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IN THE
COURT OF APPEALS OF INDIANA

BRANDON GIFFORD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A05-1010-CR-707
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Gail Bardach, Judge
Cause No. 29D06-1001-FD-15

June 8, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Brandon Gifford appeals the trial court's finding that he was an habitual substance offender. We affirm.

Issue

Gifford raises one issue, which we restate as whether the trial court properly permitted the State to amend the information alleging that he was an habitual substance offender without conducting a hearing.

Facts

On January 4, 2010, the State charged Gifford with Class D felony resisting law enforcement, Class A misdemeanor operating a vehicle while intoxicated ("OWI") endangering a person, Class A misdemeanor driving while suspended, and three counts of Class B misdemeanor failure to stop after an accident resulting in non-vehicle damage. The State also alleged that the Class A misdemeanor OWI charge should be elevated to a Class D felony because of a 2008 OWI conviction. Finally, the State alleged that Gifford was an habitual substance offender because he had accumulated two prior unrelated substance offense convictions, including a 2001 OWI conviction and a 1997 OWI conviction.

On August 26, 2010, the State moved to amend the habitual substance offender allegation. The State asserted that the 1997 OWI conviction was a Class C misdemeanor, which would not support the habitual substance offender enhancement. The State requested permission to replace the 1997 OWI conviction with the same 2008 OWI conviction the State had alleged as a basis for elevating the Class A misdemeanor charge

to a Class D felony. The State argued that Gifford was notified of its intention to rely on the 2008 conviction to elevate the offense and that a prior conviction could both elevate an offense and support an habitual offender enhancement. On August 27, 2010, the trial court granted the State's motion to amend.

On August 31, 2010, a jury trial was conducted and, on September 1, 2010, the jury found Gifford guilty of the resisting law enforcement and OWI charges and one of the failure to stop after an accident charges. Gifford waived his right to have a jury decide whether the offense should be elevated to a Class D felony and whether he was an habitual substance offender. Gifford stipulated to the past convictions, and the trial court elevated the offense and determined Gifford was an habitual substance offender. Gifford was sentenced accordingly. He now appeals.

Analysis

Gifford argues that the trial court improperly permitted the State to amend the habitual substance offender allegation without giving him an opportunity to be heard. He also contends that he had no opportunity to object to the State's motion because the trial court approved it the next day. Gifford relies on Indiana Code Section 35-34-1-5(d), which provides:

> 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.

As the State points out, however, Gifford did not object to the trial court's failure to conduct a hearing on the amendment at any time before or during the trial. "A defendant must object at trial in order to preserve an alleged error for appeal." Daniel v. State, 526 N.E.2d 1157, 1162 (Ind. 1988) ("The issue of whether the State could pursue its habitual offender allegation although it was filed late has been waived as a result of Daniel's failure to object on this basis either before or during his trial."). "[A] party may not sit idly by, permit the court to act in a claimed erroneous manner, and then attempt to take advantage of the alleged error at a later time." Robles v. State, 705 N.E.2d 183, 187 (Ind. Ct. App. 1998). "A timely objection must be lodged so that the alleged error may be promptly corrected by the trial court." Id. Had Gifford raised this issue before the habitual substance offender proceeding was conducted, the trial court could have determined whether it was necessary to conduct a hearing and if, upon concluding it was necessary, conducted such a hearing. This issue is waived because Gifford did not object to the lack of an opportunity to be heard either before or during the trial.

Conclusion

Gifford's failure to object to the trial court's granting of the amendment without conducting a hearing waives this issue for appellate review. We affirm.

Affirmed.

RILEY, J., and DARDEN, J., concur.