

E.5. SENTENCING

E.1. Role of court/jury/legislature

E.1.a. Court

TITLE: Ben-Yisrayl v. State

INDEX NO.: E.1.a.

CITE: (2nd Dist., 07-10-09), 908 N.E.2d 1223 (Ind. Ct. App. 2009)

SUBJECT: Role of court in sentencing - cannot order alternative sentences

HOLDING: Tr. Ct. lacked authority to impose an alternative term-of-years sentence in case the death penalty sentence was vacated. Ind. Code 35-50-2-3 provides options for murder sentence, with the death penalty permissible notwithstanding the requirement that Tr. Ct. impose a term of years within the specified range. The plain language of Ind. Code 35-50-2-3 does not explicitly authorize the imposition of both sentences for a single conviction, with the term of years to serve as an alternative to the death penalty. Without explicit authority for such an alternative sentencing scheme, in light of the fact that Ind. Code 35-50-2-9 (the death penalty statute) makes no reference to it, Court will not infer from this grant of authority and the availability of numerous sentencing options within this range that Tr. Ct. may then impose multiple alternative terms of years. Moreover, providing for one imposed sentence and another potential sentence creates ambiguity and confusion with respect to questions of waiver and preservation of error. It blurs issues available for and addressed upon review, and it obfuscates orders and instructions upon remand. Perhaps most significantly, it fundamentally alters standard appellate procedure by either circumventing the direct appeal process or tolling it indefinitely.

Here, in 1984, Tr. Ct. imposed the death penalty for D's murder convictions and also provided for an alternative sixty-year sentence in the event that the death penalty was set aside. Years later, the death penalty was set aside and the term-of-years sentence was imposed. Tr. Ct. lacked the authority to enter the alternative term-of-years sentence. Thus, the case must be remanded to Tr. Ct. with instructions to conduct a sentencing hearing and resentence D for his murder conviction. Because D committed his crimes long before Indiana's advisory sentencing scheme, D's sentencing hearing must be held in accordance with Blakely v. Washington, 542 U.S. 296 (2004). Held, judgment affirmed in part and reversed in part.

TITLE: Greenlaw v. United States

INDEX NO.: E.1.a.

CITE: 128 S.Ct. 2559, 554 U.S. 237, 171 L.Ed.2d 399, LEXIS 5259 (04/15/2008)

SUBJECT: *Sue sponte* increase of sentence inappropriate pursuant to cross-appeal rule

HOLDING: Majority held absent a government appeal or cross-appeal, the Eighth Circuit could not, on its own initiative, order an increase in Petitioner's sentence. The district court made an error in calculating Petitioner's sentence imposing a 10-year sentence on a count that carried a 25-year mandatory minimum term, which the government objected to at the time. Petitioner appealed his total sentence, but the government did not address the error by the district court in its appeal. The Eighth Circuit, on its own, increased Petitioner's sentence by 15 years. Majority noted, in both civil and criminal cases, in the first instance and on appeal, courts follow the principle of party presentation, i.e., the parties frame the issues for decision and the courts generally serve as neutral arbiters of matters the parties present. To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a *pro se* litigant's rights. The cross-appeal rule, pivotal in this case, is both informed by, and illustrative of, the party presentation principle. Under that rule, it takes a cross-appeal to justify a remedy in favor of an appellee. The Court has called the rule "inveterate and certain" and has in no case ordered an exception to it, with no exception being warranted here. The Eighth Circuit held that the plain-error rule, Fed. Rule Crim. Proc. 52(b), authorized it to order the sentence enhancement *sua sponte*, but nothing in the text or the history of the rule or in the Court's decisions suggests that the plain-error rule was meant to override the cross-appeal requirement. Breyer, J., filed a concurring opinion. Alito, J., filed a dissenting opinion, in which Stevens, J., joined, and in which Breyer, J., joined as specific parts.

TITLE: Walker v. State

INDEX NO.: E.1.a.

CITE: (6/3/81), Ind. App., 420 N.E.2d 1374

SUBJECT: Sentencing -- role of Ct.; non-binding sentencing recommendation

HOLDING: When specific sentence disposition is contemplated by parties to plea agreement, Tr. Ct., if it finds recommended sentence unacceptable, must reject entire plea agreement & set case for trial. However, when prosecutor makes "nonbinding" sentence recommendation, Indiana plea bargaining statutes cannot be construed so as to make rejection of entire plea agreement mandatory when Tr. Ct. does not accept recommended sentence. Here, pursuant to plea agreement, D pleaded guilty to charge of burglary. Tr. Ct. accepted D's plea but rejected prosecutor's recommendation to sentence D to five year term of imprisonment. Rather, Tr. Ct. sentenced D to eight years. D stated at post-conviction relief hearing that defense counsel put him in "trick bag" by assuring him that Tr. Ct. would impose five-year sentence. At same hearing, D acknowledged that Tr. Ct. informed him that sentence from two to eight years in duration could be imposed if Tr. Ct. accepted his guilty plea. In addition, plea agreement delineated "nonbinding" nature of prosecutor's sentence recommendation. In light of evidence, post-conviction relief Ct. did not err in refusing to resentence D in accordance with prosecutor's "nonbinding" sentence recommendation. Held, denial of post-conviction relief affirmed; Garrard, J., concurring.

TITLE: Wendling v. State
INDEX NO.: E.1.a.
CITE: (7/23/86), Ind., 495 N.E.2d 192
SUBJECT: Sentencing - role of Tr. Ct. after remand
HOLDING: Tr. Ct. was without jurisdiction to resentence D contrary to Ind. S. Ct.'s mandate in Wendling, 465 N.E.2d 169. Here, case was remanded with instructions to enhance 5-year sentence by 30 years for habitual, rather than imposing separate sentences. Tr. Ct. instead sentenced D to 8 years after finding underlying felonies were not in proper sequence. Ct.'s mandate was binding on Tr. Ct. Matter of Lemond, 413 N.E.2d 228. If D wishes to attack habitual determination, he may file PCR petition. Held, remanded with order to impose 35-year sentence.

E. SENTENCING

E.1. Role of court/jury/legislature

E.1.b. Jury

TITLE: Goodwin v. State

INDEX NO.: E.1.b.

CITE: (9/7/82), Ind., 439 N.E.2d 595

SUBJECT: Informing jury of punishment

HOLDING: Jury need not be informed of consequences of finding D a habitual offender. Refusal to advise jury of penalty does not constitute invasion by Ct. of province of jury to determine law & facts under Ind.Const. Art. 1, Section 19. Griffin, 415 N.E.2d 60; Comstock, 406 N.E.2d 1164. Held, no error in Tr. Ct.'s refusal to so instruct jury.

RELATED CASES: Baer, 866 N.E.2d 752 (Ct. disapproves of Tr. Ct. or prosecutor gratuitously informing jury or prospective jurors that varying appellate consequences may attach to different verdict choices before the jury).

TITLE: Johnson v. State

INDEX NO.: E.1.b.

CITE: (2/2/88), Ind., 518 N.E.2d 1073

SUBJECT: Sentencing -- role of jury; instructions

HOLDING: In murder prosecution, Tr. Ct. gave following jury instruction

The Constitution of the State of Indiana makes the jury the judges of both the law & the facts in criminal cases. Though this means that you are to determine the law for yourself, it does not mean that you have the right to make, repeal, disregard, or ignore the law as it exists. The instructions of the Ct. are the best sources as to the law applicable to this case. D complained that Tr. Ct. did not fully explain jury's function with above instruction because it did not advise jury of what it could consider in determining law, & that jury should have instead been instructed that in determining law, jury may consider constitution of this State, common law, decisions of Cts. of last resort, instructions of Ct. & arguments of counsel. Because instruction given is correct statement of law & adequately explains role of jury, Tr. Ct. did not err by refusing D's instruction. Held, conviction affirmed.

RELATED CASES: Loftis, 269 N.E.2d 746 (upheld following instruction: If you believe that all the essential elements of the crime charged have been proved beyond reasonable doubt, you should convict the Ds.).

TITLE: Kalady v. State
INDEX NO.: E.1.b.
CITE: (5/10/84), Ind., 462 N.E.2d 1299
SUBJECT: Sentencing -- role of jury; no role in sentencing
HOLDING: Tr. Ct. did not err by giving instruction telling jury that they were not given any instructions on penalties that could be imposed should there be conviction, because assessing penalty was sole responsibility of Tr. Ct. Jury was instructed that law was written so that jury could make its decision without being influenced by apparent severity or lenience of sentence. D claimed that instruction implied that Tr. Ct. believes D to be guilty & thereby indicated that penalty will be imposed. Ct. held that instruction was correct statement of law & therefore proper. Held, conviction affirmed.

TITLE: Young v. State

INDEX NO.: E.1.b.

CITE: (9/5/85), Ind., 482 N.E.2d 246

SUBJECT: Jury sentencing (old code)

HOLDING: Tr. Ct. erred by imposing sentence where statute required matter be left to jury to determine; however, error was harmless where jury could have assessed only one penalty - life imprisonment. Ct. distinguishes Fultz, 358 N.E.2d 123 (proper remedy is remand for reduction of sentence to statutory minimum) & finds Kelsie, 354 N.E.2d 219 on point (error was harmless where Tr. judge imposed minimum sentence). Held, denial of PCR affirmed.

RELATED CASES: Cobb, 505 N.E.2d 51 (Crim L 992; Tr. Ct. was bound by jury's recommendation that life sentence be imposed upon D for committing second degree murder; language to contrary in direct appeal (Cobb, 412 N.E.2d 728) impliedly *overruled*); Reid, 486 N.E.2d 1029 (Crim L 998(6); jury verdict "recommend[ing]" life imprisonment satisfied statute requiring that jury impose sentence; Ct. distinguishes Beasley, 370 N.E.2d 360, in which jury verdict did not even mention sentencing).

E. SENTENCING

E.2. Presentence investigation and report

E.2.a. In general (Ind. Code 35-38-1-8)

TITLE: Cannon v. State
INDEX NO.: E.2.a
CITE: (05-22-07), Ind., 866 N.E.2d 770
SUBJECT: Consideration of *ex parte* communications at sentencing - notes from judge in related case

HOLDING: Judicial Canon 3(B)(8) provides that a judge shall not consider *ex parte* communications made to judge outside presence of parties, concerning a pending or impending proceeding. *Ex parte* communications are not limited to communications between judges & lawyers or parties. A judge may not permit the receipt of extra-judicial information about a case from anyone, including a colleague. A judge may not provide or entertain case-specific facts or allegations &, in every case, must exercise independent judgment. However, it is not so that "any" communication about a case outside presence of parties is improperly *ex parte*. Judges may seek each other's advice & counsel in performance of their judicial duties, Canon 3(B)(8)(c), & thus may confer about specific cases in furtherance of their adjudicative responsibilities without violating the rule against *ex parte* communications.

Here, judge's reference to hand-written notes made by another judge in Ct. 6 case was not an improper *ex parte* communication because judge had an adjudicative responsibility over both instant case & Ct. 6 case, a "companion case" involving violation of home detention program. Inasmuch as judge was performing judicial functions with respect to both D's cases, the Ct. 6 case file was properly before the Ct. as part of the record, not as an external communication. Held, transfer granted, Ct. App.' opinion at 839 N.E.2d 185 reversed on this issue & otherwise summarily affirmed, judgment affirmed.

TITLE: Carter v. State
INDEX NO.: E.2.a.
CITE: (9/18/84), Ind., 468 N.E.2d 212
SUBJECT: PSI - inclusion in sentencing record
HOLDING: Tr. Ct.'s failure to include in sentencing record a copy of PSI report did not constitute reversible error where record demonstrates that report was prepared & that Tr. Ct. considered report in sentencing D. Hinton, 397 N.E.2d 282. Held, conviction & sentence affirmed.

TITLE: Hines v. State

INDEX NO.: E.2.a.

CITE: (4th Dist., 11-21-06), Ind. App., 856 N.E.2d 1275

SUBJECT: Psychosexual evaluation as part of pre-sentence investigation - no error

HOLDING: In child molesting prosecution, Tr. Ct. did not err in ordering D to undergo a psychosexual evaluation as part of the pre-sentence investigation, or in relying upon such during sentencing. D told evaluator about uncharged, unrelated molestation which was then used to enhance his sentence. Ct. noted that Ind. Code 35-38-1-9, concerning scope of pre-sentence investigation & report, does not limit the report to neutral facts, but contemplates gathering of information concerning D's social history, family situation, & personal habits. Furthermore, report must include any matters the Ct. directs to be included, e.g., a psychosexual evaluation.

Citing Gardner v. State, 270 Ind. 627, 388 N.E.2d 513 (1979), D argued that Tr. Ct. relied upon information contained in the evaluation which he claims was obtained in violation of his right against self-incrimination. Gardner did not say that D must be informed that he has a right to remain silent during the pre-sentence investigation. Instead, "crucial factor" was that the D had been informed of his right to remain silent "even before his trial started." Id. at 519. Here, D was informed of his right to remain silent at the guilty plea hearing. Moreover, there was no force or coercion used during the psychosexual evaluation, other than persistent questioning by the interviewing psychologist regarding D's sexually deviant behavior. Held, judgment affirmed; Darden, J., dissenting, is "deeply troubled by the fact that the Tr. Ct. had ordered Hines to undergo a psychosexual evaluation & then expressly used the information gained from it when imposing a sentence."

TITLE: Hulfachor v. State

INDEX NO.: E.2.a.

CITE: (2nd Dist., 8-26-04), Ind. App., 813 N.E.2d 1204

SUBJECT: Sentencing - consideration of evidence outside record

HOLDING: Tr. Cts. should look only to evidence properly placed in record when making sentencing determinations. Looking outside record for evidence in a sentencing hearing deprives D of opportunity to review information & refute its accuracy & creates a risk that sentencing will be based on inaccurate or irrelevant information. Here, D waived consideration of this issue because she did not object when Tr. Ct. made its statements regarding additional information regarding D & victim it obtained from CHINS file from another Ct. In fact, D's attorney invited error by helping Tr. Ct. obtain this information & agreeing to introduction of this evidence at sentencing. Held, judgment affirmed.

RELATED CASES: Gomillia, 993 N.E.2d 306 (Ind. Ct. App. 2013), *sum.aff'd.*, 13 N.E.3d 846 (any error in Tr. Ct.'s consideration of victim's testimony at a co-D's trial was harmless because it did not impact Tr. Ct.'s determination of D's sentence).

TITLE: Limp v. State

INDEX NO.: E.2.a.

CITE: (12/20/83) Ind., 457 N.E.2d 189

SUBJECT: PSI - admission of prior crimes by D

HOLDING: Tr. Ct. did not err in relying upon D's admission in PSI report (of unlawful sexual acts with victim over 2-year period) as one ground to enhance sentence for child molesting. Use of this information did not violate D's privilege against self-incrimination (D was not advised of right to remain silent prior to presentence interview with probation office). Gardner, 388 N.E.2d 513. Here, D asks Ct. to re-examine Gardner in light of Estelle v. Smith (1981), 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (admission of psychiatric testimony at sentencing phase of capital case violated D's 5th Amend privilege against self-incrimination because D was not advised before pretrial competency examination that he could remain silent/that statements would be used against him at sentencing). Ct. distinguishes between pretrial psychiatric & presentence examination. Held, no error.

RELATED CASES: Brown, App., 659 N.E.2d 671 (in making sentence determination, Tr. Ct. properly considered statements made by D during his pre-sentence interview).

TITLE: Maciaszek v. State
INDEX NO.: E.2.a.
CITE: (4/10/2017), 75 N.E.3d 1089 (Ind. Ct. App. 2017)
SUBJECT: Denial of credit time reversed
HOLDING: Defendant was entitled to pre-sentencing credit for the time he was incarcerated pending resolution of his Indiana charges, even though he was also serving time for an unrelated conviction in New Hampshire.

In May of 2012, while Defendant was serving time in Florida on an unrelated conviction, he was charged in Kosciusko County with two counts of B felony Burglary and two counts of D felony theft. The next day, Indiana placed a hold on Defendant. Defendant was already subject to holds in New Hampshire and Maine. After Defendant served his time in Florida, he was transported to New Hampshire where he was convicted and sentenced. While serving time in New Hampshire, Defendant filed a request for disposition of his Indiana charges pursuant to the Interstate Agreement on Detainers. See Ind. Code § 35-33-10-4. Defendant was transported to Indiana where he was incarcerated. He pled guilty, but the Kosciusko Circuit Court awarded no credit time for Defendant's pre-sentencing incarceration. Once he was sentenced, Defendant was immediately returned to New Hampshire. In November of 2015, he filed a verified petition for credit for time served and good time credit.

Defendant was entitled to credit for the time served in Indiana while awaiting disposition of the Indiana charges, even though he was also serving time for a New Hampshire conviction. "If a person incarcerated awaiting trial on more than one charge is sentenced to concurrent terms for the separate crimes, he or she is entitled to receive credit time applied against each separate term. However, if the defendant receives consecutive terms, he or she is only allowed credit time against the total or aggregate of the terms." Payne v. State, 838 N.E.2d 503, 510 (Ind. Ct. App. 2005), *trans. denied*. Nothing in the record indicates that the Tr. Ct. ordered Defendant to serve his Indiana sentence consecutively to his New Hampshire sentence. Neither the plea agreement nor the Tr. Ct.'s Amended Judgment of Conviction called for consecutive sentences. Thus, because Defendant's Indiana sentence is concurrent to his New Hampshire sentence, he is entitled to credit for time served from the date he was transported to Indiana to the date he was sentenced. See Ramirez v. State, 455 N.E.2d 609 (Ind. Ct. App. 1983). However, whether Defendant is also eligible for good time credit cannot be determined because the record does not indicate Defendant's credit class. Therefore, on remand, the Tr. Ct. shall determine Defendant's credit class and award good time credit accordingly. Held, judgment reversed.

TITLE: O'Connor v. State

INDEX NO.: E.2.a.

CITE: (4/13/92), Ind. App., 590 N.E.2d 145

SUBJECT: Sentencing -- presentence report (PSR) must be neutral

HOLDING: Although PSR should be neutral, PSR could possibly not be neutral, & D is not entitled to reversal unless error was prejudicial. Sharp, 534 N.E.2d 708. Here, D was convicted of resisting law enforcement, operating vehicle while intoxicated, & several infractions. D argued that Tr. Ct. improperly considered biased PSR in that probation officer who prepared report was married to one of police officers who set up roadblocks in D's path. Probation officer recommended D receive maximum sentence on each of three counts, & trial judge considered PSR in pronouncing sentence. Ct. held that beyond probation officer's marital status, D failed to show, or even to allege, how probation officer was biased against him. Held, affirmed in part & vacated in part; Sharpnack, J., concurring & dissenting.

RELATED CASES: Hines, App., 856 N.E.2d 1275 ("D cites no authority for his conclusion that 'neutral facts [are] required by statute'", Ind. Code 35-38-1-9 does not limit report to "neutral facts"); Lang, 461 N.E.2d 1110 (although PSR contained personal opinions, D was not entitled to relief where he suffered no actual prejudice, Tr. Ct. did not accept probation officer's recommendation, & sufficient reasons were given for sentence finally imposed); Gardner, 388 N.E.2d 513 (D is entitled to be sentenced only on basis of accurate information; sentence based on materially untrue assumptions violates due process).

TITLE: Schwass v. State
INDEX NO.: E.2.a.
CITE: (6-1-90), Ind., 554 N.E.2d 1127
SUBJECT: PSI report - lack of statement or certification
HOLDING: Presentence report which does not include victim's statement or probation officer's certificate that victim was offered opportunity to make a statement is not defective. It does not necessarily follow that failure to comply strictly with requirements of Ind. Code 35-38-1-9 gives D right to have particular information included in his presentence report. Wallace, Ind., 486 N.E.2d 445 (1985). Ct. expressly *overruled* contrary holdings in Beland, 476 N.E.2d 843; Isom, App., 479 N.E.2d 51; & Busam, App., 445 N.E.2d 118.

TITLE: U.S. v. Jackson

INDEX NO.: E.2.a.

CITE: 886 F.2d 838 (7th Cir. 1989)

SUBJECT: Sentencing -- contents of presentence report (PSR); self-incrimination

HOLDING: D was convicted of criminal contempt & questioned by federal probation officer in presentence interview. D challenged sentencing judge's use of statements he made to federal probation officer because there was no indication in record before Ct. that D's counsel was informed of date & time of interview or that he was present during interview. Sixth Amendment right to counsel provides every D with right to have representation during critical stage of adversarial proceedings. Holloway, 435 U.S. 475. Although right attaches upon commencement of adversarial proceedings, it only applies to critical stages of those proceedings where absence of defense counsel or lack of advice might derogate from accused's right to fair trial. Sixth Amendment right to counsel also applies at critical stages in sentencing phase of criminal proceedings. Mempa, 389 U.S. 128. Under Sixth Amendment, focus of constitutional protection of right to counsel relates to adversary character of criminal proceedings & particular process involved. Gerstein, 420 U.S. 103. Whether pretrial interview by federal probation officer was critical stage of criminal proceedings depends upon nature of federal probation officer's role in sentence determination. Probation officer did not have adversarial role in sentencing proceedings. Rather, federal probation officer was extension of Ct. & not agent of government. In interviewing D as part of presentence investigation, probation officer served as neutral information gatherer for sentencing judge. Interview of D is but one of many aspects of presentence investigation conducted by probation officer. Therefore, Ct. held that Sixth Amendment right to assistance of counsel did not extend to D's presentence interview by federal probation officer. Held, conviction affirmed.

TITLE: Wagner v. State
INDEX NO.: E.2.a.
CITE: (2/14/85), Ind., 474 N.E.2d 476
SUBJECT: Sentencing -- different county can prepare presentence report (PSR)
HOLDING: D was convicted of murder, felony robbery & felony burglary. Grant County Probation Department prepared PSR, & Tr. Ct. allowed Delaware County Probation Department to assist. D argued that only Delaware County should have been allowed to prepare PSR because offenses occurred there, & not in Grant County. However, statutes pertaining to PSRs do not indicate that report must be prepared by probation department of county where offense occurred. Moreover, D did not point out how he was prejudiced by fact that PSR was prepared by Grant County, & did not cite authority to support his assertion that Delaware County was a proper county to prepare PSR. Held, conviction affirmed.

TITLE: Ware v. State

INDEX NO.: E.2.a.

CITE: (4/24/63), Ind., 189 N.E.2d 704

SUBJECT: Sentencing -- failure to prepare presentence report (PSR)

HOLDING: D was found guilty of second-degree burglary & was sentenced without Tr. Ct. first requiring & receiving PSR. No D convicted of felony shall be committed by any criminal Ct. before written PSR, prepared by probation officer, is presented to & considered by sentencing Ct. Here, failure to comply was proper cause for redress to Ct. Held, remanded with instructions to vacate judgment; Jackson, C.J., dissenting.

RELATED CASES: Loman, 354 N.E.2d 205 (error- may be harmless where sentence entered by Tr. Ct. was mandated by statute & could not be suspended).

E. SENTENCING

E.2. Presentence investigation and report

E.2.b. Challenging contents

TITLE: Carmona v. State

INDEX NO.: E.2.b.

CITE: (5th Dist., 05-18-05), Ind. App., 827 N.E.2d 588

SUBJECT: Disputed criminal history information; burden at sentencing

HOLDING: Ct. held that where a D vigorously contests his criminal history, & that criminal history is highly relevant to his sentence, it is incumbent upon State to produce some affirmative evidence, e.g., docket sheets, certified copies of judgment of convictions, affidavits from appropriate officials, etc., to support a criminal history alleged in a PSI & urged as basis for sentence enhancement. Based on unreliability of D's criminal history, Ct. could not say with confidence that his sentence was properly enhanced. Held, sentences for battery convictions vacated & remanded for resentencing.

RELATED CASES: Dillard, App., 827 N.E.2d 570 (State's duty to "prove" factual assertions in presentence investigation report is not triggered until D, given the opportunity, disputes accuracy of those facts).

TITLE: Dillard v. State
INDEX NO.: E.2.b.
CITE: (4th Dist., 05-18-05), Ind. App., 827 N.E.2d 570
SUBJECT: D's burden to challenge information contained in presentence investigation (PSI) report
HOLDING: Information contained in PSI report is presumed accurate unless D challenges it in some respect. It does not matter why a D chooses to remain silent when offered the chance to dispute the accuracy of a PSI report he has had the opportunity to review: the knowing failure to object waives the issue of the report's accuracy for appellate review. A PSI report may constitute an adequate evidentiary foundation to support specific findings relative to criminal history at sentencing. Mayes v. State, 744 N.E.2d 390 (Ind. 2001).

Here, D argued that the criminal history exception to Blakely v. Washington, 124 S.Ct. 2531 (2004) did not apply because there was no evidence in the record to prove the existence of convictions cited by Tr. Ct. to support the criminal history aggravator. Although State did not provide verifying documentation relating to any of those convictions, they were listed in D's PSI report. D did not stipulate to PSI report's accuracy but invoked Fifth Amendment & refused to either confirm or dispute factual information contained in report. D had opportunity to examine PSI report & challenge any inaccuracies contained therein, pursuant to Ind. Code 35-38-1-12(b). D's failure to register an objection to information contained in report waived issue for appellate review. Ryle v. State, 819 N.E.2d 119 (Ind. Ct. App. 2004). Further, D did not allege there actually were any errors in criminal history section of his PSI report, but only that there was no competent evidence to support those assertions. The State's duty to "prove" factual assertions in the PSI report is not triggered until D, given the opportunity, disputes the accuracy of those facts.

RELATED CASES: Slade, 942 N.E. 2d 115 (Ind. Ct. App. 2011) (PSI, which contained probable cause affidavit wherein D admitted that he possessed handgun while dealing in cocaine, was sufficient to sustain Tr. Ct.'s finding that D possessed a firearm when he committed dealing in cocaine); Edrington, 909 N.E.2d 1093 (Ind. Ct. App. 2009) (a violation of D's 5th & 6th Amendment rights would have been implicated had Tr. Ct. relied solely on D's failure to object to facts in or attached to his pre-sentence report as evidence of position of trust aggravator; thus Ct. will not consider information in PSI report); Ryle, 842 N.E.2d 320 (using a D's failure to object to a presentence report to establish an admission to the accuracy of the report implicates the right against self-incrimination).

TITLE: Forrester v. State

INDEX NO.: E.2.b.

CITE: (10/7/82), Ind., 440 N.E.2d 475

SUBJECT: PSI report - contents of

HOLDING: Ind. Code 35-4.1-4-10 allows probation officer to include in PSI any matter he/she deems relevant to sentencing decision. Lottie, 406 N.E.2d 632. Discretion extends to Tr. Ct. Yates, App., 429 N.E.2d 992. Here, D contends reports of incidents of misbehavior at Pendleton & a 1972 sentencing report regarding charge of assault & battery are outside scope of matters specified in Ind. Code 35-4.1-4-10. Held, data at issue not outside ambit of statute.

RELATED CASES: Dillon, 492 N.E.2d 661 (probation officer did not abuse discretion by contrasting D's behavior & answers between first & second PSI reports or by noting differences between D's answers & other sources of information); Lang, 461 N.E.2d 1110 (sentencing recommendation in PSI not within statutory guidelines; evaluation section contained personal opinions of probation officer; held, reversal not required - D had opportunity to challenge/was heard).

TITLE: Forrester v. State
INDEX NO.: E.2.b.
CITE: (10/7/82), Ind., 440 N.E.2d 475
SUBJECT: PSI report - inclusion of charges resulting in dismissal/acquittal
HOLDING: Presentence report may contain reference to charges which resulted in dismissal or acquittal. Misenheimer, 374 N.E.2d 523. Fact Tr. Ct. may not consider acquittal as an aggravating circumstance does not prohibit PSI from noting acquittal. Clark, 436 N.E.2d 779; McNew, 391 N.E.2d 607. Here, D contended information regarding his criminal record should not have been included in PSI without inquiry regarding final disposition of those charges. Held, no error in contents of PSI.

TITLE: Laird v. State

INDEX NO.: E.2.b.

CITE: (10/3/85), Ind., 483 N.E.2d 68

SUBJECT: Sentencing -- appropriate information for inclusion in presentence report (PSR)

HOLDING: D was convicted of dealing in controlled substance, theft, & possession of controlled substance. D contended that Tr. Ct. erred when it declined to strike copies of newspaper articles chronicling D's past criminal life from State's memorandum submitted to Ct. on date before sentencing hearing & from PSR. D alleged that both articles contained hearsay testimony which exceeded due process requirements that information be considered by Tr. Ct. at time of sentencing be accurate & reliable. Because Tr. Ct. stated that it did not believe articles had great deal of bearing, if any, upon sentence D was to receive for convictions, D's argument was rendered moot. Held, conviction affirmed.

RELATED CASES: Carlin, 259 N.E.2d 870 (probation officer's opinion regarding facts surrounding commission of crime was appropriate information for inclusion in PSR); Collins, 422 N.E.2d 1250 (uncounseled misdemeanor convictions, acquittals, charges lodged for which there is no disposition & statements by D's family were all appropriate information for inclusion in PSR); Forrester, 440 N.E.2d 475 (arrest records & charges later dismissed or for which D was acquitted were all appropriate information for inclusion in PSR; however, Tr. Ct. could not consider acquittal as aggravating circumstance); Smith, 432 N.E.2d 1363 (D's confession was appropriate information for inclusion in PSR); Burch, 450 N.E.2d 528 (D's non-Mirandized confession to probation officer was appropriate information for PSR; however, sentencing Ct. should refuse to consider D's statement in PSR where statement was demonstrated to be involuntary as induced by violence, threats, promises or other improper influence).

TITLE: May v. State

INDEX NO.: E.2.b.

CITE: (9/23/91), Ind. App., 578 N.E.2d 716

SUBJECT: Sentencing -- disputing contents of presentence report (PSR)

HOLDING: D was convicted of escape, battery, confinement, & criminal recklessness. On appeal, D claimed that, had he been provided with copy of PSR earlier, he could have controverted numerous statements or findings that might have influenced Tr. Ct. in negative manner. He did not dispute specifically any single facet of PSR. Ct. held that such sheerly speculative argument provides no reason for it to order new sentencing hearing. Held, convictions affirmed & remanded for resentencing on other grounds.

RELATED CASES: Stanley, 401 N.E.2d 689 (because last page of PSR was not included in copy given to D; D did not have fair opportunity to refute contents; remanded for resentencing).

TITLE: Meadows v. State
INDEX NO.: E.2.b.
CITE: (12/10/81), Ind., 428 N.E.2d 1232
SUBJECT: Sentencing -- requirements for challenging presentence report (PSR) on appeal
HOLDING: D, who was convicted of burglary & theft, claimed that Tr. Ct. erred in refusing to strike portions of PSR which recommended maximum incarceration, on ground that there was no factual basis for recommendation. D contended that report prepared by probation officer was conclusory & that sentencing decision based on it was necessarily arbitrary. Ct. held that it was unable to review this claim because record did not contain copy of PSR, in addition to fact that argument was not supported by cogent argument or authorities. Held, conviction affirmed.

TITLE: Mejia v. State

INDEX NO.: E.2.b.

CITE: (5th Dist., 12-11-98), Ind. App., 702 N.E.2d 794

SUBJECT: Failure to require written presentence report

HOLDING: In delivery of cocaine prosecution, Tr. Ct. erred by accepting oral presentence report & sentencing D without written presentence report. Ind. Code 35-38-1-8(a) provides that D convicted of felony may not be sentenced before written presentence report is prepared by probation officer & considered by sentencing Ct. Further, Ind. Code 35-38-1-12(b) entitles D to receive copy of presentence report sufficiently in advance of sentencing so that D will be afforded fair opportunity to controvert material included. Here, record referred only to oral presentence report having been given. No written presentence report was included in record. Ct. was unable to determine whether D was aware of report's contents before sentencing, or whether sentencing Ct. properly considered written report. Held, judgment affirmed in part, remanded in part.

