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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL A. CAPUTO,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 03A01-1103-PC-123
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause No. 03D01-0109-DF-1240

December 21, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issue

Michael Caputo pleaded guilty to driving while suspended, a Class D felony. He petitioned for post-conviction relief, and the post-conviction court denied his petition. Caputo appeals, raising one issue for our review: whether his conviction for driving while suspended is void because the statute he was convicted under, Indiana Code section 9-24-18-5(d), was repealed after he was charged but before he pleaded guilty and was sentenced. Concluding Caputo's conviction is valid, we affirm the denial of his petition for post-conviction relief.

Facts and Procedural History

In February 1999, Caputo was charged with driving while suspended, a Class D felony; false informing, a Class B misdemeanor; and failure to stop after an accident, a Class C misdemeanor. Thereafter, an habitual offender charge was added. On August 11, 2000, Caputo pleaded guilty to driving while suspended, a Class A misdemeanor; false informing, a Class B misdemeanor; and leaving the scene of an accident, a Class C misdemeanor. The State dismissed the habitual offender charge, and the trial court sentenced Caputo to one year in prison.

In December 2000, Caputo filed a petition for post-conviction relief ("PCR"), but in January 2002 at Caputo's PCR hearing, he agreed to withdraw his petition in exchange for being allowed to plead guilty to driving while suspended, a Class D felony. The trial court sentenced Caputo to one year in the Department of Correction and dismissed Caputo's petition for PCR without prejudice. However, Caputo agreed that if he filed any subsequent petitions alleging any of the grounds in his initial petition for PCR and

the State thereafter filed a motion to deny based upon his waiver, the court would deny Caputo's petition with prejudice and without a hearing.

On July 1, 2000, the General Assembly repealed the statute Caputo was charged under for driving while suspended, Indiana Code section 9-24-18-5. It provided:

> (a) Except as provided in subsections (b) and (d), a person who operates a motor vehicle upon a highway while the person's driving privilege, license, or permit is suspended or revoked commits a Class A infraction. However, if:
>
> > (1) a person knowingly or intentionally violates this subsection; and
> > (2) less than ten (10) years have elapsed between the date a judgment was entered against the person for a prior unrelated violation of this subsection or IC 9-1-4-52 (repealed July 1, 1991) and the date the violation described in subdivision (1) was committed;
>
> the person commits a Class A misdemeanor.
>
> (b) If:
>
> > (1) a person operates a motor vehicle upon a highway while the person's driving privilege, license, or permit is suspended or revoked; and
> > (2) the person's suspension or revocation was a result of the person's conviction of an offense (as defined in IC 35-41-1-19);
>
> the person commits a Class A misdemeanor. . . .
>
> * * *
>
> (d) If a person knowingly or intentionally operates a motor vehicle upon a highway while the person's driving privilege, license, or permit is suspended or revoked as a result of a misdemeanor or felony conviction, the person commits a Class D felony. However, the offense is a Class C felony if the operation results in the death of another.
>
> * * *

Ind. Code § 9-24-18-5 (West 1998) (repealed by P.L. 32-2000, Sec. 27). In the same legislative session, the General Assembly replaced section 9-24-18-5 with, in pertinent part, sections 9-24-19-1 through -4:

> Sec. 1. Except as provided in sections 2, 3, and 4 of this chapter, a person who operates a motor vehicle upon a highway while the person's driving privilege, license, or permit is suspended or revoked commits a Class A infraction.

> Sec. 2. A person who operates a motor vehicle upon a highway when the person knows that the person's driving privilege, license, or permit is suspended or revoked, when less than ten (10) years have elapsed between:
>
> (1) the date a judgment was entered against the person for a prior unrelated violation of section 1 of this chapter, this section, IC 9-1-4-52 (repealed July 1, 1991), or IC 9-24-18-5(a) (repealed July 1, 2000); and
>
> (2) the date the violation described in subdivision (1) was committed;
>
> commits a Class A misdemeanor.
>
> Sec. 3. A person who operates a motor vehicle upon a highway when the person knows that the person's driving privilege, license, or permit is suspended or revoked, when the person's suspension or revocation was a result of the person's conviction of an offense (as defined in IC 35-41-1-19) commits a Class A misdemeanor.
>
> Sec. 4. (a) A person who violates section 3 of this chapter commits a Class D felony if the operation results in bodily injury or serious bodily injury.
>
> (b) A person who violates section 3 of this chapter commits a Class C felony if the operation results in the death of another person.

