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ATTORNEY FOR APPELLANT:

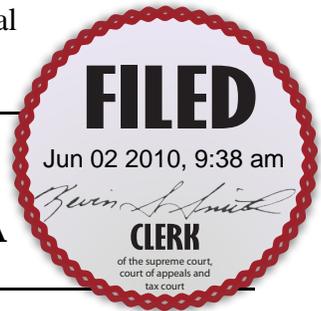
MARK S. LENYO
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

WADE JAMES HORNbacher
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**



MICHAEL CHESTER,
Appellant/Defendant,

vs.

STATE OF INDIANA,
Appellee/Plaintiff.

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No. 71A03-1003-CR-117

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome J. Frese, Judge
Cause No. 71D03-0205-FB-52

June 2, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Michael Chester appeals from the sentence imposed following his guilty pleas to Class B felony Dealing in Cocaine¹ and Class D felony Maintaining a Common Nuisance² and his admission to being a Habitual Offender.³ Chester contends that the trial court erroneously attached the habitual offender sentence enhancement to his maintaining a common nuisance conviction. We reverse and remand for resentencing.

FACTS AND PROCEDURAL HISTORY

On November 8, 2002, Chester pled guilty to Class B felony dealing in cocaine and Class D felony maintaining a common nuisance and admitted to being a habitual offender. On December 12, 2002, the trial court sentenced Chester to fifteen years of incarceration for dealing in cocaine and three for maintaining a common nuisance, the latter enhanced by four years by virtue of the habitual offender finding, with both sentences to be served consecutively. On December 3, 2009, the trial court granted Chester leave to file a belated notice of appeal.

DISCUSSION AND DECISION

Chester argues that, under the circumstances of this case, the trial court could not have legally enhanced his sentence for maintaining a common nuisance by virtue of his habitual offender admission. Specifically, Chester contends that he and his conviction for

¹ Ind. Code § 35-48-4-1 (2002).

² Ind. Code § 35-48-4-13 (2002).

³ Ind. Code § 35-50-2-8 (2002).

maintaining a common nuisance satisfy all of the requirements of Indiana Code section 35-50-2-8(b), which provides in part as follows:

(b) The state may not seek to have a person sentenced as a habitual offender for a felony offense under this section 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).

Subsections (b)(3)(A) and (b)(3)(B) are satisfied because the crime of maintaining a common nuisance is defined in Indiana Code Chapter 35-48-4, specifically section 13, and is not listed in Indiana Code section 35-50-2-2(b)(4) (2002). As for the requirement set forth in subsection (b)(3)(C), the record indicates that Chester has no unrelated convictions for any of the crimes listed. (Green App. 3-4). Consequently, the trial court erroneously applied the habitual offender enhancement to Chester's maintaining a common nuisance conviction. Moreover, it is apparent that the habitual offender enhancement could not have been properly attached to Chester's dealing in cocaine conviction either, as that offense is *also* defined in Indiana Code Chapter 35-48-4 and not listed in Indiana Code section 35-50-2-2(b)(4). The habitual offender enhancement cannot be validly attached to either one of Chester's underlying convictions.

It is true that “[a] person who pleads guilty cannot challenge the propriety of any resulting convictions on direct appeal[,]” *Starr v. State*, 874 N.E.2d 1036, 1037 (Ind. Ct. App. 2007) (citing *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004)), *trans. denied*, but this is not what Chester has done. Chester does not challenge the habitual offender determination, but, rather, its application to his underlying convictions, which Chester claims is without statutory authorization. In our view, Chester’s challenge is directly analogous to a claim that a sentence exceeds the term authorized by statute, a claim which would generally be reviewable on direct appeal following a guilty plea. So, while “[a] defendant may not enter a plea agreement calling for an illegal sentence, benefit from that sentence, and then later complain that it was an illegal sentence[,]” *Lee v. State*, 816 N.E.2d 35, 40 (Ind. 2004) (quotation marks and citation omitted), there is no indication that Chester entered into any such agreement here or received any benefit. We reverse the judgment of the trial court and remand for resentencing.

The judgment of the trial court is reversed and remanded.

RILEY, J., and MATHIAS, J., concur.