TITLE: Stokes v. State
INDEX NO.: E.2.b.
CITE: (2nd Dist., 06-14-05), Ind. App., 828 N.E.2d 937
SUBJECT: Use of pre-sentence investigation (PSI) report to discern criminal history - no error
HOLDING: Because rules of evidence do not apply to sentencing proceedings that are conducted by a judge sitting without a jury, a judge may use a PSI to discern a D's criminal history although a PSI is hearsay. Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254 (2005), does not preclude use of criminal history information delineated in a PSI by a sentencing Ct. to enhance a sentence. Underlying concern in Shepard was judicial fact-finding of circumstances surrounding a conviction, but Ct. concluded that a Tr. Ct. may examine statutory definition, charging document, written plea agreement, transcript of plea colloquy, & any explicit factual finding by trial judge to which D assented.

Here, there is not a concern as to how an offense underlying a prior conviction was committed; rather, concern is if the D has any prior convictions. As in Dillard v. State, 827 N.E.2d 570 (Ind. Ct. App. 2005), D waived appellate review of accuracy of PSI. D confirmed that he read PSI at his sentencing hearing, but he did not comment on its accuracy & instead invoked his Fifth Amendment right against self-incrimination. Even on appeal D did not challenge accuracy of the PSI. Fact of D's prior convictions have already been proven beyond a reasonable doubt & are thus exempt from Apprendi rule as explained in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2005). Held, judgment affirmed.

RELATED CASES: Robeson, App., 834 N.E.2d 723 (Ind. T.R. 44 does not require that PSI be authenticated before it may be used in sentencing; here, D's objection to PSI was based entirely on authentication of PSI, not on its accuracy; thus, she has waived this issue for appellate review).

TITLE: Townsend v. Burke

INDEX NO.: E.2.b.

CITE: 334 U.S. 736 (1948) 06/14/1948

SUBJECT: Sentencing -- presentence report (PSR); information must be factually true

HOLDING: D pleaded guilty to burglary & robbery. It appeared on record that trial judge mistakenly believed that D had three previous convictions, when in fact some charges had been dismissed & D had been acquitted on others. Because prisoner was sentenced on basis of assumptions concerning his criminal record which were materially untrue, such result, whether caused by carelessness or design, was inconsistent with due process of law, & such conviction could not stand. Held, judgment reversed & remanded for resentencing; Reed, C.J., & Burton, J., dissenting without opinion.

RELATED CASES: Rizzo, 821 F.2d. 1271 (7th Cir.) (including juvenile delinquency adjudication in PSR when D was not represented by counsel was violation of due process because Ct. sentenced D on basis of misinformation of constitutional magnitude); Berry, 561 N.E.2d 832 (juvenile conviction that Tr. Ct. knew was allegedly uncounseled could be used as aggravator to sentence); Weston, 448 F.2d. 626 (9th Cir.) (statements of narcotics agents in PSR containing unverified statements of unknown informant that D was one of biggest heroin dealers in area, was sufficient indicia of reliability to be proper basis for sentencing); Fugate, 516 N.E.2d 75 (Tr. Ct.'s express reliance on PSR which contained statement of damage to victim in crime of which D was acquitted denied D right to be sentenced on basis of materially true assumptions in violation of due process).

TITLE: Woodcox v. State

INDEX NO.: E.2.b.

CITE: (5/27/92), Ind., 591 N.E.2d 1019

SUBJECT: Sentencing -- challenging presentence report (PSR); required showing of prejudice

HOLDING: D was convicted of rape, attempted murder, & confinement, in addition to being sentenced as habitual offender. D believed that he was improperly sentenced because at time of sentencing PSR was deficient & did not comply with Ind. Code 35-38-1-9(B)(2), & that this deficiency, coupled with Ind. Code 35-38-1-8(a) requirement that D convicted of felony may not be sentenced before written PSR is prepared by probation officer, resulted in erroneous sentence & violated his constitutional right to due process. Although PSR was deficient, record revealed D was given opportunity to present any evidence or to make any statement that he desired prior to judge's pronouncing sentence. Ct. stated that it was incumbent upon D to demonstrate how he was prejudiced by omissions from report. Because D did not attempt to make showing of prejudice, Ct. could not grant reversal on basis of admittedly sparse report. Held, affirmed in part & remanded in part; Givan, J., dissenting.

RELATED CASES: Mejia, App., 702 N.E.2d 794 (Woodcox cannot be read so broadly as to hold that D is not entitled to PSR).

E. SENTENCING

E.2. Presentence investigation and report

E.2.c. Disclosure/confidentiality (Ind. Code 35-38-1-12 and 13)

TITLE: Coppock v. State

INDEX NO.: E.2.c.

CITE: (7/31/85), Ind., 480 N.E.2d 941

SUBJECT: PSI - received in sufficient time to prepare for hearing

HOLDING: D failed to show how he was harmed by receipt of PSI one day before sentencing hearing. Ind. Code 35-38-1-12(b) provides that the Tr. Ct. shall furnish D factual contents of PSI or a copy "sufficiently in advance of sentencing so that [D] will be afforded a fair opportunity to controvert the material included." Ct. notes that although one day might be insufficient time for preparation, each case should be judged under its own circumstances. Lang, 461 N.E.2d 1110. Here, Tr. Ct. addressed D personally & asked if he needed more time to inspect PSI. D said no. Counsel requested Tr. Ct. continue hearing on its own motion, but refused to so move, despite Ct.'s guarantee that motion would be granted. Held, no error.

RELATED CASES: Gilbert, 982 N.E.2d 1087 (Ind. Ct. App. 2013) (but see Gilbert v. State, No. 10A05-1204-CR-220 (Ind. Ct. App. February 22, 2013) (sentencing procedure violated due process because court scheduled sentencing hearing with 1 day notice and PSI report was not given to defendant or counsel until day of hearing; Ind. Code 35-38-1-12(b) (see full review in this section); May, App., 578 N.E.2d 716 (receipt of PSR by D ten minutes before sentencing was sufficient for review & preparation by him where he made six page statement addressing PSR at sentencing hearing); Wagner, 474 N.E.2d 476 (D received PSR on Thursday; sentencing set for following Monday; held, no error); Eubank, 456 N.E.2d 1012 (although D had one day to review PSR, he presented no evidence of harm; held, no error); Dillon, 492 N.E.2d 661 (Ct. "remain[s] concerned re limited opportunity for review of PSI report & opportunity to marshal evidence to rebut claimed inaccuracies" but finds circumstances of case support PCR Ct.'s denial of relief on this issue).

TITLE: Northern v. State

INDEX NO.: E.2.c.

CITE: (3/7/86), Ind., 489 N.E.2d 520

SUBJECT: PSI - introduced to jury during habitual

HOLDING: Tr. Ct. did not err in admitting (during habitual phase) certified Ct. records which included PSI reports. Here, D contends exhibits were unduly prejudicial & confusing because Ct. records included family history, reference to juvenile Ct. files & explanation of under-age drinking habits. Ct. finds D waived error by failing to provide authority to support his argument & by failing to present Ct. with complete record (of bench conference in which D objected). In dicta, Ct. notes certified reports presented overwhelming proof of prior convictions & PSI reports were not of such prejudicial value as to merit reversal. Held, no error. DeBruler CONCURS IN RESULT.

TITLE: U.S. v. Heilprin

INDEX NO.: E.2.c.

CITE: 910 F.2d 471 (7th Cir. 1990) 08/21/1990

SUBJECT: Sentencing -- confidentiality & disclosure of presentence report (PSR)

HOLDING: D was convicted of possession with intent to distribute two ounces of cocaine based on guilty plea. Probation officer prepared PSR & presented confidential sentencing recommendation to Ct. On appeal, D argued that probation office did not have authority to prepare report or make confidential sentencing recommendation. However, due process guarantees only that D has right to review PSR & refuse its contents. It does not guarantee D's right to be informed of particular sentencing recommendation made by probation officer to district Ct. Thus, it was not inappropriate for probation officer to make sentencing recommendation to Ct. Held, conviction affirmed.

E. SENTENCING

E.2. Presentence investigation and report

E.2.d. Physical or mental examination (Ind. Code 35-38-1-10)

TITLE: Schwass v. State

INDEX NO.: E.2.d

CITE: (6/1/90), Ind., 554 N.E.2d 1127

SUBJECT: Presentence investigation - psychiatric exam

HOLDING: Tr. Ct. did not abuse discretion in refusing to order psychiatric exam prior to sentencing. D. was charged with attempted robbery resulting in bodily injury. Before trial, D. petitioned Tr. Ct. for psychiatric exam to determine his competence to stand trial. Both doctors filed reports stating that D. showed no overt evidence of delusions or hallucinations; that his orientation as to time, place, & person was intact; that there was no evidence of recent or remote memory impairment; that his intelligence was average; that he was able to understand charges against him; & that he was able to cooperate with his attorney in his defense. D. was convicted at trial & received an enhanced sentence. On appeal, he argues that Tr. Ct. should have granted his petition for presentence psychiatric exam pursuant to Ind. Code 35-38-1-10, because his history shows psychological & emotional problems & drug & alcohol abuse. Ind. S. Ct. notes that it is quite common to see sociopathological background in those charged with crime. However, statute leaves it to discretion of Tr. Ct. whether presentence psychiatric evaluation is warranted. Here, Tr. Ct. had benefit of 2 psychiatric evaluations completed before trial, his own observation of D. during trial, & presentence report prepared by probation officer. Under circumstances, Tr. Ct. did not abuse discretion in refusing to order presentence psychiatric exam.

TITLE: Wray v. State

INDEX NO.: E.2.d.

CITE: (12/13/89), Ind., 547 N.E.2d 1062

SUBJECT: Sentencing -- physical & mental exams for presentence report

HOLDING: Ordering of either physical or mental examination is within discretion of Tr. Ct. Ind. Code 35-38-1-10. Here, D was convicted of murder & theft. Prior to sentencing, D filed motion asking for mental & physical examination because his probation officer had testified that tests would be beneficial in determining appropriate sentence for him. Because probation officer testified on recross-examination that she did not find any evidence of mental disease or defect, severe mental illness or other abnormality in D's case, Ct. held that there was no abuse of Tr. Ct.'s discretion in denying D's motion. Held, conviction affirmed.

RELATED CASES: Woods, 547 N.E.2d 772 (failure to order physical or mental examination pursuant to Ind. Code 35-38-1-10 is reviewable only as abuse of discretion); Glenn, App., 322 N.E.2d 106 (abuse of discretion may be shown where Tr. Ct. has reason to believe that D is drug abuser & that he may be eligible for election of drug/treatment pursuant to statute, & Tr. Ct. inquires no further).

E. SENTENCING

E.3. Procedure for pronouncing sentence

TITLE: Reffett v. State

INDEX NO.: E.3.

CITE: (5/17/91), Ind., 571 N.E.2d 1227

SUBJECT: Sentencing -- presentence report (PSR) considered after accepting plea agreement

HOLDING: Although judge should consider PSR prior to accepting plea agreement, its failure to do so does not strip it of power to accept plea agreement. If contents of plea agreement indicate that prosecuting attorney anticipates that D intends to enter plea of guilty to felony charge, Tr. Ct. shall order PSR required by Ind. Code 35-38-1-8 & may hear evidence on plea agreement. Ind. Code 35-35-3-3. Obvious purpose of these provisions is to ensure that Tr. Ct. has before it all relevant information it needs about D's background to exercise its discretionary authority in sentencing. If this purpose is to be achieved in cases where Tr. Ct.'s sentencing discretion is narrowed early by term in plea agreement, Tr. Ct. must consider PSR prior to accepting plea agreement. Here, D entered into plea agreement & was subsequently convicted of driving while intoxicated. After accepting plea agreement, Tr. Ct. reviewed PSR, which had not been prepared when Tr. Ct. accepted agreement. In light of PSR, trial judge rescinded his prior acceptance, entered plea of not guilty & set case for trial. D & Tr. Ct. made new agreement & D was given new sentence. Ct. held that trial judge should have considered PSR prior to accepting D's plea agreement because Tr. Ct.'s sentencing discretion was narrowed by term in plea agreement. However, having accepted D's plea & approved agreement, judge was obligated to sentence D in accordance with it. Held, case remanded to Tr. Ct. with instructions to sentence D in accordance with first plea agreement.

E. SENTENCING

E.3. Procedure for pronouncing sentence

E.3.a. Time for pronouncement of sentence (Ind. Code 35-38-1-2 and 5)

TITLE: McElroy v. State

INDEX NO.: E.3.a.

CITE: (5/10/90), Ind., 553 N.E.2d 835

SUBJECT: Sentencing -- Good cause for delay

HOLDING: D was convicted of murder. He claimed that he was denied his constitutional rights because he was found guilty on August 25, 1988, & was not sentenced until October 22, 1988, & that this is contrary to Ind. Code 35-38-1-2(a), which provides that upon entering conviction, Tr. Ct. shall set date for sentencing within thirty days. Ct. held that Tr. Cts. are excused from exact compliance with thirty-day sentencing requirement where there is good cause for delay & that such cause may be presumed where record is silent as to reason for delay & D made no objection. Kindred, 524 N.E.2d 279. Here, although record contained no evidence of reason for delay in sentencing, Ct. presumed good reason existed in absence of any objection by D to delay & in absence of any showing of detriment to appellant caused by delay. Nothing in record justified reversal by reason of unexplained short delay in sentencing. Held, conviction affirmed.

RELATED CASES: Minnick, 965 N.E.2d 124 (Ind. Ct. App. 2012) (where D did not object to Tr. Ct.'s failure to sentence him on 2 of his 3 convictions and record is silent as to reason for delay in sentencing, good cause for sentencing delay is presumed; if there was, it was harmless); Dudley, 480 N.E.2d 881 (good cause shown where delay was due to unavailability of presentence report); Ferguson, 438 N.E.2d 286 (where delay was due initially to D's continuance & later to State's appeal of Tr. Ct.'s dismissal order on habitual count, good cause was shown).

TITLE: Williams v. State

INDEX NO.: E.3.a.

CITE: (2/25/86), Ind., 489 N.E.2d 53

SUBJECT: Time for pronouncement of sentence - remedy for failure to comply

HOLDING: Tr. Ct. did not have good cause to continue sentencing beyond 30-day limit of Ind. Code 35-4.1-4-2 [now Ind. Code 35-38-1-2]; however, appropriate remedy is modification of sentence rather than discharge. Here, Tr. Ct. sua sponte continued sentencing on one charge & rescheduled sentencing on another charge to same day. D objected, *citing* 30-day limit. D's counsel in affidavit alleges Tr. Ct.'s purpose was to remove D's incentive to withdraw guilty plea in second case based upon probable perception that sentence in instant case was too severe. Cts. are excused from exact compliance if good cause exists for delay. Taylor, App., 358 N.E.2d 167; Arnold, App., 300 N.E.2d 135; Alford, App., 294 N.E.2d 168. Good cause may be presumed from silent record & if D did not object. Taylor; Moore, App., 290 N.E.2d 472. Ct. finds inferential support for affidavit in record. Good cause for delay did not exist. Ct. rejects D's contention that discharge is proper remedy. Remedy should strip away any gain by state because of delay. State's gain was consecutive sentences resulting from simultaneous sentencing. Ct. is without jurisdiction to order these sentences be served concurrently but does order one sentence to be served concurrent to sentence in separate, earlier offense. Held, remanded for sentence modification.

RELATED CASES: Vandergriff, App., 653 N.E.2d 1053 (where Tr. Ct. clearly stated on record that sentence would be postponed to facilitate finalization of divorce without further altercation, good cause was shown to continue sentencing beyond 30-day limit of Ind. Code 35-38-1-2(b)); Murphy, App., 447 N.E.2d 1148 (D waived enforcement of 30-day sentencing rule by failing to object; Tr. Ct. does not lose jurisdiction to sentence when 30-day period expires).

E. SENTENCING

E.4. Sentencing hearing

TITLE: Eubank v. State

INDEX NO.: E.4.

CITE: (12/16/83), Ind., 456 N.E.2d 1012

SUBJECT: Sentencing hearing - continuance

HOLDING: Tr. Ct. did not err in denying D's motion for continuance of sentence hearing (made because D was not given PSI report until day before hearing) where D failed to show how he was harmed. Ind. Code 35-4.1-4-13, now Ind. Code 35-38-1-12, provides Tr. Ct. shall provide factual contents of PSI report sufficiently in advance of sentencing to afford D opportunity to controvert report. D must bring any error in report to Ct.'s attention. Gardner, 388 N.E.2d 513. Here, D received report in advance of sentencing hearing; he stated he had no evidence to present; he did not say he would controvert specific findings if given more time; & showed no harm. Held, no error.

RELATED CASES: Evans, App., 855 N.E.2d 378 (no abuse of discretion where Ct. denied continuance despite fact D received PSI day before sentencing & D wanted to hire sentencing consultant who might be able to compile mitigation evidence).

E. SENTENCING

E.4. Sentencing hearing

E.4.b. Record

TITLE: Crane v. State

INDEX NO.: E.4.b.

CITE: (06/18/2020), Ind. Ct. App., 147 N.E.3d 424

SUBJECT: Sentencing orders should reflect disposition of all charges

HOLDING: Defendant was tried to a jury on two counts. The jury found him guilty on Count II and not guilty on Count I. The trial court's sentencing order did not reflect the disposition of Count I. The Court of Appeals remanded to the trial court to amend its sentencing order to reflect Defendant was tried and acquitted of Count I. In so holding, Court noted that the better practice is for sentencing orders to be complete and accurate with respect to the charges that were tried and the disposition of each, not just the charges that were reduced to a conviction.

TITLE: Whatley v. State

INDEX NO.: E.4.b.

CITE: (9-5-97), Ind., 685 N.E.2d 48

SUBJECT: Conflict between sentencing hearing & abstract of judgment

HOLDING: At sentencing hearing, judge orally informed D that he was being sentenced to 365 days for carrying handgun without license. However, abstract of judgment sent to Department of Corrections reflected that D was sentenced to handgun charge as C felony with two-year sentence. Tr. Ct. did not prepare & sign judgment as required by Ind. Criminal Rule 15.1. In analogous cases, to resolve inconsistency between judge's in-Ct. pronouncement of sentence & subsequent abstract of judgment, Ct. App. has either stricken sentence modification or remanded to Tr. Ct. for proper sentencing. Here, Ct. elected to reinstate original in-Ct. sentencing & to vacate subsequent contradictory language. Held, cause remanded to enter judgment consistent with oral sentencing pronouncement.

RELATED CASES: Stott, App., 822 N.E.2d 176 (Ct. rejected State's remand for clarification, because judge's obvious & unmistakable acquittal on one count in court prevails over subsequent contradictory language in CCS & abstract of judgment).

E. SENTENCING

E.4. Sentencing hearing

E.4.c. Rights of D (Ind. Code 35-38-1)

TITLE: Alleyne v. United States
INDEX NO.: E.4.c.
CITE: (6/17/2013), 133 S.Ct. 2151 (United States Supreme Court 2013)
SUBJECT: Jury, not Tr. Ct., must find fact that increases mandatory minimum sentence
HOLDING: Jury, not Tr. Ct., must making finding of fact that increases the mandatory minimum of a sentence, overruling Harris v. United States, 536 U.S. 545 (2002).

D was convicted of carrying a firearm related to a crime of violence. Because the jury found D guilty of only "carrying a gun," not "brandishing a gun," he was subject to a mandatory minimum sentence of five years under 18 U.S.C. Section 9(c)(1)(a). However, the Tr. Ct. later found D did brandish a gun and thus imposed the higher mandatory minimum sentence of seven years. The Tr. Ct. relied on Harris, supra, which distinguished situations where a factual finding increases a maximum sentence, see Apprendi v. New Jersey, 530 U.S. 466 (2000), and held that a D's right to jury trial was not violated where a Tr. Ct., not a jury, made a factual finding subjecting a D to a higher mandatory minimum sentence.

The critical Sixth Amendment inquiry is whether a fact is an element of a crime. Because brandishing a gun aggravates the prescribed range of sentences, it is an element of a separate, aggravated offense that the jury must find.

There is no basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum. Held, judgment reversed. Thomas, J., Ginsburg, Breyer, Sotomayor, and Kagan, J.J., concurring in Parts I, III-B, III-C, and IV, and joined by Ginsburg, Sotomayor and Kagan, J.J., concurring with parts II and III-A. Breyer, J., concurring in part. Roberts, C.J., dissenting, joined by Scalia and Kennedy, J.J. Alito, J., dissenting.

TITLE: Apprendi v. New Jersey

INDEX NO.: E.4.c.

CITE: 530 U.S. 466, 99-478, 120 S. Ct. 2348 (2000) 06/26/2000

SUBJECT: Right to jury trial, notice, standard of proof, sentence enhancement

HOLDING: The Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. Sentence enhancement scheme where, after D pled guilty to a charge carrying maximum penalty of 10 years, sentence was enhanced to 12 years because of facts found by judge at sentencing hearing, violated D's right to notice, to trial by jury, and to due process. After D pled guilty to shooting at his neighbor's house, prosecutor filed a motion to enhance his sentence, alleging that the crime was racially motivated. The sentencing judge found by a preponderance of the evidence that the crime was a hate crime and enhanced D's sentence beyond the statutory maximum for the underlying offense.

RELATED CASES: Alleyne, 133 S. Ct. 2151 (2013) (fact that increases minimum sentence must be found by jury, not Tr. Ct.); Southern Union, 132 S. Ct. 2344 (2012) (under Apprendi, the jury must find facts that increase the amount of a criminal fine, not the trial judge; see full review, this section): Parker, App., 754 N.E.2d 614 (there is distinction between facts that constitute elements of crime, which must be charged & proven beyond reasonable doubt, & mere "sentencing factors," which need not be charged or supported by jury verdict. Jones v. United States, 526 U.S. 227 (2000). Application of Indiana statute under which D's sentence was enhanced did not offend due process under Jones & Apprendi standard); Almendarez-Torres v. U.S., 523 U.S. 224 (enhancement may be based on a judicial finding of the fact of a prior criminal conviction); U.S. v. O'Brien, 130 S. Ct. 2169 (2010) (machine gun provision of 18 U.S.C. § 924(c)(1)(B)(ii), which imposes a thirty-year mandatory minimum sentence when the firearm used in certain crimes is a machine gun, is an element of the offense that must be proved to a jury beyond a reasonable doubt, rather than a sentencing factor to be proved to the judge at sentencing).

TITLE: Averitte v. State

INDEX NO.: E.4.c.

CITE: (5th Dist., 04-08-05), Ind. App., 824 N.E.2d 1283

SUBJECT: Waiver of right to jury determination of aggravating factors - harmless error

HOLDING: Jury trial waiver was not made knowingly, intelligently & voluntarily because D was not informed that she had right to have a jury determine, beyond a reasonable doubt, all facts legally essential to her sentence pursuant to Sixth Amendment & Blakely v. Washington, 124 S.Ct. 2531 (2004). Prior to Blakely holding, D executed her jury trial waiver & was tried to the bench, convicted of murder, & sentenced to enhanced term of sixty years. D was never specifically advised of her right to have a jury determine facts legally essential to her sentence & Tr. Ct. did not procure from D any waiver of such right. Nevertheless, D was not entitled to a new sentencing hearing because error in Tr. Ct.'s denial of D's Sixth Amendment right in sentencing was harmless in this case. Evidence overwhelmingly supports Tr. Ct.'s findings of aggravating circumstances to point where a reasonable jury could not have found otherwise. United States v. Booker, 125 S.Ct. 738 (2005). Held, judgment affirmed.

RELATED CASES: Miller, App., 884 N.E.2d 922 (distinguishing Averitte, Ct. noted waiver provision in D's plea agreement clearly applied to D's Blakely rights; oral colloquy not required). Freeze, App., 827 N.E.2d 600 (Ct. could not conclude beyond reasonable doubt that Tr. Ct. would have imposed an identical sentence if it had not considered invalid aggravator); Weis, App., 825 N.E.2d 896 (denial of a D's Sixth Amendment right to a jury determination is subject to harmless-error analysis & based upon D's testimony on cross-examination, no jury could have found D was not in a position of trust).

TITLE: Barnett v. State
INDEX NO.: E.4.c.
CITE: (1/23/2015), 24 N.E.3d 1013 (Ind. Ct. App. 2015)
SUBJECT: D's waiver in firearm enhancement phase did not violate Sixth Amendment right to jury
HOLDING: D's knowing and intelligent waiver of a trial by jury as to facts underlying firearm sentencing enhancement did not violate his Sixth Amendment right to jury trial. D argued that the language of the firearm enhancement statute, Ind. Code § 35-50-2-11, precluded his waiver of jury for the sentence enhancement. Court disagreed, concluding that D invited any possible statutory or constitutional violation that could have occurred. "Invited error" is a doctrine based in estoppel that prohibits a party from taking advantage of any error that party committed or invited or that was the natural consequence of his own neglect or misconduct. Brewington v. State, 7 N.E.3d 946 (Ind. 2014). Held, judgment affirmed.

TITLE: Biddinger v. State

INDEX NO.: E.4.c.

CITE: (06-20-07), Ind., 868 N.E.2d 407

SUBJECT: Right to allocution where D pleads guilty

HOLDING: A criminal D who pleads guilty to an offense has a right to make a statement in allocution prior to sentencing, & statement in allocution is not subject to cross-examination. Ind. Code 35-38-1-5(a) provides that Tr. Ct. "shall inform the D of the verdict of the jury or the finding of the Ct.," & afford D an opportunity to make a statement. Because a guilty plea is not based on "the verdict of the jury or the finding of the Ct.," the trial judge is not required to ask D whether D wants to make a statement as provided by Ind. Code 35-38-1-5. It is in that sense that there is no statutory right to allocution upon a plea of guilty. But where, as here, a D specifically makes a request of the Ct. for an opportunity to give a statement, the request should be granted. Vicory v. State, 802 N.E.2d 426 (Ind. 2004). Tr. Ct. erred by failing to allow D the opportunity to make a statement. However, error was harmless because D failed to establish how the excluded portion of his statement would have made a difference in the sentence Tr. Ct. imposed. Ct. also held that a D is not subject to cross-examination upon his or her statement in allocution, noting that "the underlying purpose of allocution is undermined when a D is put to the rigors of cross-examination." Held, transfer granted, Ct. App.' opinion at 846 N.E.2d 271 summarily affirmed in part, judgment affirmed.

RELATED CASES: Phelps, App., 914 N.E.2d 283 (prosecutor should not have cross-examined D after his sentencing statement because this undermined the purpose of allocution, to give Tr. Ct. the opportunity to consider the facts relevant to sentencing D.

TITLE: Blakely v. Washington

INDEX NO.: E.4.c.

CITE: 542 U.S. 296 (2004) 06/24/2004

SUBJECT: Apprendi, judge sentencing

HOLDING: In Apprendi v. New Jersey, 530 U.S. 466 (2000), the U.S. Supreme Court held that any fact, other than the fact of a prior conviction, used to subject a criminal D to greater possible punishment at sentencing, must be alleged in the charging information and proven to a jury beyond a reasonable doubt. The State of Washington's statutory sentencing scheme provided a maximum 10 year sentence for 2nd degree kidnapping, but under a separate sentencing matrix, Blakely was eligible for no more than 53 months incarceration based on the facts to which he plead guilty. At the sentencing hearing, the judge heard additional evidence and found, by a preponderance of the evidence, that Blakely's crime had involved "deliberate cruelty", an aggravating circumstance that enhanced the sentence to 90 months. Blakely appealed, arguing that the judicial factfinding and resulting sentence violated the 6th Amendment right to jury trial under Apprendi. The U.S. Supreme Court agreed. Although this case did not address the Federal Sentencing Guidelines directly, apparently they too violate the 6th Amendment under Apprendi. After Blakely, there are major constitutional issues with sentencing laws in many states, including Indiana.

TITLE: Carson v. State

INDEX NO.: E.4.c.

CITE: (4th Dist., 8-20-04), Ind. App., 813 N.E.2d 1187

SUBJECT: Sentencing - right to have facts supporting enhancement tried to jury; criminal history aggravator

HOLDING: On petition for rehearing from unpublished memorandum opinion, D argued that his enhanced sentence for Class C felony battery violates his Sixth Amendment right to have facts supporting enhancement of his sentence tried to a jury, pursuant to the recently-decided U.S. S.Ct. decision in Blakely v. Washington, 124 S.Ct. 2531 (2004). Blakely applied rule set forth in Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), that any fact that increases penalty for crime beyond statutory maximum, other than fact of prior conviction, must be submitted to jury & proved beyond a reasonable doubt. The relevant "statutory maximum" for Apprendi purposes is the maximum a judge may impose based solely on facts reflected in jury verdict or admitted by D. Blakely, 124 S. Ct. at 2537.

Because D did not challenge his sentence on direct appeal, Ct. found he waived review of this issue, & appropriate procedure would have been to challenge his sentence through post-conviction relief. Waiver notwithstanding, Ct. found that Blakely has no effect on his enhanced sentence. Aggravating circumstances in this case consisted of: 1) a history of criminal & delinquent activity, which includes multiple convictions; 2) a need for corrective or rehabilitative treatment that can best be provided by incarceration in a penal institution or in a work release facility; & 3) strong likelihood that, based on D's criminal history, he will commit battery again. Multiple convictions that extensive criminal history comprises have already been proven beyond reasonable doubt & are thus exempt from Apprendi rule as *clarified* by Blakely. The other two aggravators are simply derivative of that extensive criminal history & would seem also not to implicate the Blakely analysis. Moreover, a single aggravating circumstance is adequate to justify a sentence enhancement. Powell, 769 N.E.2d 1128 (Ind. 2002). Therefore, even if Indiana's sentencing scheme were to be found to run afoul of Sixth Amendment under Blakely, this finding would have no effect on D's sentence. Held, petition for rehearing denied.

RELATED CASES: Rembert, App., 832 N.E.2d 1130 (D's substantial criminal history consisting of violent misdemeanors justified enhanced sentence by Tr. Ct.); McCray, App., 823 N.E.2d 740 (D's criminal history, as contained in presentence investigation report & his acknowledgment, in open Ct., of a prior felony conviction were sufficient to support enhancement of his sentence above presumptive); Altes, App., 822 N.E.2d 1116 (because this was D's first conviction, Tr. Ct.'s speculation regarding his possible lack of future law abiding behavior cannot be derived from his past criminal conduct & this is an aggravator which should have been found by jury); Pennington, App., 821 N.E.2d 899 (while the preferred method is to recite specific incidents making up the criminal history & a conclusory statement of "criminal history" must be substantiated by specific facts, the D's criminal history here is clear from the sentencing transcript & Tr. Ct.'s sentencing statement); McNew, App., 822 N.E.2d 1078; Berry, App., 819 N.E.2d 443 (Blakely was not violated where Tr. Ct. based its assessment of likelihood that D would commit another crime on D's constant involvement in criminal justice system, an observation derived from D's criminal history, & DS admission that he was on probation); Traylor, App., 817 N.E.2d 611 (standing alone, one 5-year-old misdemeanor battery conviction was not a proper aggravator to enhance D's sentence, & any circumstances that may or may not derive from his prior criminal history also are not proper aggravators).

TITLE: Crank v. State

INDEX NO.: E.4.c.

CITE: (2d Dist. 01/29/87), Ind. App., 502 N.E.2d 1355

SUBJECT: Sentencing hearing - D can waive right to be present

HOLDING: Tr. Ct. did not err in sentencing D in absentia. D has right to be present at sentencing. Ind. Code 35-38-1-4; Royal 396 N.E.2d 390. D's right to be present at sentencing may be waived by D's voluntary absence. [Citations omitted.] D's right to be present at trial is clearly waivable. Fennell, 492 N.E.2d 297; Blatz, 486 N.E.2d 990. Ct. finds it would be anomalous to hold D may waive right to be present at proceedings prior to sentencing, but not with respect to sentencing. Here, before Tr. Ct. pronounced sentence, it heard evidence re D's absence from bail bondsmen & police officer who conducted extensive search for D. Evidence demonstrates D absented himself from trial N.E.2d sentencing because he wished to avoid Ct. proceedings. Held, no error.

