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FILED
Jun 24 2010, 8:51 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

ANTHONY H. TAYLOR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0912-CR-602
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE SAINT JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
Cause No. 71D02-0906-FD-614

June 24, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Following a bench trial, Anthony Taylor was convicted of Theft,[1] a class D felony, and determined to be a Habitual Offender.[2] On appeal, Taylor argues that the habitual offender determination is not supported by sufficient evidence.

We reverse.

On June 25, 2009, the State charged Taylor with theft, a class D felony, and alleged in a separate count that Taylor was a habitual offender. In the habitual offender allegation, the State alleged that Taylor had accumulated two prior class D felony theft convictions. The State alleged that Taylor was convicted under Cause No. 71D08-0408-FC-00882 of class D felony theft for which he was sentenced on December 8, 2004. The State further alleged that following sentencing for that offense, Taylor accumulated a second, unrelated felony theft conviction under Cause No. 71D02-0808-FD-00832 for which he was sentenced on January 16, 2009.

A bench trial in this cause was held on September 10, 2009, at which the trial court heard evidence on both the theft charge and the habitual offender allegation. With regard to the habitual offender allegation, the State moved to admit Exhibits 13, 14, and 15 to prove Taylor's conviction in Cause No. 71D08-0408-FD-00882. Taylor objected that these exhibits did not reflect a conviction for theft as alleged in the charging information, but rather a conviction for possession of cocaine as a class D felony. Thereafter the State moved to amend the habitual offender allegation to conform to the evidence. Taylor objected to the

[1] Ind. Code Ann. § 35-43-4-2 (West, Westlaw through 2009 1st Special Sess.).

[2] Ind. Code Ann. § 35-50-2-8 (West, Westlaw through 2009 1st Special Sess.).

amendment. The trial court admitted the exhibits and took the issue of the variance and the State's amendment request under advisement. On September 24, 2009, the trial court issued its judgment finding Taylor guilty of theft as a class D felony and determining Taylor to be a habitual offender.

> This matter having been tried before the Court on September 10, 2009, and having been taken under advisement, now finds that the State of Indiana has proven beyond a reasonable doubt that on June 23, 2009, the defendant entered the Meijer Store, located in Mishawaka, St. Joseph County Indiana; obtained a screw driver from the hardware department; went to the electronic department and pried open a display case containing cameras; put those cameras into his cart; pushed the cart to the garden area and placed the cameras outside the fence which enclosed the garden area. The Court, further, finds the State of Indiana has proven beyond a reasonable doubt that the defendant then exited the store, drove an automobile near the fence where he attempted to pick up the cameras and taken [sic] them into his car.
>
> Based upon these facts, the Court now finds the State of Indiana has proven beyond doubt, that on June 23, 2009, the defendant knowingly exerted unauthorized control over the property of the Meijer Store, namely cameras, with the intent to deprive the Meijer Store of the use or value thereof.
>
> Accordingly, the Court now finds the defendant guilty of Theft. The Court delays until sentencing whether the conviction shall be entered as a Class D felony or a class A misdemeanor.
>
> Further the Court now finds that the State has proven, beyond a reasonable doubt that the defendant has two unrelated felony convictions. Namely: *The State has proven beyond a reasonable doubt that on December 8, 2004, in Cause No. 71D08-0408-FD-00882, the defendant was convicted of Possession of Cocaine, a class D felony.* Further, the State has proven that after sentencing in that case, the defendant had committed another felony, namely: Theft, a class D felony, which was charged in Cause No. 71D02-0808-FD-00832 on January 17, 2008. The defendant was sentenced in Cause No. 71D02-0808-FD-00832 on January 16, 2009. Additionally, after sentencing in Cause No. 71D02-0808-FD-00832, the State has proven beyond a reasonable doubt that the defendant committed the crime of Theft, which the defendant was convicted of Theft, a class D felony, in this cause, and which Theft occurred on June 23, 2009.
>
> Accordingly, the Court finds that the defendant is an Habitual Offender, but delays until sentencing as to whether its finding will have any effect, based upon its determination as to whether the defendant's conviction for theft will be treated as a class D felony or as a Class A misdemeanor.

Appendix at 32-33 (emphasis supplied). On October 20, 2009, the trial court entered a judgment of conviction for theft as a class D felony and sentenced Taylor to two years. The trial court enhanced the sentence by three years for the habitual offender determination. Taylor now challenges the sufficiency of the evidence supporting the habitual offender determination. Taylor first argues that because the evidence proved that he was previously convicted of possession of cocaine and not the theft that was alleged, the evidence impermissibly varied from the allegation in the charging information. Taylor also argues that the crime actually proven, i.e., possession of cocaine, may not be used as a predicate felony under the habitual offender statute. The State acknowledges that the habitual offender statute precludes the use of Taylor's prior conviction for possession of cocaine as one of the two predicate felonies required to support the habitual offender determination.

I.C. § 35-50-2-8 provides that a person is a habitual offender if that person "has accumulated two (2) prior unrelated felony convictions." A felony conviction is "a conviction, in any jurisdiction at any time, with respect to which the convicted person might have been imprisoned for more than one (1) year." I.C. § 35-50-2-1(b) (West, Westlaw through 2009 1st Special Sess.). The habitual offender statute, however, contains limitations as to what prior felonies may be used to support a habitual offender determination. Specifically, I.C. § 35-50-2-8(d) provides:

> A conviction does not count for purposes of this section as a prior unrelated felony conviction 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).

Taylor's prior conviction for possession of cocaine is an offense under I.C. 35-48-4, the offense is not one of the enumerated offenses listed in I.C. § 35-50-2-2(b)(4), and the record in this case does not indicate that Taylor has more than one conviction for any of the dealing offenses listed in subsection (d)(3)(C). Under the terms of the statute, Taylor's prior felony conviction for possession of cocaine may not be used as one of the two prior, unrelated felony convictions necessary to support the habitual offender finding. We therefore reverse Taylor's adjudication as a habitual offender.

Judgment reversed.

KIRSCH, J., and ROBB, J., concur.