here with respect to Jones's HSO enhancement. Therefore, we remand for correction of Jones's sentence and the documents pertaining thereto. On remand, the trial court also should vacate the conviction for count 2, as it was enhanced by count 5,

[12] We acknowledge that the pre-2007 version of Indiana Code Section 35-34-1-5(e) specifically mentions only "a habitual offender charge under IC 35-50-2-8[,]" whereas the current version of the statute also mentions Indiana Code Sections 35-50-2-8.5 (life imprisonment without parole after multiple felony convictions) and 35-50-2-10 (habitual substance offenders). Jones does not mention this amendment, however, let alone argue that the pre-2007 version of Indiana Code Section 35-34-1-5(e) must be read so narrowly as to preclude the filing of a habitual substance offender charge later than ten days after the omnibus date. We recognize that "[p]enal statutes should be construed strictly against the State and ambiguities should be resolved in favor of the accused. At the same time, however, statutes should not be narrowed so much as to exclude cases they would fairly cover." *Merritt v. State*, 829 N.E.2d 472, 475 (Ind. 2005) (footnoted citations omitted). Appellate courts "seek to give a statute practical application by construing it in a way favoring public convenience and avoiding absurdity, hardship, and injustice." *Id.* (footnoted citation omitted). We believe that it would be absurd and unjust to conclude that the pre-2007 version of Indiana Code Section 35-34-1-5(e) is not equally applicable to habitual offender charges under Indiana Code Section 35-50-2-8 and habitual substance offender charges under Indiana Code Section 35-50-2-10.

the conviction and sentence for which are unaffected by our decision. The trial court need not hold a new sentencing hearing on remand.

Affirmed in part and remanded in part.

DARDEN, J., and MAY, J., concur.