RELATED CASES: Cleff, 565 N.E.2d 1089 (Ct.'s discretion as to whether to sentence in absentia or postpone sentencing not violation of equal protection.)

TITLE: D.M. v. State

INDEX NO.: E.4.c.

CITE: (8/8/2018), 108 N.E.3d 393 (Ind. Ct. App. 2018)

SUBJECT: Failure to advise juvenile of allocution before final disposition was not fundamental error

HOLDING: Although better practice is for trial court to specifically ask juvenile if he wants to make a statement before pronouncing disposition of case, failure to do so in this case did not deny D.M. fundamental fairness. During dispositional hearing, D.M.'s attorney vigorously argued in favor of probation and submitted a plan for the juvenile court's review. It does not appear that D.M. was substantially harmed by not being given an opportunity to personally address the court at the hearing. Further, D.M.'s juvenile record is extensive, thus it is highly unlikely that allocution by D.M. would have persuaded juvenile court to order probation or less restrictive placement than the DOC. Held, judgment affirmed.

TITLE: Disney v. State

INDEX NO.: E.4.c.

CITE: (1st Dist. 10/28/82), Ind. App., 441 N.E.2d 489

SUBJECT: Sentencing hearing - D present

HOLDING: Tr. Ct. erred in failing to specify conditions & provide D with written statement of probation conditions at sentencing hearing. Criminal D has a right to be present at sentencing. Ind. Code 35-4.1-4-4; Royal, App., 396 N.E.2d 390. Tr. Ct. may not modify sentence when neither D nor D's attorney are present in Ct. Baldock, App., 379 N.E.2d 539. D's lack of presence cannot be remedied by subsequent signing by D of terms of probation. Barfell, App., 399 N.E.2d 377 (defective guilty plea cannot be rehabilitated at PCR hearing). Here, Tr. Ct. accepted & sentenced D pursuant to plea recommendation. No terms of probation were imposed at sentencing hearing. Tr. judge told D at hearing he would draft probation order & send it to probation department which would send copy to D for D's signature. After hearing, Tr. Ct. entered order of probation which required D to make restitution of \$500 to victim. D was not present in Ct. when the terms of probation were specified. A copy was mailed to D which he signed (thus acknowledging he read, understood & agreed to comply with terms). Held, cause remanded with order to strike restitution from probation order.

TITLE: Ford v. State

INDEX NO.: E.4.c.

CITE: (3/12/79), Ind. App., 386 N.E.2d 709

SUBJECT: Sentencing -- right to counsel

HOLDING: D was convicted of assault & battery with intent to kill & first-degree burglary. Following Tr. Ct.'s entry of judgment on guilty verdicts rendered by jury but prior to sentencing, D's trial counsel received information which revealed that FBI was seeking D's cooperation in action against former client who had discussed pending federal matter with him. Based on his conclusion that continued representation of D would constitute conflict of interest under Code of Professional Responsibility, defense counsel filed Motion for Limited Withdrawal from case which was denied by Tr. Ct. Based on those same ethical considerations which had prompted his motion to withdraw, defense counsel did not address Tr. Ct. in D's behalf at hearing wherein D was sentenced. D contends that Tr. Ct.'s refusal to grant his defense counsel's motion to withdraw operated to deny him his constitutional right to effective representation by counsel. Ct. held that, regardless of merits of D's argument, it was unable to perceive how D was prejudiced by fact that his counsel did not address Tr. Ct. at sentencing hearing because sentence imposed was mandatory & could not be affected by anything said by counsel. Held, conviction affirmed.

TITLE: Gillespie v. State

INDEX NO.: E.4.c.

CITE: (5th Dist., 06-02-94), Ind. App., 634 N.E.2d 862

SUBJECT: Sentencing in absentia proper

HOLDING: Although D was absent from trial, & therefore had no knowledge of sentencing date, it was proper for Tr. Ct. to sentence D in absentia, because remaining at large after having failed to appear at trial was sufficient to establish knowing & voluntary waiver of right to be present. D & State originally entered into plea agreement, but Tr. Ct. found no factual basis & set matter for trial. Five days before trial, State amended charge to allege HO status. D then failed to appear at trial & was convicted for theft. Next day warrant was issued for D's arrest, & little over two months later he was sentenced in absentia to 18 years. Ct. noted law was somewhat unclear as to what is necessary to show voluntary & knowing waiver of right to be present at sentencing, & that Williams, 526 N.E.2d 1179, seemed to require knowledge of date of sentencing to establish waiver. Ct. examined facts of Williams, however, & found D was present for first day of trial, but absent on day he was found guilty. Therefore, Williams could not have known of date of sentencing, & Ct. still found proper waiver of right to be present. Ct. here determined Williams should be interpreted to mean that if D knowingly & voluntarily absents himself from trial, & then remains absent, knowing & voluntary waiver of right to be present at sentencing can be found. Ct. found this interpretation consistent with subsequent holdings in James, 541 N.E.2d 265, & Slocumb, App., 568 N.E.2d 1068, affirmed in part & reversed in part on other grounds, 573 N.E.2d 427. Further evidence supporting waiver was that D's counsel spoke to D's father & advised him D should turn himself in, but neither counsel nor probation were able to locate D. Held, Tr. Ct. affirmed.

TITLE: Harris v. State

INDEX NO.: E.4.c.

CITE: (3rd Dist., 03-28-05), Ind. App., 824 N.E.2d 432

SUBJECT: Blakely violation requires re-sentencing; no waiver of issue

HOLDING: D's enhanced sentence of 65 years for felony murder violated his Sixth Amendment right to have a jury determine facts upon which the enhancement was based, pursuant to Blakely v. Washington, 124 S.Ct. 2531 (2004). Based on Smylie v. State, No. 41S01-0409-CR-408 (Ind. 2005) & its directive to use "a rather liberal" approach to preserving Blakely issues, Ct. denied the State's motion to strike D's reply brief, which was the first time D raised the Blakely issue. Ct. noted the Appellant's brief had been filed prior to the Blakely decision.

Ct. remanded for resentencing, noting State could consider intervention of a jury for sentencing without addressing issues of whether jeopardy already attached or the lack of such a sentencing mechanism in the current criminal code. Ct. also determined that of the three aggravators cited by the sentencing Ct. -- the victims' age, the nature & circumstances of the crime; & the extraordinary impact on the victim's family & community -- the last aggravator was not appropriate in this case. Specifically, Tr. Ct. noted that the community was significantly affected because the killing of a market owner forced the market, a staple in the community, to close. Extraordinary impact can only be considered as an aggravator when it is not normally associated with the commission of the offense & it is foreseeable to the D. Bacher v. State, 686 N.E.2d 791 (Ind.1997). Ct. did not believe the impact to the community when a family-owned business closes is the type of incident contemplated by Bacher. Held, judgment affirmed in part, reversed & remanded in part for new sentencing.

RELATED CASES: Haas, 849 N.E.2d 550 (victim's testimony concerning her age is not proof beyond reasonable doubt of her age for purposes of requiring a Blakely hearing).

TITLE: Hawkins v. State

INDEX NO.: E.4.c.

CITE: (2/19/2013), 982 N.E.2d 997 (Ind. Ct. App. 2013)

SUBJECT: D's right to be present at sentencing hearing

HOLDING: Ind. Code. 35-38-1-4(a) provides that a criminal D "must be personally present at the time sentence is pronounced." This, along with "present in person" as used in Indiana Administrative Rule 14(A)(2)(c), refers to the D's actual physical presence. A Tr. Ct. may conduct a sentencing hearing at which the D appears by video, but only after obtaining a written waiver of his right to be present and the consent of the prosecution. Here, nothing in the record reflects a waiver of D's right to be present in person, thus it was improper for Tr. Ct. to sentence him via video conference. Held, transfer granted, Court of Appeals' opinion at 970 N.E.2d 762 vacated, conviction reversed.

RELATED CASE: C.S., 131 N.E.3d 592 (Ind. 2019) (Ind. Admin. Rule 14(B) permits remote participation in juvenile disposition-modification hearings where the parties have agreed or where the court issues a good cause order based on the factors listed in the rule including the child's best interest).

TITLE: Higginbotham v. State

INDEX NO.: E.4.c.

CITE: (2nd Dist., 03-10-05), Ind. App., 826 N.E.2d 5

SUBJECT: Blakely - waiver; effect of plea agreement

HOLDING: A D who enters into a plea agreement that calls for an enhanced sentence cannot claim that his Sixth Amendment right to a jury was violated when Tr. Ct. imposed the sentence he consented to in the plea agreement. Here, D pled guilty to Class C felony battery in exchange for dismissal of one count of Class D felony intimidation, one count of Class A misdemeanor domestic battery, & a habitual offender count. Plea agreement provided that State would recommend a fixed eight-year sentence, which Tr. Ct. imposed. Right to a jury trial guaranteed by Sixth Amendment is subject to knowing, intelligent, & voluntary waiver. Leone v. State, 797 N.E.2d 743 (Ind. 2003). By pleading guilty, D forfeited claimed entitlement to certain rights, including Sixth Amendment right to have facts supporting enhancement of his sentence tried to a jury, pursuant to Blakely v. Washington, 124 S. Ct. 2531 (2004). Held, judgment affirmed.

RELATED CASES: Stewart, App., 840 N.E.2d 859 (State & D clearly stipulated that Tr. C. could use any information from case in determining sentence); Williams, App., 836 N.E.2d 441 (Tr. Ct. properly enhanced sentence after D pled guilty; D waived Apprendi rights & consented to judicial fact finding).

TITLE: Henriquez v. State
INDEX NO.: E.4.c.
CITE: (8/9/2016), 58 N.E.3d 942 (Ind. Ct. App. 2016)
SUBJECT: No prejudice from failure to provide release dates; legislature should revisit statute
HOLDING: To the extent the Tr. Ct. erred in sentencing D without providing specific dates for earliest and latest release dates, D has not shown he was harmed by this omission. Ind. Code § 35-38-1-1(b)

D was convicted of Class A felony Child Molesting and was sentenced to a 40-year term, with ten years suspended to probation. As to D's potential release dates, the Tr. Ct. simply read the statute, which provides: "When the court pronounces the sentence, the court shall advise the person that the person is sentenced for not less than the earliest release date and for not more than the maximum possible release date."

The statute clearly requires a Tr. Ct. to provide specific dates, but in doing so, it imposes an "incredibly difficult, if not impossible" burden on Tr. Ct.s. Carrying that burden would require a Tr. Ct. to consider, inter alia, possible education credit time, the possibility of parole and probation revocations, and the term of any other concurrent or consecutive sentences. Because of this onerous burden, the General Assembly should "reconsider Ind. Code 35-38-1-1(b) and the unworkable obligation it places on our Tr. Ct.s."

Difficulties aside, D has failed to show how he was prejudiced by the Tr. Ct.'s omission. Held, judgment affirmed; Baker dissenting, believes the duty the statute puts on Tr. Ct.s "complicated" but certainly not impossible.

Note: Legislature amended Ind. Code 35-38-1-1(5) in 2017 to require Tr. Ct. and advise person of the number of days of pretrial confinement the person served while awaiting trial and sentencing and whether the days of confinement were served in jail or on house detention.

RELATED CASES: Jones, 71 N.E.3d 412 (Ind. Ct. App. 2017) (at probation revocation hearing, trial court did not err in refusing to advise D about her earliest release because Ind. Code § 35-38-1-1(b) requires trial courts to provide that information only at sentencing hearings; see full review, this section).

TITLE: Holden v. State

INDEX NO.: E.4.c.

CITE: (5th Dist., 10-13-04), Ind. App., 815 N.E.2d 1049

SUBJECT: Sentencing - right to have facts supporting enhancement tried to jury; harmless error

HOLDING: Notwithstanding Tr. Ct.'s violation of Blakely v. Washington, 124 S. Ct. 2531 (2004), in sentencing D, error was harmless because there was no reasonable possibility that complained of aggravators contributed to sentence. Blakely applied rule set forth in Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), that any fact that increases penalty for crime beyond statutory maximum, other than fact of prior conviction, must be submitted to jury & proved beyond a reasonable doubt. The relevant "statutory maximum" for Apprendi purposes is the maximum a judge may impose based solely on facts reflected in jury verdict or admitted by D. Blakely, 124 S.Ct. at 2537. Thus, the "statutory maximum" sentence equates with the presumptive sentence called for by the applicable Indiana statute.

Here, D was convicted of two counts of robbery as Class B felonies, & Tr. Ct. enhanced sentence based on following aggravating factors: 1) D's significant & consistent adult & juvenile criminal history; 2) nature & circumstances of robberies & what they demonstrated about D's character; & 3) D was in need of rehabilitative treatment best provided by commitment to a penal facility. Because Blakely is superficially applicable to a sentence greater than the presumptive, Ct. noted that "it would appear that the finding made with relation to the facts of the crime could be violative of the Blakely holding because it does not appear that jury made findings with regard to specific facts found & there is no allegation that D admitted to those facts." However, because Tr. Ct. relied upon three different aggravators, Ct. concluded that error was harmless. Held, judgment affirmed in part, & two conspiracy to commit robbery convictions reversed on double jeopardy grounds.

RELATED CASES: Davis, App., 835 N.E.2d 1087 (if a Tr. Ct. has improperly relied on non-criminal history aggravators neither found by jury nor admitted by a D, sentence may still be upheld if there are other valid aggravating factors from which appellate Ct. can discern that Tr. Ct. would have imposed same sentence); Padilla, App. 822 N.E.2d 288 (error in finding as aggravator fact D injured her infant daughter & ultimately caused her death was harmless because other facts considered by Tr. Ct. as part of nature & circumstances of crime were sufficient in & of themselves to warrant enhanced sentence); Berry, App., 819 N.E.2d 443 (no reasonable probability that nature & circumstances of crime aggravator contributed to slight enhancement of D's sentence); Cowens, App., 812 N.E.2d 255 (Ct. declined to extend Blakely holding to consecutive sentences).

TITLE: Huffman v. State

INDEX NO.: E.4.c.

CITE: (2nd Dist., 05-02-05), Ind. App., 825 N.E.2d 1274

SUBJECT: Waiver of right to jury determination - sentencing; life without parole or term of years

HOLDING: In murder prosecution, D waived his right to have jury hear evidence for sentencing purposes for any possible sentence he could receive (LWOP or term of years) & authorized Tr. Ct. to hear evidence without assistance of jury. This is precisely what U.S. S.Ct. stated was allowable in Blakely v. Washington, 124 S.Ct. 2531, 2541 (2004), when it acknowledged that Ds may consent to judicial factfinding. At guilty plea hearing before Blakely was decided, D & State agreed that Tr. Ct. would hear evidence with respect to aggravation & mitigation. D was informed of his right to have a jury hear evidence with respect to counts to which he was pleading guilty & for life without parole request. D stated he understood he was waiving his right to have jury determine whether he should receive punishment of life without parole.

D argued that he was informed only of the potential aggravating factor of lying in wait. Because that factor applied to request for life without parole, D opined that he waived his right to a jury finding only with respect to possibility of life without parole & not to standard term of years sentence. Ct. did not read Blakely to require that a D be provided notice of every fact upon which State may rely to seek an enhanced sentence. Additionally, D's right to have a jury hear evidence for sentencing arose from request that he be sentenced to life without parole. D waived that right with respect to any sentence that he could receive. Held, judgment affirmed.

TITLE: Irizarry v. United States

INDEX NO.: E.4.c.

CITE: 553 U.S., 1238 S.Ct. 2198, 171 L.Ed.2d 28 (2008) 06/12/2008

SUBJECT: Notice not required for sentence above federal guidelines since Booker

HOLDING: In 5-4 decision, Majority upheld federal district court's imposition of a sentence above the 41-51 months in prison recommended by the Federal Sentencing Guidelines and rejected Petitioner's objection that he was entitled to notice that the court was contemplating an upward departure. Majority held that Federal Rule of Criminal Procedure 32(h) does not apply to a variance from a recommended Guidelines range. At the time that Burns v. United States, 501 U.S. 129 (1991) was decided, prompting Rule 32(h)'s promulgation, the Guidelines were mandatory; the Sentencing Reform Act of 1984 prohibited district courts from disregarding most of the Guidelines' "mechanical dictates." Confronted with the constitutional problems that might otherwise arise, the Burns Court held that the Rule 32 provision allowing parties to comment on the appropriate sentence would be "rendered meaningless" unless a D was given notice of a contemplated departure. Any constitutionally protected expectation that a D would receive a sentence within the presumptively applicable Guidelines range did not, however, survive United States v. Booker, 543 U.S. 220 (2005), which invalidated the Guidelines' mandatory features. Faced with advisory Guidelines, neither the Government nor the D may place the same degree of reliance on the type of "expectancy" that gave rise to a special need for notice in Burns. Indeed, a sentence outside the Guidelines carries no presumption of unreasonableness. Gall v. United States, 552 U.S. (2007). Although the Guidelines, as the "starting point and the initial benchmark," continue to play a role in the sentencing determination, there is no longer a limit comparable to the one in Burns on variances from Guidelines ranges that a district court may find justified. Thomas, J., joined the opinion and also filed a concurrence; Breyer, J., filed a dissent, in which Kennedy, Souter, and Ginsburg, JJ. joined.

TITLE: Jones v. State

INDEX NO.: E.4.c.

CITE: 71 N.E.3d 412 (Ind. Ct. App. 2017) (3/2/2017)

SUBJECT: Probationer's right to allocute upon specific request

HOLDING: Defendant had the right to allocute, even though she wanted to make a statement at a probation revocation hearing, not her earlier sentencing hearing. Defendant pled guilty to battery and was sentenced to three years, with two on home detention and one suspended to probation. Because Defendant violated the terms of her home detention, the trial court revoked her probation. Before the trial court imposed a sentence, Defendant asked to impress the need for alternative sentencing because incarceration at DOC would likely cause her to lose her child. The trial court cut her off.

Ind. Code § 35-38-1-5 requires a trial court, at sentencing, to ask a defendant whether he wishes to make a statement before sentence is pronounced. This mandate does not apply at probation revocation hearings. Vicory v. State, 802 N.E.2d 426, 429 (Ind. 2004). However when, as here, a defendant at a revocation hearing “specifically requests the court to make a statement, . . . the request should be granted.” See id. Due process requires this. Id.; Woods v. State, 892 N.E.2d 637, 641 (Ind. 2000). Because Defendant was denied this opportunity, she should be afforded a new and full opportunity for allocution. See Owens v. State, 69 N.E.3d 531, No. 49A02-1605-CR-1142 (Ind. Ct. App. January 31, 2017). Held, judgment reversed and remanded to give Defendant a full and clear opportunity for allocution. Baker, J., concurring, urging Indiana Supreme Court to adopt one rule for allocution that would apply to both sentencing and probation revocation proceedings.

RELATED CASES: Woods, 98 N.E.3d 656 (Ind. Ct. App. 2017) (disagreeing with Jones, Court held that Ind. Code 35-38-1-5 does not require trial court to directly ask a defendant if she wants to address the court, and finding that right to allocute is not akin to the right to jury trial; see full review, this section).

TITLE: Kincaid v. State

INDEX NO.: E.4.c.

CITE: (11-29-05), Ind., 837 N.E.2d 1008

SUBJECT: Preservation of Blakely claims on appeal

HOLDING: For Blakely v. Washington claims, S. Ct. has relaxed rule that a particular sentencing claim must be raised in an appellant's initial brief on direct appeal in order to receive review on the merits. Smylie v. State, 823 N.E.2d 679, 689-90 (Ind. 2005). For cases in which appellant's initial brief on direct appeal was filed prior to date of Smylie decision (March 9, 2005), an appellant who had contested his or her sentence in some respect in appellant's initial brief on direct appeal is entitled to review on merits of a subsequently-raised Blakely claim. The keys here are that (1) some sentencing claim must have been raised in appellant's initial brief on direct appeal & (2) appellant must have added a Blakely claim by amendment, on petition for rehearing, or on petition to transfer. For cases in which appellant's initial brief was filed after date of Smylie decision, a specific Blakely claim must be made in appellant's initial brief on direct appeal for it to be reviewed on merits. Here, D's initial brief was filed after date of Blakely decision &, as required for it to be reviewed on merits, a specific Blakely claim was made in initial brief on direct appeal. Held, transfer granted, memorandum decision of Ct. App. summarily affirmed in part & remanded to Ct. App. for consideration of & ruling on D's sentencing claims.

TITLE: Koehler v. State
INDEX NO.: E.4.c.
CITE: (10/27/86), Ind., 499 N.E.2d 196
SUBJECT: Sentencing -- denial of D's request for continuance
HOLDING: D was convicted of battery. D escaped from jail day before he was to be sentenced & eluded police for ten days. Tr. Ct. later refused to grant D's request for continuance of sentencing hearing. D claimed that this was error because he was unaware of when hearing was & because he was unprepared. Ct. held that there was no error because any inconvenience or lack of preparation time was occasioned by D's escape. Held, affirmed in part & reversed in part.

TITLE: Krebs v. State
INDEX NO.: E.4.c.
CITE: (4th Dist., 10-20-04), Ind. App., 816 N.E.2d 469
SUBJECT: Child molesting - sufficiency; Blakely claim
HOLDING: Ct. sua sponte remanded for a new sentencing determination pursuant to Blakely v. Washington, 124 S.Ct. 2531 (2004), finding that a jury determination is necessary for aggravating factors other than prior convictions. "It appears our Tr.Cts. no longer have discretion to sentence a criminal D to more than the presumptive sentence unless the D waives his right to a jury at sentencing, a jury first determines the existence of aggravating factors, or the D has a criminal history." Ct. found it irrelevant that the portion in excess of the presumptive was suspended, as the suspended portion is still a definite sentence even though it is postponed. See Beck v. State, 790 N.E.2d 520 (Ind. Ct. App.2003). Held, judgment affirmed in part, reversed in part, & remanded for new sentencing consistent with Blakely.

TITLE: Locke v. State

INDEX NO.: E.4.c.

CITE: (4/17/84), Ind., 461 N.E.2d 1090

SUBJECT: Sentencing -- rights of D; right to allocution

HOLDING: After D was convicted of murder, Tr. Ct. proceeded to sentence D. D complained that he was not asked by Tr. Ct. if he had anything to say to Ct. before his sentence was pronounced. D conceded that he made no objection to Tr. Ct.'s sentencing procedure at time, but claimed that he could have brought forth witnesses to show his good character & to show his lack of previous criminal record which would have been relevant to his being sentenced. However, he made no motion to Tr. Ct. to permit him to bring forth any such witnesses & he did not object to Ct. proceeding to sentence without them. Thus, D's failure to timely object to alleged procedural error constitutes waiver. Held, conviction affirmed.

RELATED CASES: Shanholt, 448 N.E.2d 308 (no error where D was given opportunity to & did explain her view of facts & circumstances, even though Ct. failed to explicitly inquire whether she wished to make personal statement on her own behalf).

TITLE: Morgan v. State

INDEX NO.: E.4.c.

CITE: (06-15-05), Ind., 829 N.E.2d 12

SUBJECT: Blakely - judicial statements about aggravators

HOLDING: Because D admitted to fact she was on probation at time of her arrest, it was permissible for Tr. Ct. to consider that fact as an aggravating circumstance without submitting it to a jury. However, Tr. Ct. *cited* as another aggravator that prior punishments had failed to rehabilitate D. Ct. held that such statements, which are "derivative" of criminal history, are legitimate observations about weight to be given to facts appropriately noted by a judge alone under Blakely, but they cannot serve as separate aggravating circumstances. Sixth Amendment is not implicated or endangered when language of an aggravator is meant to describe factual circumstances, not to serve as a fact itself. Precise language of an aggravator need not be submitted to a jury nor admitted by a D in order to pass Sixth Amendment requirements established in Blakely.

Ct. also held that while a sentence enhanced because it is based on fact of prior conviction does not violate Sixth Amendment, question of whether sentence should be enhanced & to what extent turns on weight of an individual's criminal history. This weight is measured by number of prior convictions & their seriousness, by their proximity or distance from present offense, & by any similarity or dissimilarity to present offense that might reflect on a D's culpability. Wooley v. State, 716 N.E.2d 919 (Ind. 1999). Need for clarity & careful weighing, made by reference to appropriate prior criminal convictions, is more pronounced than ever given increased importance prior criminal convictions play in sentencing process in a post-Blakely world. Held, transfer granted, memorandum opinion of Ct. App. vacated, sentence for dealing in methamphetamine reduced to thirty years.

RELATED CASES: Garland, App., 855 N.E.2d 703 (Tr. Ct.'s comment that victim was "of tender age" was a moral-penal observation, supported by verdict, not a separate aggravator); Green, App., 850 N.E.2d 977 (acts of "scoping out" victims' residence on two separate occasions & knowing that a weapon would be involved is adequate to support a conclusion that the crime was "heinous" in nature, & such is a permissible aggravator); Haas, 849 N.E.2d 550 (judicial statements that D was at risk to commit future crimes & the nature & circumstance of the crime was heinous were not properly supported by facts proven to a jury & thus could not be used as aggravators; further, these judicial statements & the underlying facts upon which they are based could not both serve as aggravators); Williams, 838 N.E.2d 1019 (*citing* police officer's trial testimony, Tr. Ct. improperly found that D's "blatant disregard for the safety of the citizens of this county must be considered as an aggravating circumstance"); Neff, App., 832 N.E.2d 1006 (aggravating circumstances that D failed to rehabilitate & risk that he will reoffend should not have been considered as separate aggravating circumstances; however, such statements are legitimate observations about weight to be given to D's criminal history).

TITLE: Owens v. State

INDEX NO.: E.4.c.

CITE: (1/31/2017), 69 N.E.3d 531 (Ind. Ct. App. 2017)

SUBJECT: Right to allocution denied; remanded for re-sentencing

HOLDING: The trial court denied Defendant's right to due process at sentencing by denying his right to allocute. Defendant was found guilty at his bench trial of carrying a handgun without a license, a class A misdemeanor. Defense counsel asked to proceed to sentencing or to allow Defendant to self-report for sentencing because detaining Defendant would cause him to miss work. Without allowing Defendant to allocute or allowing defense counsel to elicit testimony, cite mitigating factors, or make a legal argument, the trial court imposed sentence.

A sentencing court shall allow defense counsel to speak on behalf of a defendant and shall likewise allow a defendant to make his own statement. Ind. Code § 35-38-1-5. The few moments that allocution allows a defendant to speak is minimally burdensome to sentencing proceedings. Vicory v. State, 802 N.E.2d 426, 429 (Ind. 2004). Allocution gives the trial court the opportunity to consider facts and circumstances relevant to sentencing a defendant.

"We are dismayed by the trial court's disregard for the statute that governs a defendant's rights during sentencing . . . [A] trial court must advise a defendant of [the right to allocute] and provide him with an opportunity to speak We understand that trial courts are busy, but to be so curt with defendants and their counsel, as the trial court was here, is penny wise and pound foolish the denial of due process only leads us back to where defense counsel wanted us to be during sentencing, but at the expense of our taxpayers. See Ind. Judicial Conduct Rule 2.8(B) ('A judge shall be patient, dignified, and courteous to litigants . . . lawyers . . . and others with whom the judge deals in an official capacity . . .'). We take this opportunity to remind trial courts of their statutory duty to afford criminal defendants the rights that our General Assembly intended them to have during sentencing." Held, judgment reversed and remanded for re-sentencing.

TITLE: Patrick v. State

INDEX NO.: E.4.c.

CITE: (05-10-05), Ind., 827 N.E.2d 30

SUBJECT: Sentencing - right to have facts supporting enhancement tried to jury; options on remand

HOLDING: After D pleaded guilty to murder, Class B felony battery, & Class C felony criminal confinement, Tr. Ct. sentenced him to the maximum term of ninety-three years. Ct. App. correctly decided D must be resentenced in light of Blakely v. Washington, 124 S. Ct. 2531 (2004), because some of aggravating circumstances found by Tr. Ct. were not based on facts found to exist by a jury. Ct. App. was incorrect, however, in ordering Tr. Ct. to resentence D only in light of aggravating factors that did not require a jury determination under Blakely. Those aggravating factors were invalid only because facts underlying them had not been found by a jury, a defect that can be cured by a new sentencing hearing at which a jury determines whether facts underlying those aggravating circumstances exist. Ct. remanded for a new sentencing hearing in which State may elect to prove adequate aggravating circumstances before a jury or accept the statutory fixed term. Smylie v. State, 823 N.E.2d 679 (Ind. 2005). As a third option, State may elect to forgo empaneling of a jury & stipulate to D's being resentenced by Tr. Ct. only in light of aggravating factors for which a jury determination is unnecessary under Blakely & Smylie. Ct. reserved for another day an explicit determination of unresolved issue of whether the fact that the D was on probation at time he committed instant offense is derivative of criminal history or implicates Blakely. Held, transfer granted, Ct. App.' opinion at 819 N.E.2d 840 summarily affirmed except as noted herein.

RELATED CASES: Edwards, App., 822 N.E.2d 1106 (although evidence tending to show planning & preparation was presented to jury, these facts were not necessarily reflected in the jury verdict).

TITLE: Pruitt v. State
INDEX NO.: E.4.c.
CITE: (5/16/2017), 78 N.E.3d 14 (Ind. Ct. App. 2017)
SUBJECT: Enhanced sentence does not violate Blakely v. Washington
HOLDING: Defendant forfeited his claim that his enhanced 65-year murder sentence violates Blakely v. Washington, but, nonetheless, the claim lacks merit because one aggravator – Defendant’s criminal history – required no jury finding and the other aggravator – Defendant’s killing of an on-duty police officer - was found beyond a reasonable doubt by a jury. And even though the trial court considered aggravating factors that did not comply with Blakely, it would have imposed the same sentence had it not considered those factors.

Defendant, who is intellectually disabled, was convicted of murdering a police officer and for other offenses arising out of the same incident, including the attempted murder of the officer’s son, who was riding in the patrol car as part of a college internship. In recommending the death penalty, the jury found Defendant killed an officer who was acting in the line of duty. The trial court imposed the death penalty for the murder and 115 years for the other offenses. After exhausting his state remedies, Defendant obtained relief from the 7th Circuit, which vacated the death penalty because of Defendant’s intellectual disability. On remand, the trial court imposed the maximum 65-year term, *citing* as aggravators Defendant’s: 1) killing of the on-duty officer and 2) his criminal history. It cited Defendant’s intellectual disability as the sole mitigator. It ordered Defendant to serve the sentence consecutively to the already-imposed 115-year sentence.

Defendant argued his enhanced sentence violated Blakely because the facts supporting his enhanced sentence were not found by a jury. Defendant forfeited this claim because he did not raise it at re-sentencing. Even so, the claim has no merit. No jury finding was required for Defendant’s criminal history. See Blakely v. Washington, 542 U.S. 296, 301 (2004) and Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). And the jury did find that Defendant killed an on-duty officer. This satisfies Blakely because where a defendant is eligible for the death penalty, but instead is sentenced to a term of years, “the trial court may consider the aggravating factors enumerated in Indiana Code Section 35-50-2-9,” such as killing an officer who was acting in the line of duty. Davies v. State, 758 N.E.2d 981, 986 (Ind. Ct. App. 2001), *trans. denied*. Thus, even though the 7th Circuit vacated the death penalty, that did not negate the fact that a jury found beyond a reasonable doubt that Defendant killed an officer acting in the line of duty.

