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# IN THE
# COURT OF APPEALS OF INDIANA

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| KEVIN D. RISNER, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 75A03-0907-CR-300 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE STARKE CIRCUIT COURT
The Honorable Jeanene Calebrese, Special Judge
Cause No. 75C01-0709-FD-148

**July 7, 2010**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-defendant Kevin D. Risner appeals following his convictions for Operating a Vehicle as a Habitual Traffic Violator,[1] a class D felony, Operating a Vehicle While Intoxicated with a Previous Conviction,[2] a class D felony, and the trial court's finding that Risner is a Habitual Substance Offender.[3] Risner raises the following arguments: (1) the trial court's use of a 2004 conviction to both elevate the instant operating a vehicle while intoxicated (OWI) charge to a class D felony and serve as an underlying conviction for the habitual substance offender finding is an impermissible double enhancement; and (2) the instant OWI conviction and 2004 OWI conviction are not "unrelated" felonies as required by the habitual substance offender statute. Finding no error, we affirm.

## FACTS

In 2002 and 2004, Risner was convicted of OWI. On September 19, 2007, a police officer initiated a traffic stop of the vehicle being driven by Risner. Risner failed all of the field sobriety tests performed by the officer. Subsequently, Risner was arrested and eventually charged with class D felony operating a vehicle as a habitual traffic violator, class C misdemeanor OWI, and class D felony OWI after a previous conviction for the same offense. The State also alleged that Risner was a habitual substance offender.

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[1] Ind. Code § 9-30-10-16.

[2] I.C. § 9-30-5-3.

[3] Ind. Code § 35-50-2-10.

On February 12, 2009, a jury found Risner guilty of operating a vehicle as a habitual traffic violator and class C misdemeanor OWI. Following a second phase of the trial, the jury found Risner guilty of class D felony OWI after a previous conviction. At the conclusion of a third phase of the trial, the jury found that Risner was a habitual substance offender.

On April 22, 2009, at Risner's sentencing hearing, the trial court merged the class C misdemeanor OWI count into the class D felony OWI with a previous conviction count. It imposed concurrent three-year terms for operating as a habitual traffic violator and OWI with a previous conviction. The trial court imposed an additional six-year term as a result of the habitual substance offender finding, to be served consecutively, for an aggregate nine-year term of imprisonment. Risner now appeals.

## DISCUSSION AND DECISION

The trial court enhanced Risner's OWI conviction to a class D felony from a class C misdemeanor based upon the fact that Risner had been convicted of an OWI offense in 2004, which was within the preceding five years.[4] The trial court then adjudicated Risner to be a habitual substance offender based upon the same 2004 OWI conviction.[5] Risner

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[4] Indiana Code section 9-30-5-3 provides, in relevant part, that "a person who violates section 1 . . . of this chapter commits a class D felony if . . . the person has a previous conviction of operating while intoxicated that occurred within the five (5) years immediately preceding the occurrence of the violation of section 1 or 2 of this chapter . . . ."

[5] Indiana Code section 35-50-2-10(b) authorizes the State to "seek to have a person sentenced as a habitual substance offender for any substance offense by alleging . . . that the person has accumulated two (2) prior unrelated substance offense convictions." An offense under Indiana Code section 9-30-5 is a "substance offense" for this purpose.

argues that this is an impermissible "double enhancement" that has not been authorized by the General Assembly. Appellant's Br. p. 4.

Our Supreme Court has very recently addressed this precise issue. In Beldon v. State, the State charged Beldon with misdemeanor OWI and sought to have the charge elevated to a class D felony based on Beldon's previous 2003 class D felony OWI conviction. 926 N.E.2d 480, 480-81 (Ind. 2010). The jury ultimately convicted Beldon of class D felony OWI and, in a separate phase of the trial, found Beldon to be a habitual substance offender based, in part, upon the same 2003 OWI conviction. Id. at 481. Beldon appealed, arguing that this double enhancement was improper.

Our Supreme Court affirmed the trial court's judgment, first explaining what had happened below:

> It should be apparent that what happened in this case was that the trial court elevated Beldon's class A misdemeanor conviction under Indiana Code section 9-30-5-2(b) to a class D felony using the "progressive penalty" provisions of Indiana Code section 9-30-5-3(a), which was available because of Beldon's 2003 OWI conviction. The trial court then sentenced Beldon to an additional term of years using the "specialized habitual offender" statute applicable to habitual substance offenders, which was available because of Beldon's 2003 and 1992 OWI convictions.

Id. at 483. Acknowledging that the general rule against double enhancements absent explicit legislative direction remains intact, the Beldon court explained that it has already been held "that the requisite legislative direction exists to authorize an underlying elevated conviction to be enhanced by the specialized habitual substance offender enhancement." Id. at 484 (citing State v. Downey, 770 N.E.2d 794 (Ind. 2002), and Haymaker v. State, 667 N.E.2d 1113 (Ind. 1996)). Inasmuch as our Supreme Court has

explicitly approved of the precise situation herein, therefore, we decline to reverse Risner's conviction or habitual substance offender finding on this basis.

Risner makes another argument made by Beldon and rejected by our Supreme Court: that his earlier 2004 OWI conviction and the instant offense are not "unrelated" as required by the habitual substance offender statute. See I.C. § 35-50-2-10(b) (providing that a person may be sentenced as a habitual substance offender if he "has accumulated two (2) prior unrelated substance offense convictions") (emphasis added). As in Beldon, Risner argues that his earlier conviction and the instant offense are not unrelated "because the former was used to enhance the latter. Said differently, the two are not 'unrelated,' he maintains, because the second conviction would not have even been a felony unless it had been elevated using the first." 926 N.E.2d at 484. Our Supreme Court explained, however, that in this context, "unrelated" means that "'the predicate felony is not part of the res gestae of the principal offense, and that the second predicate felony was committed after conviction of the first predicate felony.'" Id. (quoting Beach v. State, 496 N.E.2d 43, 45 (Ind. 1986) (internal citations omitted). As in Beldon, we adhere to Beach and conclude that Risner's offenses are unrelated.

The judgment of the trial court is affirmed.

DARDEN, J., and CRONE, J., concur.