In February 2011, Caputo filed a petition for PCR, arguing his conviction for driving while suspended should be vacated because the statute he was convicted under, Indiana Code section 9-24-18-5, was repealed. The trial court denied his petition in March 2011. Caputo now appeals.[1]

Discussion and Decision

I. Standard of Review

Caputo is appealing a negative judgment from the trial court. Therefore, "we must be convinced that the evidence as a whole was such that it leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." Johnson v. State, 693 N.E.2d 941, 945 (Ind. 1998). "It is only where the evidence is without

[1] Caputo filed a motion for enlargement of time in which to file his reply brief in this appeal, but after this court issued a notice of defect, the defect was not timely cured. Thus, Caputo's reply brief was not filed.

conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that the decision will be disturbed as being contrary to law." Id. We examine only the probative evidence and reasonable inferences supporting the post-conviction court's determination and we do not reweigh the evidence or judge witness credibility. Conner v. State, 711 N.E.2d 1238, 1245 (Ind. 1999), cert. denied, 531 U.S. 829 (2000).

II. Caputo's Conviction Under a Repealed Statute

Caputo contends his conviction for driving while suspended "is a nullity and otherwise void because no such offense existed." Appellant's Brief at 4. Caputo alleges the facts of his case are similar to Rudolph v. State, 565 N.E.2d 338, 339-40 (Ind. Ct. App. 1991), trans. denied, where Rudolph was convicted of operating a motor vehicle after his driving privileges were forfeited for life and this court held that a petition for PCR should have been granted because the statute he was convicted under expressly applied to persons whose driving privileges were forfeited under a then-enacted statute that was different from the repealed statute under which Rudolph's driving privileges had been forfeited. Because the legislation was specific and did not include the repealed statute that Rudolph was convicted under, we concluded he should not have been convicted of operating a motor vehicle after his driving privileges were forfeited for life. Id.

Here, unlike Rudolph, Caputo was not charged with a crime that has driving while suspended as a prerequisite, much less such a crime that expressly requires a conviction under the currently-enacted driving while suspended statute. Rather, Caputo was charged with driving while suspended under a section of the Indiana Code that was valid at the

time he was charged and subsequently repealed and replaced by a similar statute with different chapter and section numbers but criminalizing the same activity.

As the State points out, "one source of legislative intent is the general savings statute, which by law is imported into all subsequent repealing or amending acts and obviates the necessity for individual savings clauses." Lunsford v. State, 640 N.E.2d 59, 61 (Ind. Ct. App. 1994) (citation and quotation omitted). The general savings statue provides:

> . . . [T]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing statute shall so expressly provide; and such statute shall be treated as still remaining in force for the purposes of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

Ind. Code § 1-1-5-1. This section was enacted to indicate the legislative intent when no intent is expressed or necessarily implied. Lunsford, 640 N.E.2d at 61 (citation and quotation omitted). However, when legislative intent is clear, we need not rely on the intent expressed in the savings statute. Id.

In the present case, the legislature did not specify that the new sections in chapter 9-24-19 should be applied retroactively. Caputo attempts to argue that the legislature did express a limitation to the applicability of repealed Indiana Code subsection 9-24-18-5(d) because the driving while suspended offense provided for in section 9-24-19-2(1) requires a prior conviction under certain statutes which includes subsection 9-24-18-5(a) but not subsection 9-24-18-5(d). However, sections 9-24-19-1, -3, and -4 also provide for driving while suspended offenses and do not require a prior conviction under specific statutes. And, when comparing the repealed section 9-24-18-5 to the newly enacted

sections 9-24-19-1 through -4, it appears section 9-24-19-2 replaced subsection 9-24-18-5(a) rather than subsection 9-24-18-5(d), as Caputo contends. In any event, legislative intent is less than clear and we must look to the general savings statute. Under the savings statute, the provisions of the old driving while suspended statute were properly used by the trial court in Caputo's prosecution, and the post-conviction court did not err in denying his petition for PCR.

Conclusion

Caputo's conviction under Indiana Code section 9-24-18-5(d) is valid even though it was repealed after he was charged but before his conviction. The newly enacted legislation does not clearly invalidate his conviction, and Indiana Code section 1-1-5-1 provides that the section Caputo was charged under remains in effect for the purposes of his prosecution. We therefore affirm.

Affirmed.

BARNES, J., and BRADFORD, J., concur.