Defendant also argued that the trial court considered aggravating factors that violated Blakely. However, “[w]here the use of some aggravators violates Blakely and others do not, we will remand for resentencing unless we can say with confidence that the trial court would have imposed the same sentence if it considered only the proper aggravators.” Robertson v. State, 871 N.E.2d 280, 287 (Ind. 2007). Here, the trial court would have imposed the same sentence absent consideration of improper aggravating factors. The trial court could have aggravated Defendant’s sentence to sixty-five years and ordered his sentences to run consecutively based solely on a single aggravating factor. See Gleason v. State, 965 N.E.2d 702, 712 (Ind. Ct. App. 2012). It found two; both complied with Blakely. The trial court also gave due consideration to Defendant’s intellectual disability but appropriately found that Defendant understood that what he did was wrong. Finally, Defendant’s sentence was not inappropriate under Appellate Rule 7(B). Held, judgment affirmed.

TITLE: Ring v. Arizona

INDEX NO.: E.4.c.

CITE: 536 U.S. 584 (2002) 06/24/2002

SUBJECT: Jury trial, Apprendi, death penalty, aggravating factors

HOLDING: Under Arizona's death penalty law, after a jury convicts a D of first- degree murder, the judge, sitting alone, determines the existence or absence of the aggravating factors required for the imposition of a death sentence. The Court held in Walton v. Arizona, 497 U.S. 639, 649 (1990), that Arizona's capital punishment scheme was constitutional because the additional facts found by the court were 'sentencing considerations' and not 'elements of the offense of capital murder.' However, the Court more recently held in Apprendi v. New Jersey, 530 U.S. 466 (2000) that the Sixth Amendment right to jury trial requires that any fact which increases the maximum sentence to which a D may be subjected is an 'element' of the offense and must be charged and proven beyond a reasonable doubt to a jury. The D argued that under Arizona law, the aggravating circumstance found by the judge were 'elements' of the crime and that his Sixth Amendment rights had been violated when he was sentenced to death based on the judicial fact finding.

Held, in capital cases as well as non-capital cases, any fact which increases the maximum sentence to which a D may be subjected is an element of the offense, and the Sixth Amendment guarantees the D the right to have it charged and proven to a jury. The Apprendi rule applies to death penalty cases as well as to non-capital cases. To the extent Walton v. Arizona holds to the contrary, it is *overruled*.

TITLE: Ross v. State

INDEX NO.: E.4.c.

CITE: (12-31-96), Ind., 676 N.E.2d 339

SUBJECT: Restriction on D's right of allocution

HOLDING: In Indiana, purpose of D's right of allocution (codified at Ind. Code 35-38-1-5) is accomplished where D is given opportunity to express his views of facts & circumstances surrounding his case, & to articulate reasons as to why judgment should not be imposed at that time. While trial judge should be cautious about restricting D's statement & should generally allow D to say his or her piece, Ct. may act to curtail abuse of right of allocution. Here, Tr. Ct. did not violate this right when it intervened to limit D's oral statement & allowed D to enter his prepared statement into record. Nothing in record indicated that D was not afforded opportunity to make personal statement about facts & circumstances in this case or that Tr. Ct. did not reach its final sentencing decision until after it heard & read all evidence. Held, no error.

Note: In Fields, App., 676 N.E.2d 27, Ct. remanded for new sentencing hearing because Tr. Ct. failed to advise D that he had right to speak on his own behalf.

RELATED CASES: Hull, App., 868 N.E.2d 901 (if D asks to make a statement at hearing to revoke suspended sentence, his request should be granted). Pruitt, 834 N.E.2d 90 (in capital case, Tr. Ct. did not err in requiring D to exercise his right to allocution before State's closing argument instead of allowing him to speak to jury at close of all evidence); Vicory, 802 N.E.2d 426 (while Tr. Ct. should allow a probationer to make a statement, D's substantive rights were not violated in this case because D addressed Ct. directly & had opportunity to tell his side of story during hearing itself); see full review at F.1.e.2.b); Angleton, 714 N.E.2d 156; Robles, App., 705 N.E.2d 183 (D waived error by not objecting to Tr. Ct.'s failure to grant him or his counsel opportunity to speak before pronouncing sentence).

TITLE: Ryle v. State

INDEX NO.: E.4.c.

CITE: (12-13-05), Ind., 842 N.E.3d 320

SUBJECT: Blakely - probationary status & juvenile adjudications

HOLDING: A D's prior juvenile adjudications & fact that he was on probation when he committed the crime are proper sentencing considerations for a trial judge & need not be submitted to a jury under Blakely v. Washington, 542 U.S. 296 (2004), & Apprendi v. New Jersey, 530 U.S. 466 (2000). D challenged Tr. Ct.'s use of four prior juvenile adjudications to support enhancement of his voluntary manslaughter conviction. He argued that adjudications are not "prior convictions" for Apprendi purposes & whether they exist or not should be decided by jury. While Apprendi does specifically mention the right to a jury trial, Ct. has made it clear that decisions that it relied on in making prior convictions a sentencing exception turned heavily on fact that the additional sentences were based on recidivism, which may well be the most common basis for sentencing enhancements. Main concern was whether prior conviction's procedural safeguards ensured a reliable result, not that there had to be a right to a jury trial. Like that of most states, Indiana's code does not afford trial by jury but regards juvenile adjudications as reliable enough to form basis for confinement of a juvenile delinquent or for ordering a wardship. A decision to require jury to determine "fact" of prior juvenile adjudications would result in an untold number of Ds clogging Tr. Cts. on remand.

Tr. Ct. also enhanced D's sentence partly on basis that he was on probation when he committed present offense, a fact reflected in presentence investigation report prepared by probation officer. Minimum standards for presentence investigation reports are required by Ind. Code 11-13-1-8(b)(4), & board of Judicial Conference adopted a standard report that included all information specified in Ind. Code 35-38-1-9(b) - (c)(information about present crime, impact of crime on victim, D's criminal, social, & employment history, family information, economic status, education, personal habits, & any other matters the Ct. requires). These requirements governing probation officers & their presentation of information to sentencing Ct. ensure reliability of their work product. Thus, probation officers can properly contribute to character & outcome of prior convictions by researching judicial documents sanctioned in Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254 (2005). "Disputed documents," i.e., police reports & complaint applications that run afoul of Apprendi, were not used here. Probation officer compiled information on D's criminal history & probation status for report in this case by referring to case files from Cts. in which D was convicted. Held, transfer granted, Ct. App.' opinion at 819 N.E.2d 119 vacated, judgment affirmed.

TITLE: Simons v. State
INDEX NO.: E.4.c.
CITE: (5/13/2016), 54 N.E.3d 445 (Ind. Ct. App. 2016)
SUBJECT: Failure to advise D of earliest and maximum release date - harmless error
HOLDING: Ind. Code § 35-38-1-1(b) provides that when a Tr. Ct. pronounces a D's sentence, "the court shall advise the person that the person is sentenced for not less than the earliest release date and for not more than the maximum possible release date." Here, as in Hines v. State, 856 N.E.2d 1275 (Ind. Ct. App. 2006), Tr. Ct.'s failure to advise D of his possible release dates was harmless error. D failed to identify any harm or prejudice from Tr. Ct.'s failure to comply with statutory pronouncement requirement. Held, judgment affirmed.

TITLE: Smith v. State

INDEX NO.: E.4.c.

CITE: (1st Dist., 6-28-05), Ind. App., 829 N.E.2d 1021

SUBJECT: Blakely issues waived without objection; foreclosed by plea

HOLDING: D challenged his enhanced sentence on basis that State never filed a "notice of aggravating circumstances" & did not provide D with notice of aggravators. Ct. noted D did not specify how this violated Blakely v. Washington, 124 S. Ct. 2531 (2004), or what notice was required, & inferred D was not provided a copy of the presentence report as information regarding aggravators the State might assert would be included therein. Ct. found that sentencing Ct. could not have relied on aggravators in determining D's sentence as it was bound by the terms of the plea agreement & was obliged to impose a 20-year sentence pursuant to the agreement. Further, sentencing in this case occurred after Blakely was decided & D waived any error by failing to object to the delivery or content of the pre-sentence report.

Ct. also rejected D's argument that having probation officer, as an employee of the Ct., submit the report of aggravators to the sentencing Ct. violated the separation of powers clause of Art. 3, ' 1 of the Indiana Constitution. Similar arguments had been rejected in another jurisdiction prior to Blakely. See United States v. Boise, 916 F.2d 497 (9th Cir. 1990). While acknowledging Blakely might "call into question" the viability of Boise & the reliance on a report prepared by an employee of sentencing Ct., D waived issue. Moreover, Ct. would find no error in the lack of jury involvement since D's criminal history could justify his enhancement without a jury determination. Ct. also found that D's waiver & the Tr. Ct.'s obligation to impose the plea agreement precluded it from ruling on D's assertion that the rules of evidence apply to a determination of aggravators. Finally, Ct. rejected D's claim that his due process rights were violated by the cumulative effect of the circumstances asserted above even if most were not error. See Collins v. State, Ind. App., 321 N.E.2d 868 (1975). The outcome of D's sentence could be predicted with certainty by way of his plea agreement. Held, judgment affirmed.

TITLE: Smylie v. State
INDEX NO.: E.4.c.
CITE: (3-9-05), Ind., 823 N.E.2d 679
SUBJECT: Sentencing - right to have facts supporting enhancement tried to jury; retroactivity
HOLDING: Indiana's system for enhanced sentences contravenes Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), which applied rule set forth in Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), that any fact that increases penalty for crime beyond statutory maximum, other than fact of prior conviction, must be submitted to jury & proved beyond a reasonable doubt. The relevant "statutory maximum" for Apprendi purposes is the maximum a judge may impose based solely on facts reflected in jury verdict or admitted by the D without any additional findings, *i.e.*, the presumptive or standard sentence. Blakely, 124 S. Ct. at 2537.

Ct. could not see any grounds for sustaining Indiana's sentencing enhancement scheme given the Blakely holding. Indiana's scheme is not a "range" system but provides for a "fixed term" presumptive sentence as a mandatory starting point for each class of felonies, Ind. Code 35-50-2-3 to 7. The statutes also create upper & lower boundaries for each felony sentence, requiring judge to engage in judicial fact-finding during sentencing if a sentence greater than the presumptive fixed term is to be imposed. It is this type of judicial fact-finding that concerned the Ct. in Blakely & renders Indiana's sentencing system unconstitutional. A constitutional scheme akin to Indiana's could take on two forms: 1) our present arrangement of fixed presumptive terms, modified to require jury findings on facts in aggravation, or 2) an indeterminate sentencing system in which there is no stated "fixed term," where judges would impose sentences without a jury. Ct. also held that, because Indiana's statutes do not erect any target or presumption concerning concurrent or consecutive sentences, there is no constitutional problem with consecutive sentencing so long as Tr. Ct. does not exceed combined statutory maximums.

As a new rule of constitutional procedure, Ct. will apply Blakely retroactively to all cases on direct review at the time Blakely was announced. Ct. concluded that it is appropriate to be "rather liberal" in approaching whether an appellant & her lawyer have adequately preserved & raised a Blakely issue. Thus, a D need not have raised a Sixth Amendment objection at trial in order to raise a Blakely claim on appeal, as long as the D has contested his or her sentence on appeal. Those Ds who did not appeal their sentences at all will have forfeited any Blakely claim, & fundamental error doctrine will not be available to attempt retroactive application of Blakely through post-conviction relief. Held, D's enhanced sentence for Class D felony reversed & remanded for a new sentencing hearing in which State may elect to prove adequate aggravating circumstances before a jury or accept statutory fixed term; order for consecutive sentences affirmed. Dickson, J., dissenting.

RELATED CASES: Oregon v. Ice, 129 S. Ct. 711 (2009) (6th Amendment's jury trial right does not prohibit a judge from determining predicate facts necessary to impose consecutive, rather than concurrent, sentences); Kline, App., 875 N.E.2d 435 (Kline, App., 875 N.E.2d 435 (where D's resentencing was ordered through a belated appeal for reasons other than Blakely, Blakely applies at the resentencing); Gutermuth, 868 N.E.2d 427 (Blakely does not apply retroactively to belated appeals; *see* full review this section); Prickett, 856 N.E.2d 1203 (Blakely does not apply to restitution or sex offender registry orders); Mathews, 849 N.E.2d 578 (Smylie & Blakely do not apply to sentence imposed in 1994); Henry, App., 848 N.E.2d 1124 (D forfeited his ability to appeal his sentence on Blakely grounds because he took no action to amend his brief to add Blakely in support of his argument that his sentence was erroneous; further, after Ct. App. issued its decision nearly three months after Blakely, D did not file a petition for

rehearing/transfer & argue for application of Blakely); French, App., 839 N.E.2d 196 (Ct. declined D's invitation to reconsider Ind. S.Ct. holding in Smylie, that imposition of consecutive sentences does not implicate Blakely); Aguilar, App., 811 N.E.2d 476 (D is not entitled to relief under Smylie because he did not appeal his sentence, but challenged it only after Ct. App. issued its decision on single non-sentencing issue he raised); Clark, App., 829 N.E.2d 589 (because D failed to object to his sentence at any time to Tr. Ct., & because his case was not on direct review at time Blakely was announced, D forfeited his right to have this issue raised on appeal).

TITLE: Southern Union Company v. United States
INDEX NO.: E.4.c.
CITE: (06-21-12), 132 S.Ct. 2344 (Sup. Ct. 2012)
SUBJECT: Facts that increase fine must be found by jury, not Tr. Ct.
HOLDING: The jury, not the trial judge, must find facts that increase the amount of a criminal fine. See Apprendi v. New Jersey, 530 U.S. 466 (2000). While judges may exercise discretion in sentencing, they may not “inflic[t] punishment that the jury’s verdict alone does not allow.” Blakely v. Washington, 542 U. S. 296, 304 (2002). “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Apprendi, 530 U.S. at 490. There is no principled basis under Apprendi to treat criminal fines differently. Apprendi’s main concern - reserve to juries “determination of facts that warrant punishment for a specific statutory offense” - applies whether the sentence is a criminal fine, imprisonment, or death.

Here, a jury convicted Southern Union of violating the Resource Conservation and Recovery Act of 1976 (“RCA”) for knowingly storing liquid mercury without a permit from September of 2002 to October of 2004 - 762 days. The RCA allows a fine of up to \$50,000 per day, so the probation department calculated Southern’s fine at \$38.1 million. However, the jury necessarily found only that Southern violated the statute for one day. The actual fine imposed by the Tr. Ct. was \$6 million and a “community service obligation” of \$12 million.

The Government argues that fines are less onerous than incarceration and the death sentence and therefore should be exempt from Apprendi. But where a fine is large enough to trigger the 6th Amendment’s guarantee of jury trial, Apprendi applies. The Government also claims facts relevant to a fine’s amount usually quantify the harm caused by the D’s offense, but do not define separate acts for punishment. This argument, however, incorrectly assumes there is a constitutionally significant difference between a fact that is an “element” of an offense and one that is a “sentencing factor.” SOTOMAYOR, J., joined by ROBERTS, C.J., SCALIA, THOMAS, GINSBURG, and KAGAN, J.J. BREYER, J., DISSENTING, joined by KENNEDY and ALITO, J.J. *Cert. granted*, First Circuit reversed and remanded.

TITLE: Spurlock v. State

INDEX NO.: E.4.c.

CITE: (7/6/2018), 106 N.E.3d 1046 (Ind. Ct. App. 2018)

SUBJECT: Enhanced sentence did not violate right to jury trial -- aggravator based on facts implicit in jury's verdicts

HOLDING: D was convicted of four counts of murder and two counts of conspiracy in 2003. After several appeals, he had a resentencing hearing in 2017. The resentencing judge gave D an aggravated sentence because he had conspired with his friends to commit a second robbery even though he knew his friends had killed two people in the first robbery. On appeal, D argued that trial court erred in resentencing him for the conspiracy conviction because his enhanced sentence does not conform to the dictates of Blakely v. Washington, 542 U.S. 296 (2004). Blakely prohibits the reliance on facts not found by a jury or admitted by the D to enhance a sentence above the presumptive, with the exception of criminal history. Although D was entitled to the protections of Blakely at his resentencing hearing, he failed to raise a Blakely objection to the enhancement of one of his conspiracy convictions. Rejecting D's fundamental error claim, Court concluded that implicit in the jury's verdicts is the finding beyond a reasonable doubt that D embarked on a second effort to rob drug dealers with the full knowledge that a first robbery had resulted in murder of the victims. Thus, this fact could properly be relied on to enhance his sentence without violating Blakely. Held, judgment affirmed. Sentence for murder and conspiract to commit robbery affirmed.

TITLE: Stevenson v. State
INDEX NO.: E.4.c.
CITE: (5/14/75), Ind. App., 327 N.E.2d 621
SUBJECT: Sentencing -- right to counsel at resentencing hearing
HOLDING: D was convicted of burglary in first degree & was sentenced under alternative misdemeanor statute. Later, because Tr. Ct. found that D had been previously convicted of felony & thus was not eligible for sentencing under that statute, sentence was vacated & new & longer sentence was ordered. Ct. held that all Ds have right to be represented by counsel, & that representation by counsel who has not had opportunity to prepare is not true representation. Here, however, record showed that D & one of his attorneys had ample notice of hearing. In addition, there was no showing that D was harmed by alleged insufficient notification of second hearing, there was little or no factual dispute, & D's counsel represented all relevant legal arguments. Held, conviction affirmed.

TITLE: Strack v. State

INDEX NO.: E.4.c.

CITE: (5-2-22), Ind., 186 N.E.3d 99

SUBJECT: At sentencing, a criminal defendant who enters an open guilty plea has a right to allocution distinct from the right to present evidence on his or her behalf

HOLDING: Without a plea agreement, Defendant pleaded guilty to four charges and admitted to being a habitual vehicular substance offender. The State questioned Defendant at his plea hearing to establish a factual basis for the guilty plea. The trial court accepted Defendant's guilty plea and ordered a presentence investigation report. At the sentencing hearing, Defendant was advised if he had anything to say he needed to testify and be cross-examined. Trial counsel called his client to testify, and the State cross-examined him over objection. Defendant also spoke to the court at allocution. Defendant argued the trial court improperly advised him when told if he had anything to say he must testify and that this forced him to testify in violation of his right to allocution. On transfer, the Indiana Supreme Court clarifies before being sentenced for a felony, a criminal defendant is "entitled to subpoena and call witnesses and to present information in his own behalf." A defendant is not required to testify at sentencing, but when a defendant chooses to testify for evidentiary purposes, he or she must be placed under oath and subject to cross examination. "But a statement in allocution is not evidence. Rather it is more in the nature of closing argument where the defendant is given the opportunity to speak for himself or herself" to the trial court before the court pronounces sentence. Through allocution, the defendant may explain his or her views of the facts and circumstances without being "put to the rigors of cross-examination." Here, Defendant was able to exercise both his right to present evidence and his right to allocution and therefore any error was harmless.

TITLE: Strong v. State

INDEX NO.: E.4.c.

CITE: (2nd Dist., 11-5-04), Ind. App., 817 N.E.2d 256

SUBJECT: Sentencing - fundamental right to have facts supporting enhancement tried to jury; no waiver

HOLDING: In murder prosecution, D was denied his 6th Amendment right to have a jury determine, beyond a reasonable doubt, all facts legally essential to his sentence when Tr. Ct. found certain aggravating circumstances & sentenced him to an enhanced term of sixty years. State argued that D waived any sentencing error with respect to Blakely, 124 S.Ct. 2531 (2004), because he failed to object at sentencing hearing pursuant to Apprendi, 530 U.S. 466 (2000), that he had right to jury determination of aggravating circumstances used to enhance his sentence beyond statutory maximum. However, Blakely redefined the "statutory maximum" for purposes of Apprendi as being the maximum sentence that a trial judge may impose without any additional findings, *i.e.*, the presumptive or standard sentence. Thus, a D who challenges his enhanced sentence but fails to do so on grounds of Apprendi has not waived his argument pursuant to Blakely. Moreover, D's failure to object to his enhanced sentence at trial level, by itself, does not constitute waiver. Instead, the right to trial by jury, which is a fundamental right guaranteed by Sixth Amendment of federal constitution & by Art. 1, Section 13 of Indiana Constitution, is subject to a knowing, intelligent, & voluntary waiver. Leone, 797 N.E.2d 743, 752. A D's failure to object is not tantamount to such an affirmative act of waiver.

Ct. also disagreed with State's assertion that the Blakely decision does not implicate Indiana's sentencing procedure. Inasmuch as Indiana's present sentencing procedure allows a Tr. Ct., without the aid of a jury, to enhance a sentence where certain factors are present, it violates a D's Sixth Amendment right to have a jury determine all facts legally essential to his or her sentence, pursuant to Blakely. Here, Tr. Ct. enhanced D's sentence five years above the presumptive after finding that victim was shot in his home & that fatal shooting was unprovoked. Because no aggravators were found by an independent fact finder & Tr. Ct. found criminal history to be a mitigating factor, Ct. remanded for a new sentencing order consistent with dictates of Blakely.

RELATED CASES: Strong, App., 820 N.E.2d 668 (on rehearing, Ct. noted D may waive Blakely argument by stipulating to the relevant facts supporting a sentence enhancement or consenting to judicial fact-finding); Williams, App., 818 N.E.2d 970, *aff'd* in part, 838 N.E.2d 1019 (D did not waive issue by failing to object under Apprendi, because it was reasonable for D to believe his sentence did not violate Apprendi based on existing caselaw).

TITLE: Trusley v. State

INDEX NO.: E.4.c.

CITE: (06-17-05), Ind., 829 N.E.2d 923

SUBJECT: Sentencing - right to have facts supporting enhancement tried to jury; D's admission to aggravator

HOLDING: Defense counsel's statement during guilty plea colloquy was sufficient to constitute an admission by D that victim was under twelve at time of his death. Moreover, in establishing factual basis for reckless homicide, D also admitted that she provided day care for victim. Tr. Ct. found that this admission was sufficient to establish that D was in a position of trust with victim. Judicial statements such as "in a position of trust" cannot serve as separate aggravating circumstances. Morgan, 821 N.E.2d 12. However, here Tr. Ct. did not enhance sentence on grounds that D was both in a position of trust & victim's day care provider. Rather, it supported position of trust aggravator by reference to admitted fact that D was victim's day care provider. This was an appropriate legal observation about properly established facts & constituted a legitimate aggravating circumstance. Because three other aggravating circumstances were improperly considered, Ct. remanded with instructions to afford State an election to prove additional aggravators to a jury, or for Tr. Ct. to reconsider appropriate sentence based on two proper aggravators & three mitigators. Held, transfer granted, Ct. App.' opinion at 818 N.E.2d 110 vacated, judgment reversed & remanded.

RELATED CASES: Kazmier, App., 863 N.E.2d 912 (D's testimony that battery victim was his wife of 23 years constituted an admission, thus Tr. Ct.'s domestic violence determination did not implicate Blakely); Williams, App., 840 N.E.2d 433 (particular facts relied on by Tr. Ct. in assessing nature & circumstances of crime--that D hit his sister's car three times, eventually striking her & exposing her to serious injury-- are not contained within the PSI; thus, D did not admit to them, & nature & circumstances aggravator violated Blakely & may not be used to enhance D's sentence); Thomas, App., 840 N.E.2d 893 (D's failure to challenge his marriage to CW's mother did not constitute an admission that he was in a position of trust); DeVries, App., 833 N.E.2d 511 (where D stated that presentence investigation report had no factual errors that needed to be corrected, jury's verdict reflected finding that victim was five; D also admitted position of trust aggravator); Reyes, App., 828 N.E.2d 420 (D admitted to being victim's friend & was more than a person who "occasionally borrowed things" or "casually conversed" with victim; D used his relationship with victim to gain access to victim's home); Carmona, App., 827 N.E.2d 588 (although D admitted in his PSI he had been a gang member, this aggravator could not be used to justify imposition of enhanced sentence because D left gang over 14 years before instant offense & his former gang membership was wholly unrelated to instant offense); Weis, App., 825 N.E.2d 896 (Ct. found D admitted a position of trust in answers to cross-examination when he said, "I consider her as my biological daughter, even though I did not conceive her. I was there from day one when she was born."); Altes, App., 822 N.E.2d 1116 (Tr. Ct.'s finding that D violated his position of trust with children & their parents was improper in light of Blakely); Padilla, App., 822 N.E.2d 288 (D admitted to banging her 16-month old daughter's head into a wall & implicit in her admission is that she was in a position of trust with victim); Milligan, App., 819 N.E.2d 115 (despite State's assertions to contrary, D did not admit to aggravating factors of age of victim & that altercation took place in presence of D's ten-year-old daughter); Wickliff, App., 816 N.E.2d 1165 ("depreciate seriousness of crime" aggravator was based upon D's own testimony at sentencing hearing regarding nature & level of his addiction to alcohol & drugs).

TITLE: United States v. Sepulveda-Contreras
INDEX NO.: E.4.c.
CITE: 466 F.3d 166 (1st Cir. 2006) 10/25/2006
SUBJECT: Sentencing conditions not orally given violated D's right to be present
HOLDING: The First Circuit U.S. Court of Appeals held that a written judgment containing supervised release conditions that were not announced orally at sentencing, including a condition requiring D to submit to drug tests as required by the probation officer and conditions requiring him to provide access to financial information and to submit to searches, violated D's right to be present at sentencing. The Court so ruled because: (1) the conditions were non-mandatory, non-standard, and non-recommended conditions under U.S. Sentencing Guidelines Manual § 5D1.3, and (2) he was not put on constructive notice that the two conditions would be imposed in the written judgment. Under harmless error review, the conditions were vacated because the Government could not show that they would have been imposed even if D had been present. Under 18 U.S.C.S. § 3583(d), the district court abused its discretion by delegating to the probation officer the authority to determine the number of drug tests D had to undergo while on supervised release. The district court's sentencing order was vacated and the case was remanded for resentencing consistent with the Court's opinion.

TITLE: Vela v. State

INDEX NO.: E.4.c.

CITE: (2nd Dist., 08-12-05), Ind. App., 832 N.E.2d 610

SUBJECT: Acknowledging PSI report not admission under Blakely

HOLDING: D's acknowledgment that a pre-sentence report was correct, without more, is not an admission sufficient to support an aggravator for Blakely purposes. Tr. Ct. issued sentence above presumptive based on two aggravators: the nature & circumstances of the crime & D's violation of pre-trial release orders. Ct. distinguished McGinity v. State, 824 N.E.2d 784 (Ind. Ct. App.2005), which found that D admitted the nature & circumstances of the crime when he testified to those facts at the sentencing hearing. Here, D did not admit any specific facts about the circumstances of the crime at sentencing. Nor did he admit his poor performance in the pre-trial release program. Tr. Ct. noted three valid mitigating factors & Ct. remanded with instructions to afford the State an election to prove additional aggravating circumstances to a jury, & if the State declines to do so, the Tr. Ct. should reconsider its sentence in light of the valid mitigators.

Ct. did not find inconsistent verdicts where D was found guilty of aggravated battery as a Class B felony, whereas a co-D was charged with battery as a Class C felony. It is not improper for one co-D who is charged with a joint crime to have been the only one convicted of that crime. Poling, App., 740 N.E.2d 872. A Ct. reviewing a claim of inconsistent verdicts will not engage in speculation about the thought processes or motivation for reaching a particular verdict. Hodge, 688 N.E.2d 1246. Testimony in this case established D kicked victim in head four or five times but co-D only kicked him once. Ct. would not second guess fact finder based on this evidence. Held, judgment affirmed in part, vacated in part & remanded.

RELATED CASES: Davis, App., 835 N.E.2d 1102 (distinguishing Vela, Ct. noted D admitted he was on probation when he committed crimes, & D actually made corrections to PSI & confirmed date on which he was released to probation).

TITLE: Warren v. State

INDEX NO.: E.4.c.

CITE: (02/28/2022), Ind. Ct. App., 182 N.E.3d 925

SUBJECT: New sentencing hearing ordered after trial court wrongly denied Defendant's request to be physically present.

HOLDING: A trial court may conduct a sentencing hearing at which the defendant appears by video, but only after obtaining a written waiver of his right to be present and the consent of the prosecution. Here, on December 29, 2020, Defendant filed a request to be physically present in the courtroom for his sentencing hearing on multiple convictions related to dealing and possessing methamphetamine. The trial court denied Defendant's request four days later without making findings. Instead, it merely stamped "DENIED" on the defendant's motion and then proceeded to hold a remote sentencing hearing. The Court of Appeals agreed with Defendant's argument that the trial court failed to comply with Administrative Rule 14 and the Supreme Court's May 13, 2020, emergency COVID-19 order. Under Administrative Rule 14, a trial court may conduct a sentencing hearing at which the defendant appears by video, but only after obtaining a written waiver of the right to be present and the consent of the prosecution. The Supreme Court's May 2020 COVID-19 order also provided that a trial court could conduct a remote sentencing hearing only where a defendant waived his right to be physically present in the courtroom for the hearing. The Court of Appeals held that the trial court erred in holding the sentencing hearing in which the defendant clearly did not waive his right to be present. In a footnote, the Court rejected the State's argument that Defendant waived the issue by not objecting at the outset of the sentencing hearing, *citing* the Supreme Court's May 2020 emergency order. The Court found his written motion requesting to be present at sentencing hearing preserved the issue for review.

TITLE: Williams v. State

INDEX NO.: E.4.c.

CITE: (05-25-05), Ind., 827 N.E.2d 1127

SUBJECT: Blakely violation - consecutive sentencing remedy

HOLDING: Tr. Ct. ordered concurrent, enhanced sentences on two counts using aggravating circumstances that must be found by a jury under Blakely v. Washington, 124 S. Ct. 2531 (2004). Rather than remand for jury sentencing procedures, Ct. exercised its review & revise power under Article 7 Section 4 of Indiana Constitution & directed Tr. Ct. to enter consecutive presumptive terms. With aggravators previously found, i.e., brutality of beatings, Tr. Ct. could properly order presumptive sentences served consecutively. See Smylie v. State, 823 N.E.2d 679 (Ind. 2005) (aggravators requiring jury finding to support enhancement may be found by Ct. for purposes of consecutive sentences). Held, transfer granted, enhanced sentences vacated & consecutive sentences of ten years for aggravated battery & one & a half years for criminal confinement ordered.

RELATED CASES: Young, 834 N.E.2d 1015 (to remedy Blakely violation, Ct. vacated enhanced sentences & ordered 10-year sentences on 3 of Class B robbery counts to run consecutive to one another & also consecutive to 4-year sentence on one Class C felony count); Johnson, App., 831 N.E.2d 163 (Blakely is not implicated when aggregate sentence imposed by Tr. Ct. does not exceed aggregate sentence Tr. Ct. could have imposed by ordering presumptive sentences for all crimes served consecutively).

TITLE: Wilson v. State

INDEX NO.: E.4.c.

CITE: (4th Dist., 04-16-07), Ind. App., 865 N.E.2d 1024

SUBJECT: Due process - right to present evidence at sentencing hearing

HOLDING: In murder prosecution, Tr. Ct. violated D's due process rights by denying him the right to present evidence at his sentencing hearing because of his refusal to cooperate with probation officer assigned to prepare his PSI report. Ind. Code 35-38-1-3 provides that a convicted person "is entitled to subpoena & call witnesses & to present information in his own behalf." In holding that D waived his rights by failing to provide personal information for PSI report, Tr. Ct. violated statute & D's federal due process rights when it refused to admit evidence presented on D's behalf through testimony of others at sentencing hearing.

Ct. could not conclude that error in excluding this evidence was harmless beyond a reasonable doubt. While Tr. Ct. considered hardship as a potential mitigating factor, it did not weigh other information revealed in testimony of D's mother & former girlfriend. In offer to prove, D's mother testified that D had two children, an "expecting girlfriend," has struggled with depression for number of years, was in special education classes throughout most of his education & that he was enrolled in a program to obtain his high school diploma. D's former girlfriend would have testified that D was father of her ten-month-old daughter. Held, 60-year sentence vacated & remanded for another sentencing hearing.

TITLE: Woods v. State

INDEX NO.: E.4.c.

