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FILED
Feb 21 2011, 9:51 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

JAMMY DANIELS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A05-1006-PC-359
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0901-PC-2

February 21, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Jammy Daniels appeals the denial of his petition for post-conviction relief. Daniels pled guilty to several counts of robbery in separate cause numbers, and he admitted to corresponding charges that he was a habitual offender. He was sentenced to an aggregate term which included habitual offender enhancements. One of Daniels' habitual offender predicate convictions was subsequently set aside on *ex post facto* grounds, and Daniels sought vacatur of both his habitual offender enhancements and guilty plea. The post-conviction court denied his requests, and Daniels now appeals. We conclude that, because one of Daniels' prior underlying convictions has been vacated, his habitual offender enhancements are no longer viable. However, we conclude that Daniels' guilty plea otherwise remains valid and has not been proven unknowing, unintelligent, or involuntary. We remand only for resentencing.

Facts and Procedural History

The State charged Daniels in October 2006 with one count of Class B felony armed robbery. The State alleged Daniels was a habitual offender based on two prior, unrelated felony convictions. According to the State's charging instrument, Daniels' predicate offenses were a 1995 conviction for sexual misconduct with a minor and a 2004 conviction for failure to register as a sex offender.

In December 2006, the State charged Daniels in another cause number with two counts of Class C felony robbery. The State alleged that Daniels was a habitual offender based on the same 1995 conviction for sexual misconduct and 2004 conviction for failure to register.

Daniels reached a combined plea agreement with the State in December 2007. Daniels pled guilty to all of the foregoing counts and habitual offender charges, and the State agreed to limit Daniels' total penal exposure to forty-two years incarceration.

The trial court held a consolidated sentencing hearing. The court sentenced Daniels on the Class B felony to twenty years, enhanced by fifteen years for the habitual offender admission, with five years suspended to probation. The court sentenced Daniels on one of the Class C felonies to six years, enhanced by four years for the habitual offender admission, with four years suspended. The court sentenced Daniels on the remaining Class C felony to six years with four years suspended. All sentences were imposed consecutively for an aggregate term of fifty-one years with nine years suspended.

Daniels next sought post-conviction relief challenging his guilty plea and sentences. Daniels first argued, pursuant to *Wallace v. State*, 905 N.E.2d 371, 373 (Ind. 2009), *reh'g denied*, that his 2004 failure-to-register conviction was invalid on *ex post facto* grounds and required reversal. In turn, Daniels claimed that (a) his habitual offender determinations were no longer supported by two valid prior convictions and (b) his habitual offender guilty plea was not entered knowingly, intelligently, and voluntarily. The post-conviction court agreed that Daniels' failure-to-register conviction constituted an *ex post facto* application of law and vacated it. However, the court declined to reverse Daniel's habitual offender enhancements or robbery guilty plea. The court concluded in part that, since Daniels' failure-to-register conviction was intact at the time Daniels tendered his guilty plea, his habitual offender adjudication remained viable.

Daniels now appeals.

Discussion and Decision

Daniels claims the post-conviction court erred by refusing to vacate (I) his habitual offender sentencing enhancements and (II) his guilty plea / robbery convictions.

In post-conviction proceedings, the petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Helton v. State*, 907 N.E.2d 1020, 1023 (Ind. 2008). A post-conviction court's findings and judgment will be reversed only upon a showing of clear error in a factual determination or error of law. *Ben-Yisrayl v. State*, 729 N.E.2d 102, 105-06 (Ind. 2000), *reh'g denied*.

I. Habitual Offender Enhancements

Daniels first argues that the post-conviction court erred by declining to vacate his habitual offender sentencing enhancements. Daniels claims that the enhancements can no longer stand because one of their predicate convictions has been set aside.

Indiana's habitual offender sentencing scheme provides that, if a defendant has previously been convicted of two unrelated felony offenses, the trial court shall enhance his term for his present conviction. Ind. Code § 35-50-2-8(g), (h). The purpose of the habitual offender statutes is to more severely penalize those persons whom prior sanctions have failed to deter from committing felonies. *Comstock v. State*, 273 Ind. 259, 262, 406 N.E.2d 1164, 1166 (1980).

A person is a habitual offender if the jury or the court finds that the State has proven beyond a reasonable doubt that the person has accumulated two prior, unrelated

felony convictions. I.C. § 35-50-2-8(g). A defendant may also stipulate to the underlying convictions and admit to his habitual offender status, which is the functional equivalent of a habitual offender guilty plea. *See Vanzandt v. State*, 730 N.E.2d 721, 726 (Ind. Ct. App. 2000).

