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IN THE
COURT OF APPEALS OF INDIANA

THEODORE N. HANNIBAL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A02-1002-CR-130
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable William C. Menges, Jr., Judge
Cause No. 34D01-0811-FB-817

JULY 7, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Theodore N. Hannibal appeals the trial court's determination that he is a habitual substance offender. We affirm but remand for an amendment to the sentencing order.

ISSUE

Hannibal raises one issue for our review, which we restate as: Whether there was sufficient evidence to support the trial court's determination.

FACTS AND PROCEDURAL HISTORY

In an information on a habitual offender count, the State alleged that Hannibal had been convicted of the two prior unrelated substance offense convictions: (1) Possession of Cocaine, a Class D felony, under cause number 34D01-9810-CF-288, on July 13, 1999 ("CF-288"); and (2) Possession of a Controlled Substance, a Class D felony, under cause number 34D02-0506-FC-220, on October 30, 2006 ("FC-220"). Hannibal, through counsel, stipulated at trial to his prior conviction for CF-288 and to his identity as the person named on the FC-220 exhibits; however, he argued that because the State mislabeled FC-220 as "possession of a controlled substance" instead of the actual conviction for "possession of cocaine," it failed to prove the FC-220 offense. The trial court, noting that all of the information was correct except the caption, found that the

State established FC-220 for purposes of the habitual substance offender statute. Hannibal now appeals.

DISCUSSION AND DECISION

Ind. Code § 35-50-2-10(e) provides that "[a] person is a habitual substance offender if the … court … finds that the state has proved beyond a reasonable doubt that the person had accumulated two (2) prior unrelated substance offense convictions." The State's first exhibit shows that Hannibal had a 1999 Class D felony possession of cocaine conviction under CF-288. The State's second exhibit shows that Hannibal had a Class C felony conviction under FC-220. This evidence is sufficient to show that Hannibal is a habitual substance offender.

In *Morgan v. State*, 440 N.E.2d 1087, 1089 (Ind. 1982), a defendant raised a sufficiency of the evidence challenge when the State alleged that one of the prior convictions was for robbery, but the evidence at trial showed the prior conviction was for armed robbery. Our supreme court concluded "[t]here is no doubt that there is a variance here." *Id.* However, the court further concluded that the variance did not require reversal because the defendant "could not claim to have been misled in his defense against the allegation of habitual criminality by this variance." *Id*. at 1090. The court noted that the date, court and cause number alleged were all identical. *Id.*

In a similar case, the State alleged that one of the prior convictions was theft by deception, when the evidence at trial showed that it was actually a conviction of theft

under $1000. *Goodwin v. State*, 439 N.E.2d 595, 602 (Ind. 1982). Our supreme court found that the evidence was sufficient to sustain the finding of habitual offender status. *Id*. The court held: "The two referents are subspecies of theft. There is a variance here from the allegation, but it is not a material one, in light of the close relationship between the two, and the presence of other distinguishing characteristics. That appellant was misled is not evident." *Id*.

In the present case, the only variance is the labeling of FC-220 as a conviction of possession of a controlled substance, instead of the more specific possession of cocaine. As the trial court noted, cocaine is a controlled substance. More importantly, all the other information was correct as it applied to FC-220. Indeed, Hannibal freely admits that the State submitted sufficient evidence to prove he had two unrelated substance offense convictions. As in *Morgan* and *Goodwin*, it is clear that the appellant was not misled by the variance in his defense against the habitual substance offender charge. We therefore find that the evidence was sufficient to support the trial court's determination.

The trial court imposed a separate sentence for the habitual offender finding and then ordered it to be served consecutively to the sentence for the Class D felony possession of cocaine. A finding that a defendant is a habitual substance offender is a sentence enhancement to the underlying substance abuse conviction, not a separate consecutively-imposed sentence. Ind. Code § 35-50-2-10(f); *Bauer v. State*, 875 N.E.2d 744, 747 (Ind. Ct. App. 2007). We remand with instructions that the trial court amend

the sentencing order to show that Hannibal's habitual substance offender finding is attached to an underlying conviction and to enhance the sentence accordingly.

Affirmed and remanded for an amendment to the sentencing order.

MAY, J., and BROWN, J., concur.