CITE: 98 N.E.3d 656 (Ind. Ct. App. 2017) 05/10/2018

SUBJECT: Failing to directly ask D if she wanted to make statement did not violate right to allocute

HOLDING: In murder case, Tr. Ct. did not deny D's right to allocute by failing to directly ask her if she wanted to address the court. See Ind. Code § 35-38-1-5; Biddinger v. State, 868 N.E.2d 407, 410 (Ind. 2007). In so holding, the Court declined to follow Jones v. State, 79 N.E.3d 911 (Ind. Ct. App. 2017), which held that Ind. Code § 35-38-1-5 requires the Tr. Ct. to directly ask a D if she wishes to address the court. Here, D testified at length at trial, thus providing the court with her version of events. See Vicory v. State, 802 N.E.2d 426, 430 (Ind. 2004); see also Biddinger, 868 N.E.2d at 412-13. Also, once argument at the sentencing hearing was completed, the Tr. Ct. asked counsel whether D wished to speak; counsel said she did not. Further, D did not disagree or object and thus waived her right to allocute. See Angleton v. State, 714 N.E.2d 156, 159 (Ind. 1999); Locke v. State, 461 N.E.2d 1090 1092-93 (Ind. 1984). Compare Vicory, 802 N.E.2d at 430; and Biddinger, 868 N.E.2d at 412-13 (Tr. Ct.'s failure to comply with Indiana Code section 35-38-1-5 is subject to harmless error analysis). Held, judgment affirmed.

RELATED CASES: Abd, 120 N.E.3d 1126 (Ind. Ct. App. 2019)(as in Woods, D waived his claim by failing to speak up at sentencing, and also failed to demonstrate that his substantial rights were prejudiced).

E. SENTENCING

E.4. Sentencing hearing

E.4.d. Evidence

TITLE: Thomas v. State

INDEX NO.: E.4.d.

CITE: (3d Dist. 11/1/90), Ind. App., 562 N.E.2d 43

SUBJECT: Evidentiary standards at sentencing - hearsay

HOLDING: Tr. Ct. did not err in excluding statements of co-Ds at D's sentencing hearing. D was convicted of felony murder, & at sentencing she attempted to introduce co-Ds' statements indicating that D was not personally involved in killing victim. At sentencing, full range of information about particular offense & background of individual offender should be considered so that sentence can be tailored to individual offender & offense. [Citations omitted.] Strict rules of evidence do not apply at sentencing hearings because guilt or innocence with regard to particular offense is no longer in issue, & there is no need to confine evidence to that strictly relevant to crime charged. However, relaxation of these rules does not necessarily require that sentencing Ct. admit hearsay evidence. While reliance on hearsay at sentencing is not per se improper, [citations omitted] Ct. must strike balance between generally allowing hearsay information regarding D's life & insuring that D is not sentenced on invalid information. [Citations omitted.] Cts. have long recognized questionable reliability of co-Ds' pretrial statements. Held, Tr. Ct. did not abuse discretion in excluding co-Ds' hearsay statements at D's sentencing hearing. **NOTE:** In statements here, co-Ds took responsibility for killing onto themselves & away from D, so that reliability seems less questionable. Also, Ct.'s reasoning may be useful to Ds in arguing to exclude hearsay evidence damaging to D at sentencing, particularly where it concerns D's involvement in offenses which have not been charged. See Willoughby, 552 N.E.2d 462.

E. SENTENCING

E.4. Sentencing hearing

E.4.d.1. Evidence - in general

TITLE: Forrester v. State

INDEX NO.: E.4.d.1.

CITE: (10/7/82), Ind., 440 N.E.2d 475

SUBJECT: Sentencing hearing - evidence

HOLDING: In determining sentence, Tr. Ct. may consider information outside PSI report. Bish, 421 N.E.2d 608. Here, copies of other informations filed against D, a multi-page document regarding charge of forcible rape in CA (which was dismissed for lack of evidence), & an envelope upon which D wrote attorney's phone number & asked jailmate to call him & express D's opinion he was being "sent up the river" were all introduced at sentencing hearing. Ct. finds Tr. Ct. may have improperly considered CA charge, but other aggravating circumstances justify sentence imposed. Held, no error.

RELATED CASES: Laird, 483 N.E.2d 68 (Crim L 986.4(1); no error in allowing state to present written presentence memorandum; Ct. rejects D's contention that Ind. Code 35-38-1-11, which allows D to prepare memo, precludes prosecutor from doing so); Hutchinson, 477 N.E.2d 850 (Crim L 986.2 (2,4); Tr. Ct. did not err in allowing prosecutor to read excerpts from letter written by D concerning uncharged criminal acts; in recommending a sentence, prosecutor may apprise Tr. judge of reasons for recommendation & zealously advocate imposition of such sentence, *citing* Spaulding, App., 330 N.E.2d 774; Tr. Ct.'s discretion in considering history of criminal activity is not limited, *citing* Page, 442 N.E.2d 977); Tabor, 461 N.E.2d 118 (police officer allowed to testify that D showed no remorse & had stated he'd simply kill witnesses of future criminal acts).

TITLE: Naked City v. State
INDEX NO.: E.4.d.1.
CITE: (3d Dist. 1/26/84), Ind. App., 460 N.E.2d 151
SUBJECT: Sentencing hearing - illegally seized evidence
HOLDING: Tr. Ct. did not err in admitting videotape during sentencing hearing; D waived argument that tape was seized illegally by pleading guilty. Tollett v. Henderson (1973), 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235; Mitchell v. Hopper (S.D. Ga. 1982), 538 F.Supp. 77 (rule applies to introduction of such evidence at sentencing). Held, no error.

RELATED CASES: But see Haring v. Prosise (1983), U.S., 103 S.Ct. 2368, 76 L.Ed.2d 595 (guilty plea does not constitute admission or waiver of constitutionality of search), which distinguishes Tollett & concludes waiver was not basis for decision in that case. [Card at Q.5].

TITLE: Naked City v. State
INDEX NO.: E.4.d.1.
CITE: (3d Dist. 1/26/84), Ind. App., 460 N.E.2d 151
SUBJECT: Sentencing hearing - evidence; hearsay
HOLDING: D was not denied due process at sentencing hearing by admission of hearsay reports & videotape. Sentence based on "materially untrue assumptions" violates due process, Gardner, 388 N.E.2d 513; however, strict rules of evidence do not apply at sentencing, Williams v. NY (1949), 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337; Lottie 406 N.E.2d 632; Hineman, App., 292 N.E.2d 618. Here, reports by police officers indicated D (Naked City founder) offered sexual enticements to women to enter his employ & that nude dancing & porno movies were featured at Naked City. Videotape depicted D having sexual intercourse & was offered to rebut his claim of frail health. Ct. finds D had ample opportunity to dispute reports. Held, no error.

RELATED CASES: Weston, 448 F.2d 626 (9th Cir.) (statements of narcotics agents in PSR containing unverified statements of unknown informant that D was one of biggest heroin dealers in area, held to have been insufficient indicia of reliability to be proper basis for sentencing); Powell, 644 N.E.2d 82 (Tr. Ct. did not err in admitting at sentencing hearing sworn hearsay statement by D's friend relating telephone conversation describing motivation for killing victim, where D had opportunity to inform Ct. of inaccuracies in statement); Dillon 492 N.E.2d 661 ("hearsay evidence is admissible at sentencing hearing; strict rules of evidence do not apply" *citing* Busam, 445 N.E.2d 118); Sales, App., 464 N.E.2d 1336 (where accuracy of hearsay information is uncontested & absent any indication that judge improperly relied on evidence, Ct. holds D failed to show prejudice from admission of hearsay, *citing* US v. Harris (CA7), 558 F.2d 366).

TITLE: Ousley v. State

INDEX NO.: E.4.d.1.

CITE: (3rd Dist., 5-3-04), Ind. App., 807 N.E.2d 758

SUBJECT: Admissibility of evidence of D's conduct/rehabilitation subsequent to original sentencing

HOLDING: Following remand for resentencing after successfully challenging his sentence on post-conviction review, Tr. Ct. allowed D to present new evidence of D's character & rehabilitation subsequent to the original sentencing. *Citing Ingle v. State*, 766 N.E.2d 392 (Ind. Ct. App. 2002) & *Edwards v. State*, 518 N.E.2d 1137 (Ind. Ct. App. 1998), State argued that only evidence reflecting conditions as they existed as of date of original sentencing may be considered. However, in *Ingle & Edwards*, D filed a motion to correct erroneous sentence. Ct. noted that Ind. Code 35-38-1-15 does not control where, as here, D is being resentenced following a successful post-conviction challenge to a sentence. Because Indiana Post-Conviction Rule 1(10)(b) allows Tr. Ct. to increase sentence based upon bad conduct after original sentencing date, Tr. Ct. must be able to consider good behavior which occurred during the same time period. Rule 1(10)(b) & sentence modification statute, Ind. Code 35-38-1-17, clearly contemplate that evidence of D's conduct after the original sentencing date may be considered.

Ct. also held that evidence of D's mental illness is not required to be considered & given weight at all times. Rather, mental illness is a mitigating factor to be used in certain circumstances, such as when evidence demonstrates longstanding mental health issues or when jury finds that a D is mentally ill. Held, judgment affirmed.

TITLE: U.S. v. Hanna
INDEX NO.: E.4.d.1.
CITE: 49 F.3d 572 (9th Cir. 1995)
SUBJECT: Sentencing -- unsupported & uncorroborated information used by judge
HOLDING: D was convicted of aiding & abetting manufacture of more than one hundred marijuana plants pursuant to guilty plea. Ct. held that Tr. Ct. violated D's due process rights by relying upon materially false or unreliable information at sentencing. King, 876 F.2d 409 (9th Cir.). Such reliance on materially false or unreliable informant constitutes abuse of sentencing discretion as well. Here, Tr. Ct. relied on single allegation drawn from inference made by co-D in deciding that D supplied drugs to local lawyers, & as consequence, judge looked suspiciously at large number of favorable letters written by attorneys on D's behalf; permitted co-D's own attorney to examine him over government's & D's objections, while severely restricting cross examination by government & D; allowed co-D to invoke Fifth Amendment thirty-eight times during government's examination & D's cross-examination, despite fact that co-D had already entered plea of guilty to all nine counts of indictment & was awaiting sentencing; & gave co-D lower sentence than D despite government's charge that co-D was more culpable. These actions convinced Ct. that Tr. Ct.'s handling of this matter fell so far short of reasonable standard of objectivity that reliability of evidence used to justify two-level upward adjustment for D's alleged participation in growing of marijuana could not be upheld. Held, sentence vacated & remanded for resentencing before different judge.

E. SENTENCING

E.4. Sentencing hearing

E.4.d.2 Prior convictions

TITLE: Shepard v. United States

INDEX NO.: E.4.d.2.

CITE: 544 U.S. 13 (2005)

SUBJECT: Judicial Fact-finding, Prior Convictions

HOLDING: The federal Armed Career Criminal Act requires a minimum 15-year prison sentence for anyone possessing a firearm after three prior convictions for serious drug offenses or violent felonies. When determining whether a D's prior convictions qualify as violent felonies, Tr. Ct.'s may look to the statutory elements of the prior offense, charging documents, written plea agreements, transcripts of guilty plea hearings, jury instructions, and factual findings by the judge to which the D assented, but may not use police reports or 'complaint applications' to determine whether a prior conviction was for a predicate offense under ACCA.

In Taylor v. United States, 495 U.S. 575 (1990), the Court interpreted the "burglary" language in ACCA to mean only "generic burglary," or entry into a building, and not into a boat or car. The Court also held in Taylor that a court sentencing under the ACCA could look to the statutory elements, charging documents, and jury instructions of prior trial convictions to determine whether a prior trial conviction was for an ACCA predicate offense.

Before his federal prosecution for possession of a firearm, Shepard had pleaded guilty to burglary several times in state court. The Government argued at sentencing that Shepard's state convictions qualified as predicate offenses under ACCA. State law defined burglary broadly, including entries into boats and cars. The Government urged the District Court to examine police reports from Shepard's state cases to determine whether each of his prior burglary convictions was for entry into a building. The U.S. Supreme Court held, based on Taylor that a Tr. Ct. may not use police reports or 'complaint applications' to determine whether a prior guilty plea was to a predicate offense under ACCA.

RELATED CASES: Descamps, 133 S. Ct. 2276 (2013) (the modified categorical approach described in Shepard does not apply to California burglary conviction under a statute with a single, indivisible set of elements).

E. SENTENCING

E.4. Sentencing hearing

E.4.d.3. Prior Conduct/No Conviction

TITLE: Hughes v. United States

INDEX NO.: E.4.d.3

CITE: (6/4/2018), 138 S. Ct. 1765 (U.S. 2018)

SUBJECT: Federal D entitled to sentence reduction

HOLDING: Under 18 U.S.C. § 3582(c), a district court may reduce a sentence if a D's sentence was based on a sentencing range that was subsequently lowered by the Sentencing Commission. Here, even though D's plea agreement called for a specific term of years (a "Type-C" agreement), and did not explicitly refer to any particular Guideline range, the agreement was still sufficiently based on a Guidelines range to make D eligible for sentence reduction.

After D was indicted on drug and gun charges, he entered a plea deal, which called for him to serve 180 months, but the plea agreement itself did not refer to a particular Guidelines range. However, the record showed that the Tr. Ct. calculated D's Guidelines range as 188 to 235 months and determined that the sentence was in accord with the Guidelines. Less than two months later, the Sentencing Commission adopted, and made retroactive, an amendment that had the effect of reducing D's sentencing range to 151 to 188 months. The District Court denied D's motion for a reduced sentence under 18 U.S.C. § 3582(c)(2), and the Eleventh Circuit affirmed, both concluding D was ineligible for a reduced sentence because his plea agreement did not expressly rely on a Guidelines range.

D is eligible for sentence reduction under 18 U.S.C. § 3582(c)(2). The District Court accepted his Type-C agreement after concluding that a 180-month sentence was consistent with the Guidelines, and then calculated D's sentencing range and imposed a sentence it deemed "compatible" with the Guidelines. Thus, the agreement was sufficiently based on the Guidelines, making D eligible for sentence reduction. Held, cert granted, Eleventh Circuit opinion at 849 F. 3d 1008 reversed, and remanded. Kennedy, J., joined by Ginsburg, Breyer, Sotomayor, Kagan, and Gorsuch, JJ.; Sotomayor, J., concurring; Roberts, C.J., dissenting, joined by Thomas and Alito, JJ.

RELATED CASES: Koons, (6/4/2018), 138 S. Ct. 1783 (U.S. 2018) (Ds not eligible for sentence reduction under 18 U.S.C. § 3582(c)(2) because their initial sentences were based on minimum-mandatory sentencing statutes, not on lowered sentencing Guidelines ranges; see full review, this Section).

TITLE: Koons v. United States

INDEX NO.: E.4.d.3.

CITE: (6/4/2018), 138 S. Ct. 1783 (U.S. 2018)

SUBJECT: Federal Ds not entitled to sentence reduction

HOLDING: In a companion case to Hughes v. United States, the U.S. Supreme Court held that Ds are not eligible for sentence reduction under 18 U.S.C. § 3582(c)(2) because their initial sentences were based on minimum-mandatory sentencing statutes, not on lowered sentencing Guidelines ranges.

Ds pled guilty to drug conspiracy charges that subjected them to mandatory minimum sentences under 21 U. S. C. §841(b)(1). Before imposing their sentences, the District Court calculated their advisory Guidelines ranges. But because the top end of the Guidelines ranges fell below the mandatory minimums, the court concluded that the mandatory minimums superseded the Guidelines ranges. Thus, the District Court departed downward from the mandatory minimums under 18 U. S. C. §3553(e) to reflect Ds' "substantial assistance" to help prosecute other drug offenders. In settling on the final sentences, the District Court considered the relevant "substantial assistance factors" set out in the Guidelines, but it did not consider the original Guidelines ranges that it had earlier discarded. After Ds were sentenced, the Sentencing Commission amended the Guidelines and reduced the base offense levels for certain drug offenses, including the Ds' offenses. Ds sought sentence reductions under 18 U.S.C. §3582(c)(2), which makes Ds eligible if they were sentenced "based on a sentencing range" that was later lowered by the Sentencing Commission. Both the District Court and Eighth Circuit ruled that Ds were not eligible because they could not show that their sentences were "based on" the now-lowered Guidelines ranges.

For a sentence to be "based on" a lowered Guidelines range, the range must have played a relevant part in the framework the judge used. Hughes v. United States, 2018 U.S. LEXIS 3385, at 7 (U.S., June 4, 2018). Here, Ds do not fit into this category because the District Court did not consider the Guidelines ranges in imposing its ultimate sentences. Instead, it scrapped the ranges in favor of the mandatory minimums and never considered the ranges again.

It is true that sentencing judges are required to calculate the Guidelines range in every case, as it is true that many judges use those ranges as "the foundation of [their] sentencing decisions." Hughes, at 8. But this does not mean that any sentence subsequently imposed is "based on" a Guidelines range. More important is the role the Guidelines played in the selection of the sentence eventually imposed - not the role the range played at the outset. Here, while the ranges may have served as the starting point for the judge, the ranges clearly did not form the foundation of the sentences the judge ultimately imposed. See Hughes, at 9 - 11.

"In constructing a house, a builder may begin by considering one design but may ultimately decide to use entirely different plans. While the first design would represent the starting point in the builder's decision-making process, the house finally built would not be 'based on' that design. The same is true here. [Ds'] sentences were not 'based on' Guidelines ranges that the sentencing judge discarded in favor of mandatory minimums and substantial-assistance factors." Thus, Ds are not entitled to sentence reductions under 18 U.S.C. §3582(c)(2). Held, cert. granted, and Eighth Circuit opinion at 850 F.3d 973 affirmed. Alito, J., for the unanimous Court.

TITLE: U.S. v. Watts

INDEX NO.: E.4.d.3.

CITE: 519 U.S. 148, 117 S.Ct. 633 (1997)

SUBJECT: Sentencing Guidelines -- Consideration of Conduct For Which D Has Been Acquitted

HOLDING: Federal sentencing courts may consider conduct for which D has been acquitted, so long as that conduct is proved by preponderance of evidence. In 18 U.S.C. 3661, Congress codified longstanding principle that sentencing courts have broad discretion to consider various kinds of information. See also Williams v. New York, 337 U.S. 271 (1949) ("Highly relevant – if not essential – to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the D's life and characteristics.") The federal Sentencing Guidelines did not alter this aspect of a sentencing court's discretion. Double jeopardy does not bar consideration of criminally acquitted conduct, since the D is not being punished for the prior conduct, but only for the offense for which he is being sentenced. Acquittal does not prove that the D is innocent; it merely proves the existence of a reasonable doubt as to guilt. Because sentencing consideration involves lower standard of proof, government is not precluded from presenting and relitigating allegations regarding the D's prior conduct. The majority does not reach the issue of whether, in extreme circumstances, relevant conduct which would dramatically enhance a sentence must be proved by clear and convincing evidence. Stevens, J., DISSENTS, argues that this type of broad discretion made sense before the Sentencing Guidelines were adopted taking away much of a judge's discretion in, but that now judges should be restricted to considering such evidence only in selecting a sentence within a particular range, not in assigning the range itself. Kennedy, J., DISSENTS to the Court's deciding this case per curiam without full briefing and oral argument.

E. SENTENCING

E.4. Sentencing hearing

E.4.e. Advice of appeal rights/preparation of transcript (CR 11; Ind. Code 35-38-1-3)

TITLE: Blackmon v. State

INDEX NO.: E.4.e.

CITE: (2d Dist. 6/21/83), Ind. App., 450 N.E.2d 104

SUBJECT: Sentencing hearing - advice of appeal rights

HOLDING: Informing D only of right to appellate review of sentence does not satisfy requirements of CR 11 (Tr. judge must advise D of right to appeal from judgment of conviction). Here, Ct. remands PC 2, Section 1 appeal for hearing following Tr. judge's summary denial of D's petition. Ct. traces origin & development of right to appeal Indiana criminal conviction (Ind. Const. Art. 7, Sections 4, 6; Ind. Code 35-1-47-1; CR 11). Sentence review provisions are found in Ind. Const. Art. 7, Section 4; ARSR 1, 2. Held, reversed & remanded.

RELATED CASES: Carter, 438 N.E.2d 738 (although CR 11 required Ct. to advise D of right to appeal, D failed to demonstrate any harm from Ct.'s failure to do so).

E. SENTENCING

E.5. Sentencing decision/discretion of court

TITLE: Malenchik v. State

INDEX NO.: E.5.

CITE: (06-09-10), 928 N.E.2d 564 (Ind. 2010)

SUBJECT: LSI-R and SASSI tests are appropriate supplemental tools for judicial consideration at sentencing

HOLDING: In sentencing D, Tr. Ct. did not err in referring to D's elevated scores on Level Service Inventory Revised (LSI-R) and Substance Abuse Subtle Screening Inventory (SASSI), standardized tests assessing rehabilitative needs and risk of recidivism and substance abuse. Tr. Ct. did not use scores as aggravating factors, which would have been improper, but to fashion D's Aprogram of penal consequences,@ which would include assessment by DOC and once released, supervised probation. Test scores were only supplemental to other evidence that independently supported D's six-year aggregate sentence (four executed) for class D felony receiving stolen property and to being an habitual offender. Such test scores cannot determine gross length of a sentence or serve as aggravating or mitigating circumstances, but Tr. Ct.s are encouraged to use such reliable evidence-based assessment tools to help craft penal program tailored to each D. Court did not address claim that any particular D's scores are unreliable because testing scales in LSI-R and SASSI are based on probabilities derived from evaluating large pool of offenders, not a particular D.

Court disapproved Rhodes v. State, 896 N.E.2d 1193, 1195 (Ind. Ct. App. 2008), which held that use of standardized scoring models, such as LSI-R, undercuts Tr. Ct.'s duty to craft appropriate, individualized sentence and that relying on a score purportedly derived from objective data cannot substitute for independent and thoughtful evaluation of evidence. Held, transfer granted, Court of Appeals' memorandum opinion vacated, judgment affirmed. See also: J.S. v. State, 923 N.E.2d 576 (Ind. Ct. App. 2010).

RELATED CASES: Schuler, 112 N.E.3d 180 (Ind. 2018) (Tr. Ct. did not abuse its discretion by considering the Indiana Risk Assessment System in sentencing D to LWOP); Moyer, 83 N.E.3d 136 (Ind. Ct. App. 2017) (when Tr. Ct. said it was considering as an aggravator the probation department's determination that D was at a high risk to reoffend – a fact that, if true, would be improper as a matter of law - Tr. Ct. was actually using D's risk assessment scores as a supplement to the factors in the written sentencing orders; the risk assessment scores were not included in the written order, so they were not improperly considered as an aggravator).

TITLE: Richardson v. State

INDEX NO.: E.5.

CITE: 906 N.E.2d 241 (Ind. Ct. App. 2009)

SUBJECT: Advisory sentence is not a mandatory starting point

HOLDING: In sentencing D for two Class B felonies, Tr. Ct. did not err by beginning its sentencing analysis with thirteen years rather than with advisory sentence of ten years. "Advisory sentence" means "a guideline sentence that the court may voluntarily consider as the midpoint between the maximum sentence and the minimum sentence." Ind. Code 35-50-2-1.3(a). However, the advisory sentences specifically delineated in Ind. Code 35-50-2-4 through -7 are not the mathematical midpoints between the maximum and minimum sentences. While strange, this does not change the fact that the "advisory sentence," or any other particular point for that matter, is not a mandatory starting point in sentencing considerations. See Pedraza v. State, 887 N.E.2d 77 (Ind. 2008). Thus, if sentencing statement is reasonably detailed, if the court did not abuse its discretion by using improper/unsupported reasons or omitting supported reasons, and if the sentence was within the statutory range and appropriate in light of nature of offense and character of the offender, then whether a judge started at the advisory sentence, at the actual mathematical midpoint, or elsewhere is of no moment. Held, judgment affirmed.

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.a. In general re sentencing/separation of powers

TITLE: Abercrombie v. State

INDEX NO.: E.5.a.

CITE: (11/12/82), Ind., 441 N.E.2d 442

SUBJECT: Sentencing - objectives of imprisonment

HOLDING: Primary goal of imprisonment is rehabilitation/reformation [Ind. Const. Art. I, Section 18; Ind. Code 35-4.1-4-7], but other goals, such as need to protect community by sequestration of offender, deterrence & community condemnation of offender, are proper considerations in sentencing process. Abercrombie, 417 N.E.2d 320. Here, on direct appeal, Ct. affirmed convictions (rape, robbery, burglary, theft), but remanded case for resentencing because record contained no statement of reasons or of specific aggravating/mitigating circumstances to support enhancement of sentence or imposition of consecutive terms of punishment. Because original Tr. judge was deceased, Ct. ordered new sentencing hearing. Held, resentencing judge complied with Ct.'s directive that goal of rehabilitation be considered; sentence affirmed.

TITLE: Coleman v. State

INDEX NO.: E.5.a.

CITE: (3/25/86), Ind., 490 N.E.2d 711

SUBJECT: Sentencing - revision permissible

HOLDING: Tr. Ct. did not err in revising D's sentence from 35 years to 42 years, where case had not been adjourned or entry made in Tr.Ct's record book. Here, after being sentenced to 35 years (5 for burglary, 2 for theft to run concurrently & enhanced by 30 years for habitual), D began to use rude & profane language directed at Tr. Ct., creating disturbance, & requiring removal of Ct. audience. Tr. Ct. ordered D removed, gagged & brought back for resentencing. D was then resentenced to 8 years for burglary, 4 for theft to run consecutively & enhanced by 30 years for habitual. In sentencing D, Tr. Ct. set forth long history of criminal activity, his need for correctional & rehabilitative treatment, his contempt & hatred of Ct. & judicial process displayed by his conduct in present case, attempted escape & that lesser sentence would depreciate seriousness of crime. Held, no error in revision of sentence. DeBruler would remand for imposition of initial 35 years sentence.

TITLE: Emerson v. State

INDEX NO.: E.5.a.

CITE: (6-11-98), Ind., 695 N.E.2d 912

SUBJECT: Sentencing discretion - judge's ignorance of law

HOLDING: D failed to prove that sentencing judge erroneously believed thirty year HO enhancement was mandatory & did not know that Ct. could reduce enhancement up to ten years. Whether or not to reduce thirty-year enhancement rests within discretion of Tr. Ct. However, it is presumed that judges are aware of & know law. Here, D relied on two comments by judge during sentencing: judge told D's mother that legislature says he is required to give D whole lots of time for habitual; & judge told D that he was sentencing him to thirty extra years based on D being found HO. While both of these statements indicate intent to impose undisturbed thirty year enhancement, neither statement overtly demonstrates ignorance of law. Thus, D did not prove that judge did anything other than exercise his discretion in sentencing. Held, denial of post-conviction relief affirmed.

TITLE: Hoage v. State
INDEX NO.: E.5.a.
CITE: (2d Dist. 7/11/85), Ind. App., 479 N.E.2d 1362
SUBJECT: Sentencing - term beyond statutory maximum; D's consent
HOLDING: Tr. Ct. erred in sentencing D to one year suspended sentence with 30 days executed & 4 additional years "informal probation" for misdemeanor assault & battery conviction. Statutory maximum is one year. Ind. Code 35-50-3-1 & 2. Tr. Ct.'s discretion in sentencing is limited by its grant of statutory authority. Rife, App., 424 N.E.2d 188. Ct. rejects state's contention that D's oral agreement at sentencing hearing constitutes consent. Tr. Ct. was without authority to impose sentence greater than allowable by law. Morgan, App., 417 N.E.2d 1154. D's consent to probationary period exceeding statutory maximum, obtained in coercive setting in which Ct. has power to imprison D without any probation, is without effect. US v. Rodriguez (CA9 1982), 682 F.2d 827. Held, probation beyond one year reversed.

TITLE: Hull v. State

INDEX NO.: E.5.a.

CITE: (2nd Dist., 12-9-03), Ind. App., 799 N.E.2d 1178

SUBJECT: Illegal sentence - partially concurrent/partially consecutive "delayed" sentence

HOLDING: In imposing enhanced executed sentences of sixty-five years for each of two murder convictions, Tr. Ct. erred in ordering ten years of sentence for count II to be served consecutively to sixty-five-year sentence for count I. There is no statutory authority for ten-year delay in commencement of sentence for count II, thus sentence was illegal. When a sentence is imposed, commencement of that sentence cannot be delayed absent specific statutory authorization. Erby v. State, 511 N.E.2d 302 (Ind. 1987). Given that minimum sentence on each count of murder is forty-five years & that plea bargain provided the "total executed sentence shall not exceed 90 years," the sentence was improper. Held, judgment vacated & remanded for resentencing.

RELATED CASES: Chism, App., 807 N.E.2d 798 (Tr. Ct. did not err in vacating that portion of D's sentence that exceeded parameters of his plea agreement & simultaneously extending length of his probation & adding home detention as condition of probation, which did not exceed statutory authority or terms of plea agreement).

TITLE: Malenchik v. State

INDEX NO.: E.5.

CITE: (06-09-10), 928 N.E.2d 564 (Ind. 2010)

SUBJECT: LSI-R and SASSI tests are appropriate supplemental tools for judicial consideration at sentencing

HOLDING: In sentencing D, Tr. Ct. did not err in referring to D's elevated scores on Level Service Inventory Revised (LSI-R) and Substance Abuse Subtle Screening Inventory (SASSI), standardized tests assessing rehabilitative needs and risk of recidivism and substance abuse. Tr. Ct. did not use scores as aggravating factors, which would have been improper, but to fashion D's Aprogram of penal consequences,@ which would include assessment by DOC and once released, supervised probation. Test scores were only supplemental to other evidence that independently supported D's six-year aggregate sentence (four executed) for class D felony receiving stolen property and to being an habitual offender. Such test scores cannot determine gross length of a sentence or serve as aggravating or mitigating circumstances, but Tr. Ct.s are encouraged to use such reliable evidence-based assessment tools to help craft penal program tailored to each D. Court did not address claim that any particular D's scores are unreliable because testing scales in LSI-R and SASSI are based on probabilities derived from evaluating large pool of offenders, not a particular D.

Court disapproved Rhodes v. State, 896 N.E.2d 1193, 1195 (Ind. Ct. App. 2008), which held that use of standardized scoring models, such as LSI-R, undercuts Tr. Ct.'s duty to craft appropriate, individualized sentence and that relying on a score purportedly derived from objective data cannot substitute for independent and thoughtful evaluation of evidence. Held, transfer granted, Court of Appeals' memorandum opinion vacated, judgment affirmed. See also: J.S. v. State, 923 N.E.2d 576 (Ind. Ct. App. 2010).

RELATED CASES: Moyer, 83 N.E.3d 136 (Ind. Ct. App. 2017) (when Tr. Ct. said it was considering as an aggravator the probation department's determination that D was at a high risk to reoffend – a fact that, if true, would be improper as a matter of law – Tr. Ct. was actually using D's risk assessment scores as a supplement to the factors in the written sentencing orders; the risk assessment scores were not included in the written order, so they were not improperly considered as an aggravator).

TITLE: Saddler v. State

INDEX NO.: E.5.a.

CITE: (09-13-11), 953 N.E.2d 1220 (Ind. Ct. App. 2011)

SUBJECT: Erroneous conditional sentence - restitution

HOLDING: Tr. Ct. issued an illegal conditional sentence for criminal mischief when it required D to pay restitution prior to sentencing if D did not want to be sentenced to prison. Indiana permits conditional sentences when restitution is a condition of probation. Ind. Code 35-38-2-2.3(a)(5). In such a case, Tr. Ct. is obligated to first determine whether or not a D can afford to pay restitution.

Here, in response to State's initial request for probation, Tr. Ct. inquired whether or not D could pay restitution. D said that she could not. This should have concluded the inquiry into D's ability to pay restitution. Yet, Tr. Ct. did not proceed to sentencing, but instead continued sentencing hearing to give D a chance to pay the \$500 restitution. When D could not pay the restitution amount at the first continuance, Tr. Ct. granted D another chance to pay the \$500. At the second continuance, D still had not paid the restitution and Tr. Ct. sentenced her to 270 days of incarceration along with restitution. It is clear that D's sentence was, in effect, conditional: payment of the restitution amount at any time prior to the second continuance determined which sentence D received. Held, judgment reversed and remanded for resentencing.