A conviction does not count as a prior unrelated felony conviction for the purposes of habitual offender status if, among other things, "the conviction has been set aside." I.C. § 35-50-2-8(d)(1). Therefore, where a person commits a third felony following his conviction for two prior unrelated felonies, but he is successful in setting aside one of the underlying felony convictions before being found a habitual offender in connection with the third felony, the statute precludes use of the vacated conviction as support for the habitual offender determination. *Coble v. State*, 500 N.E.2d 1221, 1223 (Ind. 1986). Moreover, "[s]ince the statute would preclude use of prior convictions set-aside *after* commission of the third felony but *before* the habitual offender trial, it is consistent with the rationale and plain language of the statute that habitual offender sentence enhancement also cannot be based upon prior convictions which are set aside *after* the habitual offender determination." *Id.*; *accord Olinger v. State*, 494 N.E.2d 310, 311 (Ind. 1986). Such is the case whether the defendant was adjudicated a habitual offender by way of guilty plea or through determination by the factfinder. *State v. Jones*, 819 N.E.2d 877, 880 (Ind. Ct. App. 2004), *trans. denied*.

In line with the foregoing, we conclude that Daniels is entitled to vacatur of his habitual offender sentencing enhancements. The enhancements were predicated specifically upon Daniels' 1995 conviction for sexual misconduct and his 2004

conviction for failure to register as a sex offender. The latter conviction has now been set aside on *ex post facto* grounds. Daniels' sentencing enhancements are thus no longer supported by one of their two predicate convictions, and the enhancements accordingly must be vacated. *See Coble*, 500 N.E.2d at 1223; *Olinger*, 494 N.E.2d at 311.

II. Guilty Plea / Convictions

Daniels next argues that his robbery guilty plea and convictions should be reversed as well. Daniels claims that his guilty plea was not entered knowingly, voluntarily, and intelligently because he unwittingly thought he could be sentenced as a habitual offender based on his predicate convictions.

For a guilty plea to be valid, the defendant's decision to plead guilty must be made knowingly, voluntarily, and intelligently. *Davis v. State*, 675 N.E.2d 1097, 1102 (Ind. 1996). "A 'voluntary' guilty plea reflects the absence of coercion (threats or promises) in the giving of the plea while 'knowing' and 'intelligent' concern the defendant's awareness and understanding of the consequences of the plea itself." 16A William A. Kerr, *Indiana Practice: Criminal Procedure* § 12.5 (2010) (quoting *Sides v. State*, 482 N.E.2d 757, 759 n.1 (Ind. Ct. App. 1985), *affirmed in relevant part*, 490 N.E.2d 318 (Ind. 1986), *vacated on reh'g*, 507 N.E.2d 560 (Ind. 1986)).

"A court shall not accept a plea of guilty without first determining that the defendant . . . has been informed of the maximum possible sentence and minimum sentence for the crime charged and any possible increased sentence by reason of the fact of a prior conviction or convictions . . . ." Ind. Code § 35-35-1-3(a)(3).

When a guilty plea is attacked because of alleged misinformation concerning sentencing, the issue of the validity of such plea is determined by a two-part test: (1) whether the defendant was aware of actual sentencing possibilities and (2) whether the accurate information would have made any difference in his decision to enter the plea. *Harris v. State*, 762 N.E.2d 163, 166-67 (Ind. Ct. App. 2002).

"[A]bsent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." *Brady v. United States*, 397 U.S. 742, 757 (1970) (citation omitted).

We conclude Daniels has failed to sustain a claim that his guilty plea was entered unknowingly, involuntarily, or unintelligently. Daniels pled guilty to the instant robbery charges and habitual offender counts in 2007. Both his 1995 conviction for sexual misconduct and his 2004 conviction for failure to register as a sex offender were effective at the time he pled guilty. The invalidity of his failure-to-register conviction would not be established until 2009 when our Supreme Court rendered its decision in *Wallace*. Accordingly, Daniels cannot sustain a showing that he was misled or misinformed about the validity of his predicate convictions and their penal consequences at the time he tendered his guilty plea. Furthermore, Daniels has offered no evidence indicating that, had he known that his 2004 conviction would be declared invalid and that he could not be sentenced as a habitual offender, he would have altered his plea or trial strategy altogether.

For the reasons stated, we remand this cause only for resentencing.

Reversed and remanded.

BAKER, J., and BARNES, J., concur.