TITLE: Wilson v. State
INDEX NO.: E.5.a.
CITE: (4/1/2014), 5 N.E.3d 759 (Ind. 2014)
SUBJECT: Illegal partially consecutive sentence
HOLDING: Tr. Ct.'s have discretion to determine, subject to certain qualifications, whether sentences are served consecutively or concurrently; but nothing in statutory sentencing scheme grants a Tr. Ct. authority to impose partially consecutive, hybrid, or blended sentences for multiple convictions. Courts are limited to imposing sentences that are authorized by statute, rather than only being limited to sentences that are not prohibited by statute.

Here, in 1996, Tr. Ct. split D's 20-year sentence for Class B felony robbery into a partially consecutive sentence, with the remaining five years to be served concurrently with his 45-year sentence for Class A felony rape and criminal deviate conduct convictions. Plain language of Ind. Code § 35-50-1-2(c) contemplates only consecutive or concurrent terms, not a hybrid of both, for a sentence on one count. D's partially consecutive sentence was erroneous on its face, and Tr. Ct. erred in denying his motion to correct erroneous sentence. Held, transfer granted, Court of Appeals' opinion at 988 N.E.2d 1221 vacated, remanded for resentencing not to exceed current 50-year term.

RELATED CASES: Wampler, 168 N.E.3d 1026 (Ind. Ct. App. 2021) (Tr. Ct. does not have the authority to resentence a defendant who has served his sentence and been released from the DOC).

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.b. Mandatory considerations (Ind. Code 35-38-1-7(a))

TITLE: Abercrombie v. State
INDEX NO.: E.5.b.
CITE: (11/12/82), Ind., 441 N.E.2d 442
SUBJECT: Sentencing - mandatory considerations; presumptive sentence
HOLDING: When Tr. judge imposes basic sentence embodied within statute, it is presumed mandatory considerations were made, even if record lacks specificity in enumerating those considerations. Gardner, 388 N.E.2d 513. Here, following new sentencing hearing, presumptive sentences imposed for robbery, burglary & theft. Held, resentencing judge not required to present detailed statement of justification for imposition of presumptive sentences.

TITLE: Jones v. State

INDEX NO.: E.5.b.

CITE: (06-02-93), Ind., 614 N.E.2d 936

SUBJECT: Sentence appropriate, statutory requirements followed

HOLDING: Imposition of two 60-year concurrent terms for two counts of murder was appropriate, & Tr. Ct. did not err in consideration of aggravators & mitigators. D pled guilty with agreement that sentences imposed would be concurrent. There is no requirement that Cts. specifically address & discuss each statutory factor in Ind. Code 35-38-1-7.1(a), Johnson, (1991), 580 N.E.2d 959, & one aggravator will sustain enhanced sentence, Reaves, (1992), 586 N.E.2d 847. Judge thoroughly set forth aggravators he relied on; fact D entered home with intent to commit robbery, fact judge did not believe gun went off accidentally, & fact victims were deliberately killed. Judge also acknowledged mitigators that D was only 16 years old & had no prior record. Ct. also rejected argument that Tr. Ct. erred by enhancing sentences to compensate for agreement that they be imposed concurrently. Although judge stated "D has already received consideration for this particular weighing of events in that the Ct. is precluded from consecutive sentencing...", Ct. found no indication statement was element in enhancement of sentence. Ct. also noted that there is no affirmative duty to expressly negate each potential mitigator. Lastly, Ct. found sentence was not manifestly unreasonable because although D was only 16 & had no criminal history, sentences were imposed concurrently, D stole gun to commit crime & took jewelry at same time, & D entered home for purpose of committing robbery. Held, sentence affirmed, DeBruler, J., dissenting, finding failure to consider mitigators that D was acolyte & helper at church; he called police to get help for victims within minutes of shootings; he was remorseful; & he was raised in fatherless family.

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.b.2. Nature and circumstances of crime

TITLE: Angleton v. State
INDEX NO.: E.5.b.2.
CITE: (8-4-99), Ind., 714 N.E.2d 156
SUBJECT: Aggravating circumstances - nature & circumstances of crime
HOLDING: Single aggravating circumstance of "nature & circumstances of crime" was sufficient to enhance D's murder sentence from presumptive forty-year sentence to fifty-five years. Nature of offense was that D shot his wife while she was sleeping to profit from life insurance policy & because she was planning to leave him. Tr. Ct. did not abuse its discretion when it found killing to be "cold-blooded & calculated," as murder under circumstances of this case necessarily required some degree of calculation or planning beyond a mere knowing or intentional killing as those terms are defined by statute. Ct. also rejected D's argument that his sentence was manifestly unreasonable. Held, judgment affirmed; Sullivan, J., dissenting.

RELATED CASES: Ross, App., 835 N.E.2d 1090 (While it is improper to consider fact that a person died as a result of murder as an aggravator, number of times a victim is shot is proper consideration under nature & circumstances aggravator); Matshazi, App., 804 N.E.2d 1232 (no error in attaching significant weight to particularized circumstances of rape, *i.e.*, that victim was physically & mentally challenged); Glass, App., 801 N.E.2d 204 (D, an admitted methamphetamine addict, consented to & assisted in his drug supplier's construction of a meth lab in the trailer in which his girlfriend's children resided. Tr. Ct. properly found the "expense, harm, & threat" of meth manufacture & the "scourge" of meth use on society as aggravating circumstances); Settles, App., 791 N.E.2d 812 (Tr. Ct. properly considered brutality of D's attack & severity of victim's injuries as aggravator); Martin, App., 784 N.E.2d 997 (in battery resulting in SBI prosecution, Tr. Ct. did not err in finding crime was extremely brutal & involved striking victim in head area a number of times with great force); Hornbostel, App., 757 N.E.2d 170 (Tr. Ct. properly considered D killing victim with his bare hands as part of nature & circumstances of crime; & D was properly sentenced to 96 years imprisonment); Bonds, 729 N.E.2d 1002 (purpose for committing robbery, D's role as primary actor & his recruiting of other participants are not material elements of murder or conspiracy, but rather constitute nature & circumstances of crimes).

TITLE: McMichael v. State

INDEX NO.: E.5.b.2.

CITE: (4th Dist. 12/6/84), Ind. App., 471 N.E.2d 726

SUBJECT: Aggravating circumstances - victim's death

HOLDING: Tr. Ct. did not err in enhancing D's sentence (Class D felony - neglect of dependent) by 2 years. Here, D contends Tr. Ct. erroneously considered victim's death as aggravating circumstance. D's son died of blow to abdomen, which perforated small intestine, resulting in peritonitis & sepsis. Child's life could have been saved with prompt medical treatment. Ind. Code 35-38-1-7(a)(2) provides Tr. Ct. may consider nature & circumstances of crime committed. Owens, 427 N.E.2d 880; McNew, 391 N.E.2d 607. It is not unusual for Tr. Ct. to consider crime's effect on victim when enhancing sentence. [Citations omitted.] Ct. rejects D's argument that child's death cannot be considered when D was not convicted of causing child's death. Tr. Ct. may consider factors that also may have led to conviction on greater charge. Lang, 461 N.E.2d 1110; Robinson, 446 N.E.2d 1287. Held, no error.

RELATED CASES: Bunch, App., 760 N.E.2d 1163, *sum. aff'd* 778 N.E.2d 1285 (despite fact that D was acquitted of reckless homicide, consideration of fact that victim died was proper because death was consequence of crime that D committed (i.e., dealing in cocaine)).

TITLE: Meadows v. State

INDEX NO.: E.5.b.2.

CITE: (2nd Dist., 3-31-03), Ind. App., 785 N.E.2d 1112

SUBJECT: Aggravating circumstances - nature & circumstances of crime committed by principal

HOLDING: In prosecution for possession of firearm by serious violent felon (aiding & abetting), Tr.

Ct. did not err in considering nature & circumstances of crimes committed by principal while using firearms purchased by D. D purchased SKS & AK-47 rifles, which he then loaned to Dumperth, a serious violent felon. Dumperth was subsequently involved in police chase & shooting using these rifles, in which police officer & Dumperth were both killed. Ind. Code 35-38-1-7.1 requires that Tr. Ct. consider nature & circumstances of crime committed when determining what sentence to impose. Because D was convicted of crime actually committed by Dumperth, all acts by Dumperth which involved use of firearms are relevant to sentencing of D because they are inextricably linked to fact that D put guns in hands of Dumperth knowing him to be convicted felon. Moreover, Tr. Ct. did not err in considering nature of weapons in context of sentencing, because firearms were ultimately used in crime in which their capabilities may have played a significant role in death of police officer & injury of bystander. However, Tr. Ct. erred in considering as aggravator that imposition of reduced sentence or suspension of sentence would depreciate seriousness of crime. Held, remanded to Tr. Ct. to assign weight to aggravators & revisit sentencing.

RELATED CASES: Meadows, App., 853 N.E.2d 1032 (after remand, Ct. affirmed enhanced consecutive sentencing for this “particularly heinous” crime).

TITLE: Sharkey v. State

INDEX NO.: E.5.b.2.

CITE: (05-23-12), 967 N.E.2d 1074 (Ind. Ct. App. 2012)

SUBJECT: Nature & circumstances of crime was proper aggravator

HOLDING: Tr. Ct. properly sentenced D to a suspended sentence of one and one-half years for Class D felony intimidation. D was upset that he could not talk to his daughter after she was arrested at school for having drugs, and he told the officer who arrested his daughter that he would come to school with his "guns blaring," that he has a 12-gauge and will "come down and...let everybody have it." The high school was put on lock down as a result of D's threat. The plea agreement capped D's maximum sentence at 18 months and allowed him to argue his conviction should be entered as a Class A misdemeanor. Tr. Ct. declined to enter the conviction as a misdemeanor after reading a letter from the arresting officer about D's threat. D's comments to the officer came near the time that several police officers were shot in the United States. Tr. Ct. also noted that D initially denied he made the threat and later denied it was a specific threat to the arresting officer.

Court of Appeals held that Tr. Ct.'s consideration and finding of only one aggravator--that the harm caused was greater than that necessary to prove the commission of the offense--was proper. In finding this aggravator, Tr. Ct. relied on arresting officer's letter, which detailed "the enormous safety concerns" triggered by D's vivid threat, which not only affected victim but spilled over to eighteen hundred high school students and hundreds of faculty members. D's character and nature of the crime supported the 18-month suspended sentence. Held, judgment affirmed.

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.b.3. D's criminal record/character/condition

TITLE: Jordan v. State

INDEX NO.: E.5.b.3.

CITE: (2nd Dist., 5-9-03), Ind. App., 787 N.E.2d 993

SUBJECT: Character of D - manifestly unreasonable sentence

HOLDING: D's maximum twenty-year sentence for Class B felony dealing in controlled substance was manifestly unreasonable where nature of offense supported enhanced sentence, but character of offender did not. Tr. Ct. violated D's constitutional rights by failing to consider treatment as alternative to incarceration. D expressly invited Ct. to consider fact that he had extensive drug habit at time crime was committed & asked that he receive treatment rather than incarceration. On those facts, it was error for Tr. Ct. to consider D's drug habit as aggravating circumstance without considering alternative drug abuse treatment programs. Tr. Ct. also erred in finding that D was in need of correctional & rehabilitative treatment that could best be provided in penal facility because it failed to provide specific or individualized statement of reason why this was so. Nevertheless, Tr. Ct. did find other valid aggravators that would justify enhanced sentence. However, maximum sentence was extreme given character of D. D was young, had extensive drug habit, prior & present offenses were non-violent, & D had requested drug treatment in lieu of retribution. Maximum sentence should be reserved for very worst offenses & offenders. Brown v. State, 760 N.E.2d 243 (Ind. Ct. App. 2002). Therefore, maximum sentence in this case was inappropriate. Held, reversed & remanded to reduce sentence to fifteen years.

RELATED CASES: Calvert, 930 N.E.2d 633 (Ind. Ct. App. 2010) (D's admission that he had a substance abuse problem and therefore used illegal drugs was considered a negative reflection on his character); Cotto, 829 N.E.2d 520 (maximum sentence for Class A felony possession of methamphetamine inappropriate despite D's criminal history); Merlington, 814 N.E.2d 269 (D's 45-year sentence for possession of methamphetamine with intent to deliver was inappropriate in light of nature of this offense & character of this offender); Donnegan, App., 809 N.E.2d 966 (40-year sentence for dealing in cocaine not inappropriate given D's criminal history & sophisticated drug dealing network & operation).

TITLE: Kirby v. State
INDEX NO.: E.5.b.3.
CITE: (2nd Dist., 4-30-01), Ind. App., 746 N.E.2d 440
SUBJECT: Aggravating circumstances - D's failure to pay child support
HOLDING: Tr. Ct. did not err in considering D's failure to pay child support as one of three aggravators in determining appropriate sentence for his conviction for possession of controlled substance. It was apparent from D's conviction for possession that he elected to direct whatever financial resources he had towards procuring drugs rather than towards supporting his children. Such behavior speaks to quality of D's character & may properly be considered by Tr. Ct. in sentencing. Wethington v. State, 560 N.E.2d 496 (Ind. 1990). Held, no error.

TITLE: Lottie v. State

INDEX NO.: E.5.b.3.

CITE: (6/23/80), Ind., 406 N.E.2d 632, *overruled* on other grounds, 784 N.E.2d 459 (Ind. 2003)

SUBJECT: Sentencing - prior Juv.Ct. record

HOLDING: Tr. Ct. did not err in considering D's prior juvenile record in determining sentence in criminal Ct. Sentencing judge must be as well informed as possible concerning D's life and characteristics in order to select appropriate sentence. Williams v. New York, (1949) 69 S. Ct. 1079. In Williams, S.Ct. noted that, ". . . modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial." Here, Ct. found that sentencing judge may consider juvenile offenses, Jewell, 309 N.E.2d 441, as well as D's school life and academic achievements, Hineman, App., 292 N.E.2d 618. Because D is given opportunity to rebut all unfavorable evidence presented at sentencing hearing, Tr. Ct. did not err in admitting D's juvenile records. Held, judgment affirmed. See also Sales, App., 464 N.E.2d 1336.

RELATED CASES: Day, 560 N.E.2d 641 (Tr. Ct. erred in using juvenile record to enhance D's sentence where matters involving D in Juv.Ct. had ended without disposition; Mere fact that petition was filed alleging delinquency does not suffice as proof of criminal history); Evans, 497 N.E.2d 919 (Presentence report contained specifics as to juvenile record, and those specifics adequately supported evidence of criminal history which could constitute aggravating circumstances.)

TITLE: Owens v. State

INDEX NO.: E.5.b.3.

CITE: (10/20/89), Ind., 544 N.E.2d 1375

SUBJECT: Aggravating circumstances - criminal record; expunged record may not be considered

HOLDING: Tr. Ct. erred in considering expunged juvenile record as aggravating circumstance in sentencing D. D received consecutive sentences for burglary, theft, & voluntary manslaughter convictions. Among reasons stated by Tr. Ct. for imposing consecutive sentences was D's past criminal record. On appeal, D argues that Tr. Ct. erroneously considered D's expunged juvenile record. When Ct. grants expungement, it shall order each law enforcement agency & each person who provided treatment for child to send records to Ct. Ind. Code 31-6-8-2(d). Once records reach Ct., they may be destroyed or given to person to whom they pertain. Ind. Code 31-6-8-2(e). Properly implemented, these procedures render expunged juvenile records unavailable for later consideration as aggravating sentencing factors. At D's sentencing hearing, juvenile probation officer testified that Tr. Ct. had earlier granted D expungement of juvenile records so that he could apply for military service, & that juvenile probation office had destroyed its copy of record. However, officer who prepared pre-sentence report testified that he had obtained copy of juvenile record from prosecutor's office. Tr. Ct. stated on record that it would not disregard juvenile record, noting that expungement was granted for limited purpose of allowing D to enter military service & did not extend beyond juvenile probation office. However, Ind. S. Ct. finds that statute does not provide for partial or conditional expungement, & that Tr. Ct. erred in considering record. While remaining aggravating circumstances support imposition of consecutive sentences, they do not support additional enhancement of voluntary manslaughter sentence. Held, remanded for imposition of standard term for manslaughter; affirmed in all other respects.

TITLE: Westmoreland v. State

INDEX NO.: E.5.b.3.

CITE: (1st Dist., 5-9-03), Ind. App., 787 N.E.2d 1005

SUBJECT: Prior criminal history as aggravator - sentence manifestly unreasonable

HOLDING: Tr. Ct. improperly considered D's prior criminal history as aggravating circumstance & as such, inappropriately sentenced him to maximum sentence for criminal deviate conduct. Pre-sentence investigation report, relied on by Tr. Ct., contained significant errors. Report indicated that D was on probation at time offense was committed, which was not true. In addition, report indicated that D was charged with possession of marijuana, which subsequently had a line drawn through it. Report did show D had been convicted of past misdemeanors & unrelated battery charge. In light of errors in report & criminal history comprised of unrelated misdemeanor convictions, D's criminal history was not significant aggravator in context of sentencing hearing for criminal deviate conduct. Further, taking into account D's limited prior criminal history, non-violent nature of prior offenses, & youth at time crime was committed, maximum sentence was manifestly unreasonable. Maximum sentence enhancement permitted by law should be reserved for very worst offenses & offenders. Borton v. State, 759 N.E.2d 641 (Ind. Ct. App. 2001). Here, neither nature of offense nor character of offender supported enhanced sentence. Held, reversed & remanded to reduce sentence to presumptive ten years.

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.b.5. Victim's statement

TITLE: Loveless v. State

INDEX NO.: E.5.b.5.

CITE: (11-17-94), Ind., 642 N.E.2d 974

SUBJECT: Victim impact statement

HOLDING: Tr. Ct. did not err in permitting family members other than Ct.-appointed victim representative to testify regarding unpleasant effects of crime. Pursuant to Ind. Code 35-38-1-2, Tr. Ct. designated deceased victim's mother as victim representative, but also permitted other family members to testify at sentencing hearing as to effects murder had on their lives. Ct. rejected D's claim that only single, appointed representative is permitted to offer "victim impact" testimony & that additional testimony unfairly prejudiced Tr. Ct. against her, resulting in maximum sentence. Purpose of statute is to guarantee that victim's interests are fully & effectively represented at sentencing hearing. While interests of judicial economy & objectivity might best be served by using one witness to communicate impact of crime, statute does not require this interpretation. Ind. Code 35-38-1-71.(a)(6). Prejudice to D is unclear, as trial judge is presumed to be unbiased.

RELATED CASES: Link, App., 648 N.E.2d 709 (Tr. Ct. did not err in considering both victim's mother's letter & testimony of victim's father at sentencing hearing); Bivins, 642 N.E.2d 928 (in a capital case, Ind.Const. Art. I, Sec. 16 prohibits admission of victim impact evidence unless it is relevant to alleged aggravating circumstance(s) or to rebut offered mitigating circumstance(s)).

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.c. Mitigating circumstances (Ind. Code 35-38-1-7(c))

TITLE: Burgess v. State

INDEX NO.: E.5.c.

CITE: (4th Dist., 09-18-06), Ind. App., 854 N.E.2d 35

SUBJECT: Failure to raise mitigators - waiver

HOLDING: Tr. Ct. did not err in imposing full thirty-year presumptive sentence for dealing in methamphetamine, which was maximum sentence under plea agreement. D's failure to raise four proposed mitigators at sentencing precluded him from raising them for the first time on appeal. Pennington v. State, 821 N.E.2d 899 (Ind. Ct. App. 2005). In declining to reduce or suspend part of the sentence, Tr. Ct. did not err in considering that D was an addict & was therefore at risk to re-offend.

Under circumstances of crime, specifically that D's three-year-old son was present in same house where D was manufacturing meth, Tr. Ct. properly concluded that reducing or suspending the presumptive sentence would depreciate the seriousness of the crime. However, fact that crime occurred within 1000 feet of an elementary school was erroneously used as "depreciate the seriousness" factor, because it constituted a material element of the offense. Because risk of manufacturing meth has already been factored into the crime, & no evidence supported conclusion that this crime posed a greater risk than any other manufacture of meth would, Court was unable to approve of such fact to support Tr. Ct.'s refusal to reduce or suspend part of D's sentence. Held, judgment affirmed.

Note: This case can be used to challenge the State's use of aggravators for first time on appeal.

TITLE: Strack v. State

INDEX NO.: E.5.c

CITE: (11/29/2022), Ind. Ct. App., 178 N.E.3d 1253

SUBJECT: D was not denied his right of allocution - cumulative sentencing error claim rejected

HOLDING: When a defendant pleads guilty and asks for an opportunity to give a statement in allocution, the trial court “should” grant that request free from cross-examination. Biddinger v. State, 868 N.E.2d 407, 412 (Ind. 2007). Here, Defendant was afforded both an opportunity to speak in the form of testimony and to make a statement in allocution after the evidence phase of his sentencing hearing concluded. His failure to object to the prosecutor's cross-examination during allocution waived his due process claim for appeal. The Court of Appeals declined to find fundamental error because affording defendant the opportunity to speak at sentencing following a guilty plea, free from cross-examination, is not a necessary pre-requisite to satisfying the constitutional right to be heard under Article 1, Section 13 of the Indiana Constitution. Regardless of waiver and Defendant's unavailing fundamental error argument, Court would not find that he was deprived of his right to be heard because the trial court gave Defendant the opportunity to testify at the hearing.

The Court also found error in precluding evidence pertaining to the impact Defendant's incarceration would have on his daughter, and that the trial court abused its discretion in failing to afford mitigating weight to Defendant's entry of a guilty plea without the benefit of a plea agreement. However, the Court declined to remand for resentencing due to the abuse of discretion and alleged cumulative effect of the trial court's errors because the Court of Appeals could not conclude that the trial court would have ordered a different sentence had it properly considered the mitigator and evidence.

TITLE: Collins v. State

INDEX NO.: E.5.c

CITE: (4th Dist., 12-14-00), Ind. App., 740 N.E.2d 143

SUBJECT: Inappropriate mitigator - prior relationship with victim

HOLDING: In appeal of sentence for burglary & rape, Ct. rejected D's claim that Tr. Ct. should have considered his prior physical & romantic relationship with victim as mitigating circumstance in this case. Although Indiana Evidence Rule 412 permits victim's or witness's prior sexual relationship with D to be introduced into evidence in sex crime prosecution, such evidence is relevant only to issue of D's guilt. Existence of prior physical relationship between D & victim cannot & should not serve as mitigator when Tr. Ct. considers appropriate sentence for rape conviction. Held, vacated in part & remanded for resentencing.

TITLE: Dockery v. State
INDEX NO.: E.5.c.
CITE: (4th Dist. 2/23/87), Ind. App., 504 N.E.2d 291
SUBJECT: Mitigating circumstances - consideration required
HOLDING: Tr. Ct. erred by failing to identify mitigating circumstances which existed & by entering conclusory recitation of aggravating circumstances. Here, D was 76 years old, in poor health, had no previous criminal record, & had been a productive worker. Failure of Tr. judge to find these facts impedes meaningful appellate review of sentence imposed. Tr. judge may not ignore facts in record which would mitigate offense. Jones, 467 N.E.2d 681. Failure of Tr. Ct. to find "mitigating circumstances when clearly supported by the record may reasonably give rise to a belief that they were overlooked [&] not properly considered." Townsend, 498 N.E.2d 1198. Criteria listed in Ind. Code 35-38-1-7(b) & (e) are merely illustrative of facts which if found to exist either mitigate or aggravate offense. Tr. Ct's. are not limited to those considerations but must particularize their conclusions by reciting specific facts & reasons which lead to conclusion that circumstance exists. Hammons, 493 N.E.2d 1250. Held, remanded for proper weighing of all aggravating & mitigating circumstances & entry of new sentencing order.

TITLE: Everroad v. State

INDEX NO.: E.5.c.

CITE: (1st Dist., 11-30-98), Ind. App., 701 N.E.2d 1284

SUBJECT: Failure to find mitigating circumstances - no error

HOLDING: In child molesting & sexual misconduct with minor prosecution, Tr. Ct. properly concluded there were no significant mitigating circumstances. Tr. Ct. is under no obligation to find mitigating circumstance exists simply because it is supported by some evidence in record; moreover, there is no obligation to weigh D's evidence of mitigating circumstance in manner D suggests. Saylor, 686 N.E.2d 80. Here, D argued that record supported finding of several mitigating circumstances, including: 1) D pled guilty to most of charges & spared State & his young victims burden of going through trial; 2) he expressed remorse for his conduct; 3) he was abused as child; & 4) he was productive member of community.

Affirming Tr. Ct.'s decision to give no mitigating weight to D's guilty plea, Ct. concluded that it was D who substantially benefitted from his plea because State agreed to dismiss six very serious pending charges against D & to reduce charge on count one from class A to class B felony. Contrary to D's statement of remorse during sentencing, record showed that D repeatedly rebuffed his psychiatrists' advice that, instead of preying on young boys to satisfy his sexual desires, D should seek to engage in consensual homosexual activity with adults. Further, D's assertion that he was molested by his father when he was child was mentioned for first time during sentencing hearing. Finally, in light of D's admission that he had molested between 75 to 100 boys during his lifetime, Ct. concluded that Bartholomew County has clearly suffered more than it benefitted from D's membership of that community. Held, 93-year sentence affirmed.

RELATED CASES: Bennett, App., 862 N.E.2d 1281 (Tr. Ct. was within its discretion in assigning lack of criminal history significant though not overwhelming weight, regardless of D's opinion).

TITLE: Frey v. State

INDEX NO.: E.5.c.

CITE: (2nd Dist., 01-31-06), Ind. App., 841 N.E.2d 231

SUBJECT: Statement of reasons - aggravating/mitigating circumstances; imposition of reduced sentence

HOLDING: Tr. Ct.'s duty to make a statement of reasons explaining sentence it imposes, including identification of aggravating & mitigating factors, is triggered in every instance except when it imposes presumptive sentence without explaining its decision. Tr. Ct. is required to explain its decision to impose reduced sentence. Here, Tr. Ct. explained its decision to sentence D to eight years for Class B felony battery, which is two years less than presumptive sentence but maximum possible sentence under plea agreement. However, Tr. Ct. erred by not specifically identifying aggravating & mitigating circumstances. Record supported finding of two aggravating circumstances: 1) extreme youth of victim & fact that D occupied a position of trust with her, & 2) particularized circumstances of offense, i.e., crushing small victim against floor with his foot with such force that it caused injuries consistent with suffocation & strangulation. Court found these aggravators to be in "medium to high range," & outweighed following mitigators: 1) that D confessed, pled guilty, & accepted responsibility for his actions, & 2) he expressed remorse. Court rejected D's contention that his history of criminal behavior consisting of a "remote" conviction should be considered a mitigating circumstance. Held, judgment affirmed; Sullivan, J., concurring; Vaidik, J., concurring in part & dissenting in part, would remand case for Tr. Ct. to identify aggravating & mitigating circumstances & determine appropriate sentence.

TITLE: Fugate v. State

INDEX NO.: E.5.c.

CITE: (02-12-93), Ind., 608 N.E.2d 1370

SUBJECT: Consideration of mitigators in sentencing

HOLDING: Tr. Ct. did not err in sentencing D to total of 100 years for murder & attempted murder convictions. Tr. Ct. found he had extensive record of arrests & convictions as juvenile & adult, & that previous incarceration had no effect on his behavior. Ct. also found D had two prior probation revocations, that he was in need of corrective or rehabilitative treatment, & that he had propensity to commit violent crimes. Although D had in past attempted suicide & been hospitalized for mental illness, Ct. rejected argument that Tr. Ct. erred in failing to consider evidence of his substance abuse & mental illness as mitigators. Only one aggravator need be listed to support enhanced sentence, & finding of mitigators discretionary with Tr. Ct., Graham, 535 N.E.2d 1152. If Tr. Ct. does not find existence of mitigators after they are argued by counsel, it does not have to explain why it found no mitigators, Hammons, 493 N.E.2d 1250, & it is not required to weigh or credit mitigating evidence as D suggested. Held, Tr. Ct. affirmed.

RELATED CASES: Anderson, App., 695 N.E.2d 156 (even if Tr. Ct. had found D's mental state mitigating factor, it was within Tr. Ct.'s discretion to balance that against D's criminal history & arrive at presumptive sentence); Snyder, App., 655 N.E.2d 1238 (Tr. Ct. under no obligation to accept as mitigating circumstances fact D provided consistent support to dependent, victim asked trial judge not to impose executed or enhanced sentence, & D previously completed one-year term of probation in 6 months); Cleary, App., 638 N.E.2d 431; Hicks, App., 631 N.E.2d 499 (Although D said imprisonment would cause financial hardship to wife & 3 children, Tr. Ct. did not err in finding no mitigators & imposing maximum sentence. Aggravators found were that reduced sentence would depreciate seriousness of situation, that D had significant criminal history & that he was on probation at time of offense. Findings were sufficient statement of Tr. Ct.'s considerations. Record revealed aggravators & mitigators, but Tr. Ct. found no mitigators & therefore did not have to conduct balancing of factors).

TITLE: Hernandez v. State

INDEX NO.: E.5.c.

CITE: (9/24/82), Ind., 439 N.E.2d 625

SUBJECT: Sentencing - Ind. Code 35-4.1-4-7 inapplicable to habitual

HOLDING: Tr. Ct. did not err in excluding mitigating factors from consideration in sentencing D as habitual. Here, D had argued fixed term enhancement denied him due process absent a finding that his prior confinement & attempted rehabilitation were ineffective. Aggravating/mitigating circumstances listed in Ind. Code 35-4.1-4-7 guide Tr. Ct.'s discretion to augment or reduce presumptive sentence. Habitual offender statute, Ind. Code 35-50-2-8, provides for a mandatory 30 years unless more than 10 years have elapsed since D was discharged on last offense, in which case Ct. may reduce 30-year fixed term by up to 25 years. Held, no error.

TITLE: Hughes v. United States

INDEX NO.: E.5.c.

CITE: (6/4/2018), 138 S. Ct. 1765 (U.S. 2018)

SUBJECT: Federal D entitled to sentence reduction

HOLDING: Under 18 U.S.C. § 3582(c), a district court may reduce a sentence if a D's sentence was based on a sentencing range that was subsequently lowered by the Sentencing Commission. Here, even though D's plea agreement called for a specific term of years (a "Type-C" agreement), and did not explicitly refer to any particular Guideline range, the agreement was still sufficiently based on a Guidelines range to make D eligible for sentence reduction.

After D was indicted on drug and gun charges, he entered a plea deal, which called for him to serve 180 months, but the plea agreement itself did not refer to a particular Guidelines range. However, the record showed that the Tr. Ct. calculated D's Guidelines range as 188 to 235 months and determined that the sentence was in accord with the Guidelines. Less than two months later, the Sentencing Commission adopted, and made retroactive, an amendment that had the effect of reducing D's sentencing range to 151 to 188 months. The District Court denied D's motion for a reduced sentence under 18 U.S.C. § 3582(c)(2), and the Eleventh Circuit affirmed, both concluding D was ineligible for a reduced sentence because his plea agreement did not expressly rely on a Guidelines range.

D is eligible for sentence reduction under 18 U.S.C. § 3582(c)(2). The District Court accepted his Type-C agreement after concluding that a 180-month sentence was consistent with the Guidelines, and then calculated D's sentencing range and imposed a sentence it deemed "compatible" with the Guidelines. Thus, the agreement was sufficiently based on the Guidelines, making D eligible for sentence reduction. Held, cert granted, Eleventh Circuit opinion at 849 F. 3d 1008 reversed, and remanded. Kennedy, J., joined by Ginsburg, Breyer, Sotomayor, Kagan, and Gorsuch, JJ.; Sotomayor, J., concurring; Roberts, C.J., dissenting, joined by Thomas and Alito, JJ.

RELATED CASES: Koons, (6/4/2018), (U.S. Supreme Court 2018) (Defendants not eligible for sentence reduction under 18 U.S.C. § 3582(c)(2) because their initial sentences were based on minimum-mandatory sentencing statutes, not on lowered sentencing Guidelines ranges; see full review, this Section).

TITLE: Kimbrough v. United States

INDEX NO.: E.5.c.

CITE: 552 U.S. 85, 128 S. Ct. 558, 169 L.Ed.2d 481 (2007)

SUBJECT: No error in sentencing departure based on crack/powder cocaine disparity

HOLDING: Majority held that pursuant to 18 U.S.C. 3553(a) and United States v. Booker, 543 U.S. 220 (2005) in relation to "advisory" nature of the U.S. Sentencing Guidelines that the federal district court did not err in giving D a 4.5 year sentence reduction below the Guidelines range based in part on judge's view that D's case exemplified the "disproportionate and unjust effect that crack cocaine guidelines have in sentencing" in comparison to powder cocaine. Fourth Circuit erred in holding the crack/powder disparity effectively mandatory under 21 U.S.C. 841. A district judge must include the Guidelines range in the array of factors warranting consideration, but the judge may determine that in a particular case a within-Guidelines sentence is "greater than necessary" to serve the objectives of sentencing under ' 3553(a). In making this determination, a judge may consider the disparity between the Guidelines' treatment of crack and powder offenses. The relevant statutes and Guidelines employ a 100-to-1 ratio that yields sentences for crack offenses three to six times longer than those involving an equal amount of powder. Congress with the Anti-Drug Abuse Act of 1986 (1986 Act) created the disproportionate ratio because it believed crack was significantly more dangerous than powder. Based on additional research and experience with the 100-to-1 ratio, the Sentencing Commission later determined that the crack/powder differential does not meet the objectives of the Sentencing Reform Act and the 1986 Act, noting that the disparity is inconsistent with the 1986 Act's goal of punishing major drug traffickers more severely than low-level dealers and fosters a lack of confidence in the criminal justice system through the perception that it promotes an unwarranted divergence based on race. The Commission has attempted to achieve a reduction in the crack/powder ratio, with Congress rejecting a 1995 amendment to the Guidelines that would have replaced the ratio with a 1-to-1 ratio while also directing the Commission to propose revision of the ratio under the relevant statutes and Guidelines. Congress took no action after the Commission's 1997 and 2002 reports recommending changing the ratio. The Commission's 2007 report again urged Congress to amend the 1986 Act, but also adopted an ameliorating change in the Guidelines with the modest amendment becoming effective on November 1, 2007. The federal sentencing statute, as modified by Booker, requires a court to give respectful consideration to the Guidelines, but permits the court to tailor the sentence in light of other [' 3553(a)] concerns as well.

Majority rejected government's contentions that the Guidelines adopting the 100-to-1 ratio are an exception to this general freedom. Court noted a cautionary reading of the 1986 Act draws force from Neal v. United States, 516 U.S. 284 (1996) which involved different methods of calculating LSD weights. The method applicable in determining statutory minimum sentences combined the weight of the pure drug and its carrier medium, while the one controlling the calculation of Guidelines ranges presumed a lower weight for the carrier medium. The Court rejected the argument that the Guidelines and the statute should be interpreted consistently, with the government's current position putting Neal in serious jeopardy if it were followed. Majority also rejected government's contention that Congress' disproving of the Commission's 1995 proposed guidelines amendment showed the 1986 Act required the Commission and courts to respect the 100-to-1 ratio. But nothing in Congress' 1995 action suggested that crack sentences must exceed powder sentences by a ratio of 100 to 1. To the contrary, Congress required the Commission to recommend a revision of the ratio that resulted in the 2007 amendment, neither disapproved nor modified by Congress, which deviated from the statute's 100-to-1

ratio and advanced a ratio that varies between 25-to-1 and 80-to-1. Majority also rejected government's argument that "unwarranted sentence disparities" would ensue if courts were allowed to deviate from the Guidelines based on disagreements with the crack/powder ratio. While uniformity remains an important sentencing goal, Booker recognized that some departures from uniformity were a necessary cost of the remedy that decision adopted. The 1986 Act's mandatory minimums constrain possible variations in relation to crack sentences. Further, where government correctly identifies possible disparities, the proper solution is for district courts to take account of sentencing practices in other courts and weigh these disparities against the other ' 3553(a) factors and any unwarranted disparities created by the crack/powder ratio itself.

Booker rendered the Sentencing Guidelines advisory but preserved a key role for the Sentencing Commission. In the ordinary case, the Commission's recommendation of a sentencing range will "reflect a rough approximation of sentences that might achieve ' 3553(a)'s objectives." The sentencing judge, on the other hand, is in a superior position to find facts and judge their import under ' 3553(a) in each particular case. Giving due respect to the District Court's reasoned appraisal, a reviewing court could not rationally conclude that the 4.5-year sentence reduction D received qualified as an abuse of discretion. Scalia, J., joining the majority opinion, also filed a concurrence; Thomas, J., and Alito, J., filed dissenting opinions.

TITLE: Koons v. United States

INDEX NO.: E.5.c.

CITE: (6/4/2018), 138 S. Ct. 1783 (U.S. 2018)

SUBJECT: Federal Ds not entitled to sentence reduction

HOLDING: In a companion case to Hughes v. United States, the U.S. Supreme Court held that Ds are not eligible for sentence reduction under 18 U.S.C. § 3582(c)(2) because their initial sentences were based on minimum-mandatory sentencing statutes, not on lowered sentencing Guidelines ranges.

Ds pled guilty to drug conspiracy charges that subjected them to mandatory minimum sentences under 21 U. S. C. § 841(b)(1). Before imposing their sentences, the District Court calculated their advisory Guidelines ranges. But because the top end of the Guidelines ranges fell below the mandatory minimums, the court concluded that the mandatory minimums superseded the Guidelines ranges. Thus, the District Court departed downward from the mandatory minimums under 18 U. S. C. § 3553(e) to reflect Ds' "substantial assistance" to help prosecute other drug offenders. In settling on the final sentences, the District Court considered the relevant "substantial assistance factors" set out in the Guidelines, but it did not consider the original Guidelines ranges that it had earlier discarded. After Ds were sentenced, the Sentencing Commission amended the Guidelines and reduced the base offense levels for certain drug offenses, including the Ds' offenses. Ds sought sentence reductions under 18 U.S.C. § 3582(c)(2), which makes Ds eligible if they were sentenced "based on a sentencing range" that was later lowered by the Sentencing Commission. Both the District Court and Eighth Circuit ruled that Ds were not eligible because they could not show that their sentences were "based on" the now-lowered Guidelines ranges.

For a sentence to be "based on" a lowered Guidelines range, the range must have played a relevant part in the framework the judge used. Hughes v. United States, 2018 U.S. LEXIS 3385, at 7 (U.S., June 4, 2018). Here, Ds do not fit into this category because the District Court did not consider the Guidelines ranges in imposing its ultimate sentences. Instead, it scrapped the ranges in favor of the mandatory minimums and never considered the ranges again.

It is true that sentencing judges are required to calculate the Guidelines range in every case, as it is true that many judges use those ranges as "the foundation of [their] sentencing decisions." Hughes, at 8. But this does not mean that any sentence subsequently imposed is "based on" a Guidelines range. More important is the role the Guidelines played in the selection of the sentence eventually imposed—not the role the range played at the outset. Here, while the ranges may have served as the starting point for the judge, the ranges clearly did not form the foundation of the sentences the judge ultimately imposed. See Hughes, at 9–11.

"In constructing a house, a builder may begin by considering one design but may ultimately decide to use entirely different plans. While the first design would represent the starting point in the builder's decision-making process, the house finally built would not be 'based on' that design. The same is true here. [Ds'] sentences were not 'based on' Guidelines ranges that the sentencing judge discarded in favor of mandatory minimums and substantial-assistance factors." Thus, Ds are not entitled to sentence reductions under 18 U.S.C. § 3582(c)(2). Held, cert. granted, and Eighth Circuit opinion at 850 F.3d 973 affirmed. Alito, J., for the unanimous Court.

TITLE: Moore v. United States,
INDEX NO.: E.5.c.
CITE: 555 U.S. 1, 129 S. Ct. 4, 127 L.Ed.2d 1 (2008)
SUBJECT: Right to counsel attaches at probable cause hearing, not when charges filed
HOLDING: In *per curiam* decision, Court reversed and remanded to the Eighth Circuit Court of Appeals finding lower court's decision on remand did not comport with Kimbrough v. United States, 552 U.S. 85, 128 S.Ct. 558 (2007). Kimbrough concluded that a judge “may consider the disparity between the [federal sentencing guidelines’] treatment of crack and powder cocaine offenses when applying 18 U.S.C. § 3553(a), “even in a mine-run case.” On remand, Court of Appeals concluded that “[a]s there was then no circuit authority to the contrary, we presume the district court was aware that Booker granted it discretion to vary downward based upon the impact of the crack cocaine guidelines on this D, but elected not to exercise that discretion.” Court agreed with *pro se* Petitioner that Eighth Circuit's characterization of the transcript is wrong, and that it was “clear that the district court thought judges had no discretion to reject” the Guidelines ratio. In light of district court's comments at sentencing, Eighth Circuit should have remanded case to district court for resentencing under Kimbrough.

TITLE: Scheckel v. State

INDEX NO.: E.5.c.

CITE: (08-31-93), Ind., 620 N.E.2d 681

SUBJECT: Failure to consider mitigation requires vacation of sentence

HOLDING: Where substantial mitigation evidence was presented, but Tr. Ct. found no mitigating circumstances, sentence must be vacated due to conclusion that mitigation was erroneously overlooked or not properly considered. Tr. Ct. imposed maximum 60-year sentence, finding aggravators but no mitigators. At sentencing hearing 14 people testified that D was loving, trusted, caring, helpful, responsible, sensitive, not mean-natured, & good person. There was evidence he had been employed, served as orderly at hospital, been a volunteer teacher in community children's program, & assisted with church activity. At time of crime, he had been accepted into nursing program & was described as not being aggressive or threatening & not in need of long-term incarceration. D was affected by alcoholic father & was portrayed as good worker with much promise. Although D had drinking problem, he was facing consequences, & crime was not in keeping with his character. Pre-sentence report largely corroborated testimony & provided good work appraisals. D had also been molested as child, & two years before murder arrest had been involved in auto accident where young mother of two was killed, receiving no counseling for either incident.

Tr. Ct. made no statement about evidence of mitigation or its evaluation for weight & credibility. Ind. Code 35-38-1-3 requires that if aggravators or mitigators are found, record must include statement of reasons for imposing sentence including ID of all mitigators & aggravators found; specific facts & reasons leading to finding them; & showing they have been balanced & weighed. While judges are not required to explain why they did not choose to make finding of mitigation, they cannot ignore mitigating facts in record. Held, sentence vacated, Givan, J., dissenting. **Note:** Decision also discusses improper aggravators.

RELATED CASES: Antrim, App., 745 N.E.2d 246 (Tr. Ct. erred in failing to consider, as significant mitigating factors, undue hardship D's incarceration may have on his family & D's guilty plea); Bretz, App., 701 N.E.2d 1251 (Ct. was unable to discern from sentencing statement whether Tr. Ct. considered evidence of potential mitigators, but found them insignificant, or whether it found some of them to be significant, but outweighed by identified aggravators); Scheckel, 655 N.E.2d 506 (explanation for enhancing murder sentence was inadequate where resentencing judge failed to mention significant aggravating & mitigating circumstances surrounding murder).

TITLE: Smith v. State
INDEX NO.: E.5.c.
CITE: (9-17-96), Ind., 670 N.E.2d 7
SUBJECT: Failure to find mitigating circumstances - no error
HOLDING: Tr. Ct. did not err in declining to find as mitigating circumstances fact that D was mentally impaired as result of brain damage caused by automobile accident. Ct. found that D's claim of mental impairment was "sufficiently debatable." While Tr. Ct. must take into account any established mitigating circumstances, there is no error in failing to find mitigation when mitigation claim is "highly disputable in nature, weight, or significance." Wilkins v. State, 500 N.E.2d 747 (Ind. 1986). Held, sentence affirmed.

TITLE: Tackett v. State

INDEX NO.: E.5.c.

CITE: (11-17-94), Ind., 642 N.E.2d 978

SUBJECT: Imposition of maximum sentence not manifestly unreasonable

HOLDING: Although Tr. Ct. failed to properly consider several mitigating factors at sentencing, imposition of maximum sentence for murder was not manifestly unreasonable in light of offense & offender. D participated with three other girls in torture & murder of twelve-year-old girl. As aggravating circumstances, Tr. Ct. focused on young age of victim & control which D exercised during lengthy & gruesome crime. As mitigators, Tr. Ct. found D's age & lack of prior criminal activity, but neglected to consider history of substance abuse, self-mutilation, suicidal tendencies, physical & sexual abuse, & hospitalization for psychiatric disorders. Where proper consideration of background of deep mental disturbance is lacking, revision of sentence or remand for new sentence may be required. However, in this case Ct. was not persuaded that maximum sentence was manifestly unreasonable. Held, sentence affirmed, Dickson, J., dissenting.

RELATED CASES: James, 643 N.E.2d 321; Loveless, 642 N.E.2d 974 (Tr. Ct. not obligated to consider D's extremely dysfunctional family background at sentencing; no indication of how dysfunctional background was relevant to D's level of culpability).

TITLE: Zavala v. State

INDEX NO.: E.5.c.

CITE: (12/12/19), Ind. Ct. App., 138 N.E.3d 291

SUBJECT: No abuse of discretion by failing to accept D's pre-sentence rehabilitation efforts as a mitigator

HOLDING: Defendant pleaded guilty to battery causing serious bodily injury as a Class C felony based on his use of a handgun to shoot the complaining witness (C.W.) multiple times, causing significant and enduring injuries. His plea agreement called for a sentencing cap of six years and the trial court sentenced him to five years with two and a half years in the Department of Correction and two and a half years to be served in Community Corrections. Due to multiple continuances, Defendant's sentencing was conducted approximately four years after the offense. On appeal, Defendant argued that the trial court should have identified his pre-sentencing rehabilitation efforts as a significant mitigating circumstance. Although trial court's sentencing statement and order could have been more detailed, it was not an abuse of discretion to reject Defendant's efforts at pre-sentencing rehabilitation as a significant mitigating factor in light of the serious nature of his offense. Further, Defendant's sentence was not inappropriate because the nature of the offense included shooting from a car and striking C.W. multiple times, leading to him almost dying, needing six surgeries and suffering ongoing serious bodily injury. Defendant's criminal history, gang affiliation, and reputation for violence reflect poorly on his character.

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.c.1. Lack of serious harm

TITLE: Warfield v. State

INDEX NO.: E.5.c.1.

CITE: (3/9/81), Ind., 417 N.E.2d 304

SUBJECT: Sentencing -- mitigating factors; threats do not comprise lack of serious harm

HOLDING: D was convicted of robbery & criminal confinement. On appeal, D claimed in part that Tr. Ct. abused its discretion in sentencing by ignoring mitigating factors, one of which he claims was fact that he did not contemplate commission of crime that threatened serious harm to persons or property. However, during crime, D was wearing mask & carrying gun loaded with hollow-point bullets. In addition, three people were robbed & bound, two of them having been bound in presence of five-year-old child. Lastly, after encountering police officer, D refused to surrender, threatened to kill officer, & held gun to officer's head before being disarmed. Ct. held that crime did threaten serious harm. Held, conviction affirmed.

RELATED CASES: Clay, 416 N.E.2d 842 (where robbery victim was threatened with serious harm, although no actual harm occurred, Tr. Ct. could not consider mitigation in imposing sentence).

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.c.2. Crime unlikely to occur (circumstances)

TITLE: English v. State

INDEX NO.: E.5.c.2.

CITE: (7/25/91), Ind., 575 N.E.2d 14

SUBJECT: Sentencing -- mitigating factors; crime unlikely to recur

HOLDING: D was convicted of murder & confinement for killing his ex-wife. D claimed that Tr. Ct. erred in failing to consider mitigating circumstances in that crime was highly emotional situation unlikely to recur. D claimed that he had no memory of event & that he was emotionally upset because of his belief that victim had been unfaithful during their marriage. Ct. held that this was not situation of sudden discovery. Divorce had been granted & D's knowledge or beliefs as to ex-wife's unfaithfulness had existed for some time, during which he had threatened to kill his ex-wife & his children. In addition, on day of attack, he came armed with weapon & note stating his intentions. Ct. held that D's claim of mitigating circumstances in this case was invalid. Held, conviction affirmed.

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.c.3. Victim induced/facilitated offense

TITLE: Roan v. State

INDEX NO.: E.5.c.3.

CITE: (9/21/92), Ind. App., 599 N.E.2d 230

SUBJECT: Sentencing -- mitigating circumstances; victim facilitated/induced offense

HOLDING: D was convicted of operating vehicle while intoxicated resulting in death. D alleged that sentencing Ct. erred in failing to identify & consider mitigating circumstances in that by purchasing drinks for D, D's passenger, who was killed when D drove into guardrail, facilitated D's crime. However, Ind. Code 35-38-1-7.1 does not require Ct. to consider fact that decedent facilitated offense to be mitigating circumstance; it permits Ct. to consider facilitation as mitigator. Finding of mitigating circumstances is not mandatory & rests within sound discretion of sentencing Ct. Gilley, 535 N.E.2d 130. Here, Ct. held that fact that decedent aided D in becoming intoxicated does not necessarily mean that she induced or facilitated crime; D's earlier alcohol- related driving offense suggests that he is capable of committing offense without inducement or facilitation. Held, conviction & sentence affirmed.

RELATED CASES: Lang, 461 N.E.2d 1110 (victim's kindness to D cannot be interpreted as inducement to commit crime).

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.c.5. Strong provocation

TITLE: Crawley v. State

INDEX NO.: E.5.c.5.

CITE: (3/26/97), Ind., 677 N.E.2d 520

SUBJECT: Sentencing -- mitigating circumstances; strong provocation

HOLDING: Failure to find mitigating circumstances that are clearly supported by record may imply that they were improperly overlooked. Johnson, 580 N.E.2d 959. However, sentencing judge is not obligated to credit these factors in same manner as would D, nor to explain why he or she has chosen not to find mitigating circumstances. Hammons, 493 N.E.2d 1250. Here, D was convicted of murder, criminal confinement, dealing in sawed off-shotgun, & residential entry pursuant to guilty plea. D claimed that judge ignored uncontradicted evidence of D's history of mental disturbance & intoxication, both of which D urges fall within statutory mitigator "substantial grounds tending to excuse or justify the crime, though failing to establish a defense," & which allegedly constituted provocation from within D's own mind, referring to "acted under strong provocation" mitigator. Ind. Code 35-38-1-7.1(c)(4). Ct. rejected D's claim & held that although existence of history of untreated mental disorders is mitigating factor, it was not error for Tr. Ct. to fail to discuss strong provocation factor or use it as mitigating circumstance. In addition, it was not an abuse of discretion for Tr. Ct. to find that D's intoxication at time of crime was not mitigating factor. Held, conviction & sentence affirmed.

RELATED CASES: Ousley, App., 807 N.E.2d 758 (evidence did not support consideration of provocation as a significant mitigating factor).

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.c.6. Lack of past criminal/delinquent activity

TITLE: Bluck v. State

INDEX NO.: E.5.c.6.

CITE: (2nd Dist.; 9-22-99), Ind. App., 716 N.E.2d 507

SUBJECT: Failure to give weight to mitigating factor - lack of criminal history

HOLDING: Tr. Ct. erred in not giving any weight to significant mitigator, D's lack of criminal record. No prior criminal record is factor which deserves substantial mitigating weight. Loveless, 642 N.E.2d 974. In criminal justice system founded on principles of reformation, where reasonably possible, sentencing orders should distinguish between first offenders & repeat offenders. Here, Tr. Ct. identified that instant convictions were D's first convictions; however, Tr. Ct. imposed maximum sentence permitted by law. Thus, Tr. Ct. failed to give D's lack of criminal history any weight at all. Held, judgment affirmed in part & reversed in part; Garrard, J., dissenting on basis that Tr. Ct. was justified in discounting D's lack of criminal record because there is reasonable inference that D's lack of record reflects no more than that he was not previously caught.

RELATED CASES: Marlett, App., 878 N.E.2d 860 (even where crime was egregious, maximum sentence was inappropriate in light of the lack of criminal history); Townsend, App., 860 N.E.2d 1268 (D's criminal history, or lack thereof, consisting of one misdemeanor conviction, in a murder & attempted murder case was neither an aggravator nor a mitigator); Matshazi, App., 804 N.E.2d 1232 (based on D's demeanor on witness stand, his total rationalization & justification for his behavior, Tr. Ct. did not abuse its discretion in according no weight to D's lack of prior criminal history); Cloum, App., 779 N.E.2d 84 (sentence for 38-year-old without so much as a single arrest on his record should be entitled to substantial mitigation); Mann, App., 742 N.E.2d 1025 (after D pled guilty to voluntary manslaughter, Tr. Ct. improperly enhanced his sentence when it recognized significant mitigating circumstance of lack of criminal history yet imposed maximum sentence)

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.c.8. Future crime unlikely

TITLE: Johnson v. State

INDEX NO.: E.5.c.8.

CITE: (11/14/91), Ind., 580 N.E.2d 959

SUBJECT: Sentencing -- mitigating circumstances; future crime unlikely

HOLDING: D killed her husband, his girlfriend, & another couple. D was convicted of four counts of felony-murder & sentenced to forty years on each count with two terms to be served consecutively to other two terms. D claimed that Tr. Ct. failed to identify & consider various mitigating circumstances including that D was unlikely to commit another crime. Failure to find mitigating circumstances that are clearly supported by record may imply that they were overlooked & not properly considered. Jones, 467 N.E.2d 681. However, Tr. Ct. has no duty to make affirmative finding expressly negating each potentially mitigating circumstance. Stout, 528 N.E.2d 426. Ct. held that under circumstances presented by this case, it was not error to omit specific reference to mitigating factors claimed by D. Held, conviction & sentence affirmed.

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.c.9. Restitution to victim

TITLE: Rife v. State

INDEX NO.: E.5.c.9.

CITE: (8/12/81), Ind. App., 424 N.E.2d 188

SUBJECT: Sentencing -- mitigating circumstances; restitution to victim

HOLDING: Fact that Tr. Ct. imposed restitution as part of sentence is factor which may be considered as mitigating circumstance if person has made or will make restitution to victim of his crime for injury, damage, or loss sustained. Here, D was convicted of deception & welfare fraud. Tr. Ct. imposed restitution as part of her sentence. However, this is only factor to be considered in determining sentence, & Ind. Code 35-4.1-4-7 does not give authority for making restitution element of sentence. Judge must act within statutorily prescribed limits, & imposition of restitution is not within those statutory limits. Held, conviction affirmed, imposition of restitution was reversed.

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.c.10. Undue hardship

TITLE: Antrim v. State

INDEX NO.: E.5.c.10.

CITE: (1st Dist., 2-26-01), Ind. App., 745 N.E.2d 246

SUBJECT: Failure to consider significant mitigating factors supported by record

HOLDING: Tr. Ct. erred in failing to consider, as significant mitigating factors, undue hardship D's incarceration may have on his family & D's guilty plea. In sentencing D to three years incarceration for possession of marijuana, Tr. Ct. found as aggravating factor that D had history of delinquent or criminal activity & found no mitigators. However, D's uncontroverted testimony established that his wife has cerebral palsy & is disabled; he provides support for his two teenage children at home & also pays support for third child; & that he has two jobs. Further, D's guilty plea is significant mitigating factor in that it shows willingness to accept responsibility for his actions & saves Ct. time & judicial resources. Widener v. State, 659 N.E.2d 529 (Ind. 1995). It was within Tr. Ct.'s discretion, however, to not find D's employment or number of years since his last arrest to be significant mitigating factors. Held, reversed & remanded for new sentencing hearing to consider two significant mitigating factors overlooked by Tr. Ct.

TITLE: Linger v. State

INDEX NO.: E.5.c.10.

CITE: (6/1/87), Ind. App., 508 N.E.2d 56

SUBJECT: Statutory mitigators -- imprisonment & undue hardship

HOLDING: D was convicted for four theft counts & sentenced to four years on each. Tr. Ct. identified fact that D's imprisonment would result in hardship to his dependents as mitigating circumstance. Ct. held that this was proper mitigating circumstance. However, Tr. Ct.'s statement of reasons for imposing enhanced sentence was inadequate because it failed to articulate for all four theft counts, that it evaluated & balanced mitigating factors against aggravating factors to determine if mitigating circumstances offset aggravating circumstances. Held, conviction affirmed & remanded for sentencing.

RELATED CASES: Strack, 178 N.E.3d 1253 (Ind. Ct. App. 2021) (trial court committed harmless error by precluding evidence pertinent to his daughter's circumstances while living with her mother); Abel, 773 N.E.2d 276 (D did not explain how his incarceration for maximum sentence will result in more hardship to his daughter than his incarceration for presumptive or minimum sentence).

TITLE: Mason v. State

INDEX NO.: E.5.c.10.

CITE: (6/15/89), Ind., 539 N.E.2d 468

SUBJECT: Mitigating circumstances -- no undue hardship

HOLDING: D was convicted of confinement, child molestation, & resisting law enforcement for which D received enhanced sentence. D claimed that this was error in light of mitigating circumstance that imprisonment would result in undue hardship on his three children. However, Tr. Ct. found that there was no threat of undue hardship in that D had not been living with children's mother & had never supported them. Held, conviction & sentence affirmed.

RELATED CASES: Reese, 939 N.E. 2d 695 (Ind. Ct. App. 2011) (no abuse of discretion in ignoring mitigating factor that incarceration would cause undue hardship to D's dependents; absent special circumstances, Tr. Ct. is not required to make a finding of undue hardship, and record showed that D's support of dependents was sporadic); Edmonds, App., 840 N.E.2d 456 (undue hardship was not a significant mitigating circumstance where D had custody of only two of her three children & they had been in care of her mother while D was in jail pending outcome of this case); Haun, App., 792 N.E.2d 69 (Tr. Ct. was not required to consider hardship of D's incarceration on his dependents); Wilkins, 500 N.E.2d 747 (D was separated from his wife at time of offense, & there was no evidence of D's pattern of prior support to his dependents, nor showing that they would suffer undue hardship as result of his imprisonment; held, no error).

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.c.11. Remorse (Ind. Code 35-38-1-7(d))

TITLE: Kocher v. State

INDEX NO.: E.5.c.11.

CITE: (10/1/82), Ind., 439 N.E.2d 1344

SUBJECT: Mitigating circumstances - remorse

HOLDING: Ind. Code 35-50-1A-7(b) does not require Tr. Ct. to consider enumerated factors as mitigating circumstances. Here, Tr. Ct. recognized D's remorse & stated that it would make a difference in the sentence imposed. D sentenced to presumptives for kidnapping (30) & robbery while armed (10), to be served concurrently. D argues presumptive sentences unreasonable because Ct. considered mitigating circumstances (remorse), outlined no aggravating circumstances & stated facts would make a difference. Tr. Ct. did not specifically find mitigating circumstances. Fact D believes certain factors enumerated in Ind. Code 35-50-1A-7 to be applicable to him is without significance. Tr. Ct. could properly consider remorse as factor in ordering sentences to be served concurrently (discretionary act). Held, sentences affirmed.

RELATED CASES: Holmes, 86 N.E.3d 394 (Ind. Ct. App. 2017) (trial court did not fail to address Defendant's purported mitigating factors of: 1) being raised in deplorable conditions, similar to the deplorable conditions leading to her child's death; 2) the fact that she was employed; and 3) her alleged remorse; it simply rejected them as mitigators), Sharp, 951 N.E.2d 282 (Ind. Ct. App. 2011) *sum. aff'd*. 970 N.E.2d 647 (Ind. 2012)(no abuse of discretion in failing to find remorse where Tr. Ct. found that D made a "very guarded" and "[v]ery carefully worded" statement which did not address his more serious Class A felony child molesting conviction); Banks, App., 841 N.E.2d 654 (D was "somewhat ambivalent" in his statements to Tr. Ct. at sentencing, & failed to take full responsibility for his actions; thus, Tr. Ct. did not abuse its discretion by choosing not to give mitigating weight to his remorseful statements).

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.c.12. Other (Ind. Code 35-38-1-7(d)).

TITLE: Archer v. State

INDEX NO.: E.5.c.12.

CITE: (11-19-97), Ind., 689 N.E.2d 678

SUBJECT: Mental illness as substantial mitigating factor - sentence manifestly unreasonable

HOLDING: Where Tr. Ct. failed to give weight to mitigating circumstance of D's mental illness, Ct. reduced total sentence from 165 years to 125 years. In rejecting this mitigating factor at sentencing, Tr. Ct. stated that D's psychological problems were not "to such an extent as to make it impossible for the D to control his actions & behavior in society." Tr. Ct.'s all or nothing premise is inconsistent with nature of mental illness, defined as including any disorder that "substantially disturbs" person's behavior & "impairs" person's ability to function. Ind. Code 35-36-1-1. Thus, while D's ability to control his behavior may be one important factor to consider when evaluating weight to be accorded D's mental illness, it is also appropriate to recognize degrees of impairment of that ability, as well as other factors such as overall limitations upon functioning & long-standing nature of mental illness. Here, although there were several aggravating circumstances which Tr. Ct. appropriately found, & facts of case were "egregious," uncontroverted evidence of D's mental illness warranted at least some offset to aggravating circumstances & reduction of total sentence. Held, convictions affirmed; sentence reduced to 125 years.

RELATED CASES: Ankney, App., 825 N.E.2d 965 (in light of well-documented evidence of D's significant & long-standing mental illness, it is entitled to some mitigating weight & warrants reduction in D's total sentence; D's attacks on officers & attempted escape were consistent with, if not obvious product of, his mental illness).

TITLE: Cloum v. State

INDEX NO.: E.5.c.12.

CITE: (5th Dist., 11-27-02), Ind. App., 779 N.E.2d 84

SUBJECT: D's guilty plea as mitigating factor

HOLDING: In murder prosecution, where D pled guilty to voluntary manslaughter, Tr. Ct. abused its discretion in not assigning any mitigating weight to D's decision to plead guilty. State reaped substantial benefit from D's agreement to plead guilty to voluntary manslaughter, which conserved judicial resources & spared victim's family from trauma of full-blown trial. Moreover, although guilty plea does not by itself necessarily demonstrate remorse on D's part, it can show acceptance of responsibility for one's actions where it is at least partially confirmed by other mitigating evidence of D's character. Sensback v. State, 720 N.E.2d 1160 (Ind. 1999). There was such evidence presented in this case. D himself testified as to his remorse & full acceptance of responsibility for what he had done, & his remorse was confirmed by others. Held, remanded for resentencing.

RELATED CASES: Healey, 969 N.E.2d 607 (Ind. Ct. App. 2012) (stipulating to the facts of a case in a bench trial in order to avoid a jury trial while preserving an issue for appeal is not entitled to mitigating weight because it is not the same as accepting responsibility through a guilty plea); Marlett, App., 878 N.E.2d 860 (although courts will look at benefit derived by a D from a dismissal of charges in a plea agreement, courts will do so with a practical eye towards discouraging the obvious overcharging of Ds; here Ct. should have considered mitigating effect of plea); Scott, App., 840 N.E.2d 376 (although D did not explicitly argue that his guilty plea deserved mitigating treatment, Ct. could not say matter was waived); Comer, App., 839 N.E.2d 721 (no error in failing to find guilty plea as mitigating circumstance); Strack, 178 N.E.3d 1253 (Ind. Ct. App. 2021); Francis, 817 N.E.2d 235 (Tr. Ct. erroneously failed to find D's guilty plea to be a mitigating circumstance; see full review at G.1.c).

TITLE: Davies v. State

INDEX NO.: E.5.c.12.

CITE: (11-28-01), Ind. App., 758 N.E.2d 981

SUBJECT: Fetal Alcohol Effects (FAE) as mitigator

HOLDING: It was proper for Tr. Ct. to give minimal weight to Fetal Alcohol Effects (FAE) as mitigating circumstance. Here, sixteen-year-old D was sentenced to 108 years after pleading guilty to murder, burglary, & criminal deviate conduct. Ind. Code 35-50-2-9(c)(6) lists as mitigator substantial impairment as result of mental disease or defect on D's capacity to appreciate criminality of his conduct or to conform that conduct to requirements of law. Although testimony of D's experts indicated that D suffered neurocognitive deficits & other dysfunctions, their testimony did not establish that mental disease or defect substantially impaired D's ability to appreciate criminality of conduct or conform that conduct to requirements of law. Testimony indicated that D was impulsive & incapable of fully understanding cause & effect; however, one doctor also testified that D obviously knew what he was doing was wrong. Therefore, it was not shown that FAE had substantial impairment on D. Held, judgment affirmed.

TITLE: Holmes v. State

INDEX NO.: E.5.c.12.

CITE: (10/18/2017), 86 N.E.3d 394 (Ind. Ct. App. 2017)

SUBJECT: Trial court did not fail to address purported mitigating factors

HOLDING: At sentencing for neglect of dependent conviction, trial court did not fail to address Defendant's purported mitigating factors of: 1) being raised in deplorable conditions, similar to the deplorable conditions leading to her child's death; 2) the fact that she was employed; and 3) her alleged remorse. The trial court did not fail to address these alleged mitigators; it simply rejected them.

Defendant pled guilty to one count of Level 1 felony neglect of a dependent resulting in death and five counts of Level 6 felony neglect of a dependent. The trial court imposed an aggregate sentence of 40 years. The trial court's reasoning for rejecting Defendant's upbringing as a mitigator was satisfactory. It noted that Defendant was educated, having been trained as a certified nursing assistant, "which teaches you to take care of people." Employment was not a mitigating factor because many people are employed, and Defendant had been employed for only a few months. See Newsome v. State, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003), *trans. denied*. As to Defendant's lack of remorse, the trial court was mistaken in finding Defendant had never said that she was sorry. Cf. Stout v. State, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005), *trans. denied*. Even so, the Court was confident the trial court would have imposed the same sentence because the nature and circumstances of Defendant's crime was the trial court's primary consideration, not Defendant's remorse. Finally, the Court found that Defendant's sentence was not inappropriate. Held, judgment affirmed.

TITLE: Magers v. State

INDEX NO: E.5.c.12.

CITE: (09-28-93), Ind., 621 N.E.2d 323

SUBJECT: No need to consider mental illness as mitigator

HOLDING: Although D was admitted as teenager to mental hospitals & diagnosed as incorrigible, aggressive, & paranoid schizophrenic, it was not error for Tr. Ct. to find no mitigators in sentencing him to 55 years for murder guilty plea. When D was committed to hospital by adoptive parents it was observed that he might at times be psychotic, unpredictable, and potentially dangerous. Update report from hospital offered in mitigation indicated he had progressed in treatment of hostility, belligerence & uncooperativeness, but still had difficulty managing impulses & responding to external controls. Report also said he was less inclined to respond to external controls in negative or hostile fashion, & that he was showing capacity for trusting relationships. At sentencing, judge found aggravators that D had threatened to kill others in recent past; had deliberately entered into scheme to rob cab driver & be prepared to kill him; initially appeared to have no remorse, & that there was high risk D would commit additional crimes. Tr. Ct. found no mitigators.

Ct. rejected argument that Tr. Ct.'s failure to find mitigators indicated it had overlooked & not properly considered them. Finding of mitigators is not mandatory, but discretionary, Wall, 573 N.E.2d 1134. Tr. Ct. isn't obligated to accept D's version of what is mitigating, Gaddie, 566 N.E.2d 535, and low mental capacity is no defense to criminal charge, Hester, 512 N.E.2d 1110. Ct. concluded Tr. Ct. was not required to consider D's past conduct & hospitalization as mitigation. Held, conviction affirmed, DeBruler & Dickson, JJ., dissenting without opinion.

RELATED CASES: Townsend, 45 N.E.3d 821 (Ind. Ct. App. 2015) (Tr. Ct. did not abuse its discretion in failing to find that temporary insanity due to voluntary intoxication was a mitigating factor); Washington, 940 N.E. 2d 1220 (Ind. Ct. App. 2011) (D's history of mental illness did not make 35-year sentence for class A felony battery inappropriate); Steinberg, 941 N.E. 2d 515 (Ind. Ct. App. 2011) (D failed to demonstrate nexus between his mental illness and murder where he did not present independent evidence regarding his mental health at sentencing, but rather at trial attempted to pin murder on masked men involved in nanotechnology); Webb, 941 N.E. 2d 1082 (Ind. Ct. App. 2011) (no abuse of discretion in determination that D's mental health is not a mitigating factor, where D had a pattern of stopping his prescribed treatment and self-medicating with illicit drugs); Marlett, App., 878 N.E.2d 860 (Aspergers may under certain circumstances be a significant mitigator); Scott, App., 840 N.E.2d 376 (though he suffered from bipolar disorder, D was capable of controlling his behavior, did not have significant limitations on his functioning, & failed to identify a nexus between his mental illness & instant offense); Ousley, App., 807 N.E.2d 758 (evidence did not establish a mental illness such that it is required to be given significant mitigating weight)

TITLE: Mayberry v. State

INDEX NO.: E.5.c.12.

CITE: (7/19/96), Ind., 670 N.E.2d 1262

SUBJECT: Sentencing -- nonstatutory mitigators; mental illness

HOLDING: D was convicted of murder & sentenced to maximum sentence of sixty years. Record shows that D introduced evidence that she was mentally ill at time she committed crime as mitigating factor. Tr. Ct. expressly declined, finding that D's mental illness was not mitigating factor under all circumstances of case, even though record showed that two of four psychiatrists testified that D was mentally ill at time she committed crime. Moreover, jury also thought D was mentally ill at time of her crime as evidenced by its returning verdict of guilty but mentally ill. In face of this evidence of D's mental illness, Ct. held that Tr. Ct. abused its discretion by refusing to find mental illness as significant mitigating factor. When Ct. considered D's mental illness & mitigator recognized by Tr. Ct., that D had led law-abiding life up to her commission of this crime & that there was no evidence that she had committed prior crimes, it did not think that aggravating circumstances so substantially outweighed mitigating circumstances that enhancement of presumptive sentence for murder was justified. Held, conviction affirmed & remanded for imposition of presumptive sentence for murder of forty years.

RELATED CASES: Crawford, 770 N.E.2d 775 (Ct. revised 65-year sentence for murder to presumptive 55 years because Tr. Ct. failed to consider D's mental illness as significant mitigating factor); Barany, 658 N.E.2d 60 (overwhelming evidence of D's mental illness at time of offense justified reduction of murder sentence; failure to find mitigating circumstances clearly supported by record gives rise to belief that Tr. Ct. was not cognizant of them & therefore failed to consider them).

TITLE: Moyer v. State

INDEX NO.: E.5.c.12.

CITE: (2nd Dist., 9-23-03), Ind. App., 796 N.E.2d 309

SUBJECT: Sentencing - failure to consider D's illness as mitigator

HOLDING: In dealing in controlled substance prosecution, in which D received 40-year aggregate sentence for two counts of Class B felony dealing & two counts of Class C felony dealing, Tr. Ct. erroneously ignored mitigating factor of D's illness. Tr. Ct. failed to properly weigh aggravators & mitigators by not acknowledging D's serious medical problems as a mitigator. D's serious illness & need for constant medical attention was clearly supported by record & was significant mitigating circumstance. Ct. did not believe case justified maximum sentences due to this mitigating circumstance & invoked its option to independently reweigh aggravators & mitigators at appellate level. Held, sentence reduced from 40 years to 24 years on four counts of dealing in controlled substances.

RELATED CASES: Biddinger, App., 846 N.E.2d 271, *sum. aff'd* 868 N.E.2d 407 (Tr. Ct. erroneously overlooked undisputed fact that D suffered from post-traumatic stress disorder as a mitigating circumstance).

TITLE: Sanders v. State

INDEX NO.: E.5.c.12.

CITE: (2/24/2017), 71 N.E.3d 839 (Ind. Ct. App. 2017)

SUBJECT: No obligation to find youth as mitigating factor

HOLDING: The trial court did not abuse its discretion in declining to find the defendant's youth – age 20 at sentencing - to be a mitigating factor. Defendant pled guilty to Level 3 Dealing in Cocaine and Class B misdemeanor possession of marijuana. Per the plea agreement, the trial court ordered Defendant to enter a drug court participation agreement, which, upon successful completion, would result in dismissal of the underlying charges. Defendant failed to comply with the program, so the trial court imposed the nine-year advisory sentence, suspending three years to probation.

"[Y]outh is not automatically a significant mitigating circumstance." Smith v. State, 872 N.E.2d 169, 178 (Ind. Ct. App. 2007), *trans. denied*. Whether a defendant's youth is a mitigating factor is within the trial court's discretion. Id. Here, the trial court acknowledged Defendant's youth but choose to not find it as a mitigating factor. "This was the trial court's call." Id. (*quoting Anglemyer v. State*, 868 N.E.2d 482, 493 (Ind. 2007)). Held, judgment affirmed.

TITLE: Scott v. State

INDEX NO.: E.5.c.12.

CITE: (01/27/21), Ind. Ct. App., 162 N.E.3d 578

SUBJECT: 14-year robbery sentence not inappropriate despite defendant being victim of human trafficking

HOLDING: In robbery and fraud prosecution, trial court abused its discretion in failing to consider and include as a mitigating circumstance Defendant's significant history as a victim of human trafficking. Although the Court would not second-guess the trial court's possible disbelief of Defendant's report of her own mental condition, the trial court effectively found that Defendant experienced no trauma whatsoever in refusing to consider trafficking a mitigating circumstance. To support such a finding, the trial court would have to conclude either that Defendant was never trafficked at all and had hoodwinked Indiana's statewide human trafficking task force (IPATH), advocates and federal prosecutors or that her victimization had no traumatic effect. Both conclusions are clearly against the logic and effect of the facts before the court. However, the trial court's error was harmless because considering the many unconstested aggravating circumstances, it would have reached the same 14-year sentence even after duly considering Defendant's history of being trafficked

The Court also rejected Defendant's argument that her sentence was inappropriate in light of the nature of the offenses and her character. In so holding, the Court noted the split among panels as to whether defendants must argue both the "character" and "nature of offense" prongs to avoid waiver of their Appellate Rule 7(B) claims. The Court chose to follow the Indiana Supreme Court's example in Shoun v. State, 67 N.E.3d 635 (Ind. 2017), declined to find waiver where a defendant exclusively challenged his sentence under the character prong.

TITLE: Stephens v. State

INDEX NO.: E.5.c.12.

CITE: (12/6/89), Ind. App., 546 N.E.2d 1260

SUBJECT: Sentencing -- Mitigating circumstances; age of D

HOLDING: Finding of mitigating factors is discretionary. McNeely, 529 N.E.2d 1317. Here, D was convicted of child molesting with deadly weapon & child molesting. He was given aggravated sentence & claimed Tr. Ct. erred by not considering his age as mitigating factor. D's age is not among statutory mitigating factors, but it is potentially mitigating factor. Stowers, 512 N.E.2d 853. At time of sentencing, D was twenty-three, so Ct. held that Tr. Ct. did not abuse its discretion in not considering D's age. Held, conviction affirmed.

RELATED CASES: Sanders, 71 N.E.3d 839 (Ind. Ct. App. 2017) (no abuse of discretion in not finding Defendant's age - 20 as a mitigating factor); Forgey, App., 886 N.E.2d 16 (Tr. Ct. was within its discretion to conclude D's military training assisted his commission of instant offenses & to reject D's military record as a mitigating sentencing factor).

TITLE: Trice v. State

INDEX NO.: E.5.c.12.

CITE: (2nd Dist., 4-23-98), Ind. App., 693 N.E.2d 649

SUBJECT: Mitigating factors - troubled childhood

HOLDING: D's sentence was not manifestly unreasonable. Tr. Ct. does not have to explain why it did not find mitigating circumstances & does not have to afford same weight to mitigating evidence. Herrera, 679 N.E.2d 1322. Here, D was sentenced to maximum term for aggravated battery based on his lengthy criminal history which Tr. Ct. recited in detail at sentencing hearing. Although D presented evidence of his troubled childhood wherein he was raised by his grandmother after his father went to prison for killing his mother, it was within Tr. Ct.'s discretion to give little weight to D's proffered mitigating circumstances of troubled childhood. Held, judgment affirmed in part & reversed in part on other grounds.

RELATED CASES: Mefford, 983 N.E.2d 232 (Ind. Ct. App. 2013) (it was within Tr. Ct.'s discretion to refuse to consider the fact that D was molested as a child as a mitigating circumstance); Ritchie, 875 N.E.2d 706 (Ind.2007) (evidence of a difficult childhood warrants little, if any, mitigating weight); Patterson, 909 N.E.2d 1058 (Ind. Ct. App. 2009) (a difficult childhood warrants little, if any, mitigating weight).

TITLE: Weeks v. State

INDEX NO.: E.5.c.12.

CITE: (6-25-98), Ind., 697 N.E.2d 28

SUBJECT: Consideration of mental illness as mitigating factor

HOLDING: In murder prosecution, Tr. Ct. erred in not finding D's history of mental illness, & jury's verdict of guilty but mentally ill (GBMI), to be of some mitigating value. In sentencing GBMI D in same manner as any other D, Tr. Ct.'s. should at minimum carefully consider on record what mitigating weight, if any, to accord to any evidence of mental illness, even though there is no obligation to give evidence same weight as D does. Verdict of GBMI may signal that significant evidence of mitigating value has been presented. Factors that bear on weight, if any, that should be given to mental illness at sentencing include: 1) extent of D's inability to control his or her behavior due to disorder or impairment; 2) overall limitations on functioning; 3) duration of mental illness; & 4) extent of any nexus between disorder or impairment & commission of crime. Archer, 689 N.E.2d 678. Here, although there was no clear nexus between D's illness & killing, there was sufficient showing of his erratic behavior to require that his illness be considered in sentencing. Held, conviction affirmed; sentence reduced to presumptive term of fifty years; Dickson, J., dissenting without opinion.

RELATED CASES: Lopez, App., 869 N.E.2d 1254 (even where all 4 factors outlined in Weeks indicate strongly that crimes at issue are attributable to D's mental illness, the mitigating weight of such illness has generally served to favor imposition of presumptive, rather than reduced, sentence, especially when nature of offense is particularly egregious); Ousley, App., 807 N.E.2d 758 (evidence of D's mental illness is not required to be considered & given weight at all times; rather, mental illness is a mitigating factor to be used in certain circumstances, such as when evidence demonstrates longstanding mental health issues or when jury finds that a D is mentally ill); Wessling, App., 798 N.E.2d 929 (Tr. Ct. abused its discretion by enhancing D's sentence based on D's mental capability, which was found to be both aggravating & mitigating); Prowell, App., 787 N.E.2d 997 (psychiatrist's testimony that D should never again be in society due to likelihood that he would murder again clearly outweighed any mitigating weight of D's illness); Smith, 770 N.E.2d 818 (Ct. remanded for new sentencing hearing where Tr. Ct. failed to indicate what, if any, mitigating weight to give to any evidence of D's mental illness); Powell, App., 751 N.E.2d 311 (Tr. Ct.'s failure to consider evidence of D's mental illness led to improperly enhanced sentence); Young, 696 N.E.2d 386 (195-year sentence was manifestly unreasonable because Tr. Ct. failed to consider D's mental disabilities as mitigating factor; held, remanded for imposition of 135-year sentence).

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.d. Aggravating circumstances (Ind. Code 35-38-1-7(b))

TITLE: Abercrombie v. State

INDEX NO.: E.5.d.

CITE: (11/12/82), Ind., 441 N.E.2d 442

SUBJECT: Aggravating/mitigating circumstances - weight

HOLDING: It is within Tr. Ct.'s authority to determine weight given to aggravating & mitigating circumstances & to increase/decrease sentence accordingly. McManus, 433 N.E.2d 775; Dorton, 419 N.E.2d 1289; Dean, 398 N.E.2d 1270. Here, Tr. Ct. added 10 years to Class B rape & imposed it as a consecutive term to sentences for robbery, burglary & theft (to be served concurrently with each other). Held, sentence is not manifestly unreasonable.

TITLE: Anderson v. State

INDEX NO.: E.5.d.

CITE: (5/26/83), Ind., 448 N.E.2d 1180

SUBJECT: Aggravating circumstances - consecutive sentences

HOLDING: Tr. Ct. did not err in using same aggravating circumstances used to enhance sentence to impose consecutive sentences. Here, D was convicted of attempted murder, 3 counts of armed robbery & criminal confinement. The presumptive sentences were enhanced (10 years for Class A felony; 5 years for each Class B felony) & ordered served consecutively, resulting in a sentence of 100 years. Alternative ways of increasing a particular sentence are not mutually exclusive under IN's present sentencing statutes. Humes, 426 N.E.2d 379; Washington, 422 N.E.2d 1218; Bish, 421 N.E.2d 608; Inman, 393 N.E.2d 767. Tr. Ct. has discretion to determine whether sentences are to be served concurrently or consecutively. Ind. Code 35-50-1-2(a). Held, sentence is not manifestly unreasonable.

TITLE: Beno v. State

INDEX NO.: E.5.d.

CITE: (11/25/91), Ind., 581 N.E.2d 922

SUBJECT: Aggravated sentence - improper considerations

HOLDING: Where D was convicted of 2 drug dealings arising out of nearly identical State-sponsored buys within 4-day period, sentencing to maximum, consecutive, terms was inappropriate. Convictions were result of police sting operation, & nothing prevented State from conducting any number of additional buys, placing D on hook for additional crimes with each sale. Ct. found, however, that using multiple buys to support multiple convictions with maximum consecutive sentences was error. Neither probation nor State requested consecutive sentences, & Tr. Ct. stated it was imposing consecutive sentences to make example of D to other drug dealers. While recognizing deterrent goal of sentencing, Supreme Ct. found sentencing was not proper place for judge to send personal philosophical or political message, & that desire to send message was not proper reason to aggravate sentence. Held, transfer granted, sentence modified to maximum concurrent sentences, for total of 50 years, & Tr. Ct. ordered to vacate \$30,000 fine or make express statement that D not be imprisoned for failing to pay fine, Givan, J., dissenting.

RELATED CASES: Saunders, App., 794 N.E.2d 523 (alleged applicability of Beno to D's direct appeal would have still resulted in a 70-year sentence; see full review at G.6.e); Hendrickson, App., 690 N.E.2d 765 (purpose of Beno in prohibiting consecutive sentences when police entice additional drug buys, applies whether or not different drugs are involved); Ervin, App., 683 N.E.2d 641 (statements at sentencing, taken in their entirety, were appropriately interpreted as declaration that judge would not permit race to play role in sentencing & that he would give maximum sentence regardless of victim's race, as he had done in previous case); Hopkins, App., 668 N.E.2d 686; Grimes, App., 633 N.E.2d 262 (following Beno).

TITLE: Bethea v. State

INDEX NO.: E.5.d.

CITE: (3/14/2013), 983 N.E.2d 1134 (Ind. 2013)

SUBJECT: Aggravators - courts can use elements of offenses dismissed pursuant to a plea

HOLDING: Tr. Ct.'s finding that the injury suffered by the victim to be an aggravating factor was proper despite the plea agreement that dismissed that count. A Tr. Ct. cannot aggravate a sentence in order to compensate for his or her disagreement with the jury verdict. Hammons v. State, 493 N.E.2d 1250 (Ind. 1986). Here, D entered into a plea agreement in which he would plead guilty to two class B felonies, and in return, the State would dismiss the seven additional felony charges. The sentence was left open to the Tr. Ct.'s discretion, and the Tr. Ct. entered maximum, consecutive sentences. In support of the sentence, Tr. Ct. considered the victim's injury as an aggravator, although the injury was an element of one of the dismissed charges. Although there are cases applying Hammons to guilty pleas, the Court held that these cases were erroneously decided. A guilty plea is a contract between the parties, and here, the plea did not limit what evidence could be presented as aggravators or mitigators at sentencing. Unless the evidence is forbidden by terms of the plea agreement, the Tr. Ct. judge may consider all evidence properly before him. Therefore, the Court holds that Hammons does not apply to cases involving plea agreements, and as such, D's appellate attorney was not ineffective for failing to raise the issue on appeal. Held, Court of Appeals' memorandum decision vacated and the judgment of the post-conviction court affirmed.

NOTE: This case overrules a long line of cases, including, but not limited to, Conwell v. State, 542 N.E.2d 1024 (Ind. Ct. App. 1989), Carlson v. State, 716 N.E.2d 469 (Ind. Ct. App. 1999), Farmer v. State, 772 N.E.2d 1025 (Ind. Ct. App. 2002) and Roney v. State, 872 N.E.2d 192 (Ind. Ct. App. 2007).

RELATED CASES: J.S., 110 N.E.3d 1173 (Ind. Ct. App. 2018) (juvenile court may consider evidence beyond juvenile's agreed admission in determining placement options; see full review at U.11.e); Healey v. Carter, 109 N.E.3d 1043 (Ind. Ct. App. 2018) (where Defendant was charged with 1 count of battery and 2 counts of criminal confinement for assaulting a child, but where the only offense he pled to did not state the age of the victim, Defendant was still required to register as a sex offender; in deciding whether to impose the registration requirement, DOC may consider facts beyond those acknowledged in the factual basis supporting a plea agreement); Forshee, 56 N.E.3d 1182 (Ind. Ct. App. 2015) (in sentencing D who pleaded guilty to dangerous control of a child, Tr. Ct. did not abuse its discretion in using as aggravator the "position of care" element of Class A felony neglect offense dismissed pursuant to guilty plea agreement); Morris, 985 N.E.2d 364 (Ind. Ct. App. 2013) (in sentencing D for Class A misdemeanor OWI, Tr. Ct. could consider victim's death as evidence of egregiousness of offense even though State agreed to dismiss OWI causing death charge in exchange for his guilty plea).

TITLE: Chastain v. State
INDEX NO.: E.5.d.
CITE: (3-4-21), Ind. Ct. App., 165 N.E.3d 589
SUBJECT: 23-year sentence for child molesting affirmed despite improper aggravator
HOLDING: Despite a trial court improperly considering an aggravating factor that went against a “clear directive” from the Indiana Court of Appeals, Defendant's 23-year sentence for molesting his niece was upheld on remand. In 2019, Defendant's Class A felony child molesting conviction was reduced to a Class B felony on direct appeal, and the case was remanded for resentencing. In its first opinion in the case, the Court of Appeals found “concerning” an aggravating factor noting other allegations of child abuse against Defendant, even though he did not admit, was not charged or had been acquitted of charges based on those allegations. However, in resentencing Defendant to 23 years on remand, the trial court again noted the other allegations of sexual misconduct made by three individuals against Defendant.

The trial court assigned “the greatest weight” to the aggravator that Defendant was at least 21 years old at the time he molested C.W., allowing his age to be an enhancing factor. Because Defendant admitted his date of birth at the sentencing hearing, this aggravator did not run afoul of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), and his right to have a jury determine whether his age should have constituted an aggravating factor. Defendant also waived his Blakely arguments by not objecting at the time of sentencing. Court also found no abuse of discretion based on the trial court’s use of the other allegations of molestation as a “moderating factor” that diminished Defendant's lack of criminal history, despite the trial court's improper consideration of this factor in violation of the court's "clear directive." A single aggravating circumstance is enough to justify an enhancement or the imposition of consecutive sentences. Here, the trial court found several valid aggravators and several other mitigators. Under these circumstances, the Court could say with confidence that the trial court would have imposed the same sentence even without the improper consideration that was used to diminish the weight of the mitigator. The Court likewise rejected Defendant's argument that his sentence was inappropriate in light of the nature of his crime and character.

TITLE: Cheshier v. State

INDEX NO.: E.5.d.

CITE: (2nd Dist., 2-3-98), Ind. App., 690 N.E.2d 1226

SUBJECT: Aggravating factors - cannot use element of crime to enhance

HOLDING: Although fact that D used deadly weapon during battery could not be used as aggravating factor because it was element of conviction, enhancement of sentence was proper because it was based on other valid aggravating factors. Fact that comprises material element of crime may not constitute aggravating circumstance supporting enhanced sentence. Manns, App., 637 N.E.2d 842. Nonetheless, even if Tr. Ct. considered impermissible factors to enhance sentence, Ct. should affirm sentence if other aggravating circumstances are adequate to support sentence imposed. Here, along with improperly using deadly weapon as aggravator, Tr. Ct. also used facts that D had been arrested seven times & had history of increasingly violent behavior, which was alone enough to support enhancement. Held, conviction affirmed.

RELATED CASES: Gellenbeck, App., 918 N.E.2d 706 (no error in considering disparity between D's and CW's ages in enhancing child seduction convictions); Taylor, App., 891 N.E.2d 155 (under the advisory sentencing scheme, it was not per se improper for the Tr. Ct. to consider the molesting victim's age of eight-year-old as an aggravator); Pedraza, 887 N.E.2d 77 (under advisory scheme, element of offense or habitual offender status can be used as aggravator, but two sentences enhanced by the same crime cannot be run consecutively); Douglas, App., 878 N.E.2d 873 (prior sex offenses cannot be considered as part of criminal history for sentence for failure to register as sex offender); Haas, App., 849 N.E.2d 550 (facts charged as overt acts could be used to support heinous nature & circumstances aggravator); Comer, App., 839 N.E.2d 721 (in child molesting case, Tr. Ct. improperly considered fact that victim was under age of 12 at time of offenses); Kelp, 119 N.E.3d 1071 (Ind. Ct. App. 2019); Hart, App., 829 N.E.2d 541 (Tr. Ct. improperly used fact that D disseminated photos of his four-year-old child over the Internet to enhance child exploitation counts, as this consideration is part of criminal conduct); Jones, App., 812 N.E.2d 820 (in nonsupport case, Tr. Ct. did not err in aggravating D's sentence based solely on the excessive arrearage which D argued was an element of the offense; amount of arrearage is "astounding" and several times more than the statutory minimum for a Class C felony); Davis, App., 796 N.E.2d 798 (because element of crime may not also be used to enhance sentence without particularized circumstances of case, & Tr. Ct. Here gave no particularized circumstances, fact that victim was less than 12 years old, normally a statutory aggravator, was not a valid aggravator in domestic battery case); Rodriguez, App., 785 N.E.2d 1169 (in operating while intoxicated causing death prosecution, Tr. Ct. could consider D's high BAC level & clear abuse of alcohol & time of day of D's conduct together as separate & proper aggravating circumstances); Kien, App., 782 N.E.2d 398 (fact that molestation occurred on multiple occasions was improper aggravator because D was convicted of each act & fact which comprises material element of crime may not also be used & aggravating circumstance to support enhanced sentence; however, Tr. Ct. properly relied upon what commission of separate crimes of molestation revealed about D's character when he had time to reflect upon harm he was causing to victim); Quintanilla, 146 N.E.3d 982 (Ind. Ct. App. 2020) (no error in considering large amount of drugs as aggravator even though the degree of the offense had already been elevated based upon the amount of drugs); Smith, 780 N.E.2d 1214 (Tr. Ct. erred in using fact that D sells drugs for profit & amount of drugs involved in incident as aggravating circumstance because these factors comprise material element of offense with which D was convicted); Conrad, App., 747 N.E.2d 575 (D convicted of unlawful possession of firearm by serious violent felon may not have his sentence enhanced again under general

habitual offender statute by proof of as same felony used to establish that D was serious violent felon); Stone, App., 727 N.E.2d 33 (Tr. Ct. erred in considering aggravating circumstances fact that D delivered amount greater than three grams of cocaine, & that offense occurred within 1,000 feet of school); Allen, App., 722 N.E.2d 1246 (fact that D held gun & made threats to hotel employee during robbery did not constitute aggravated & serious role to justify consecutive sentence; sentence upheld on other grounds); Benton, App., 691 N.E.2d 459 (although natural element of crime cannot also be used as aggravating circumstance to enhance sentence, particularized circumstances of crime, such as viciousness with which injury was inflicted, may support enhancement).

TITLE: Couch v. State
INDEX NO.: E.5.d.
CITE: (11/14/2012), 977 N.E. 2d 1013 (Ind. Ct. App. 2012)
SUBJECT: Admission of uncharged misconduct at sentencing did not circumvent plea agreement
HOLDING: During sentencing hearing in child molesting case, Tr. Ct. did not abuse its discretion by admitting testimony of two other alleged victims. Ind. Evid. Rule 101(c)(2) states the evidence "rules, other than those with respect to privileges, do not apply in" sentencing proceedings. *Citing Roney v. State*, 872 N.E.2d 192 (Ind. Ct. App. 2007), D argued that admission of testimony from victims of uncharged molestations amounts to a circumvention of his plea agreement because Tr. Ct. allegedly used their testimony to enhance his sentences and order some of them to be served consecutively. Court described D's contention as "pure conjecture supported by nothing in the record," as Tr. Ct. did not even mention it in imposing sentence.

Court also rejected appropriateness challenge to D's aggregate 91-year sentence for five counts of Class A felony child molesting, Class C felony child exploitation and possession of child pornography. Nature of D's crimes was particularly egregious and his guilty plea was a pragmatic decision rather than a true acceptance of responsibility for his crimes. D conceded that uncharged misconduct evidence admitted at sentencing was relevant as it related to his character. Thus, Court is not prevented from considering how it illustrates D's character in its appellate consideration of the appropriateness of his sentence. Held, judgment affirmed.

TITLE: Day v. State

INDEX NO.: E.5.d.

CITE: (10/10/90), Ind., 560 N.E.2d 641

SUBJECT: Sentencing - partially impermissible aggravators; review

HOLDING: Because permissible grounds supporting D's sentence are not sufficient to persuade Ind. S. Ct. that original sentencing decision would have been same had Tr. Ct. not relied on impermissible factor, it remands for resentencing. D was convicted of attempted rape, criminal confinement, & 2 counts of battery, & received maximum, consecutive sentences plus a habitual enhancement. In stating its reasons for this sentence, Tr. Ct. referred to prior convictions, including various juvenile offenses. Ind. S. Ct. determines that Tr. Ct.'s reliance on juvenile record was improper (see Day card at E.5.d.2), & must determine effect of error on sentence. When reviewing Ct. can identify sufficient aggravating circumstances to persuade it that Tr. Ct. would have entered same sentence even absent impermissible factor, it should affirm sentencing decision. When reviewing Ct. cannot say with confidence that same result would have been reached, it should remand for resentencing or correct sentence on appeal. Here, Ind. S. Ct. cannot say with confidence that sentence is supportable absent reliance on juvenile record. First, D was sentenced to maximum, consecutive sentences totaling 56 years. Second, 2 convictions used to enhance were also basis for habitual enhancement. Third, while Tr. Ct. referred to D's proclivity for sexual violence against women, record does not contain sufficient facts to demonstrate that convictions which were properly considered involved such sexual violence. In short, while 56 years may be justifiable sentence, reliance on D's juvenile record played more than minimal part in Tr. Ct.'s decision, & Ind. S. Ct. cannot say with confidence that D would have been sentenced to 56 years without it. Held, remanded for new sentencing hearing.

TITLE: Dean v. United States
INDEX NO.: E.5.d.
CITE: 129 S. Ct. 1849 (2009) 04/29/2009
SUBJECT: Accidental discharge sufficient for harsher mandatory minimum sentence
HOLDING: 18 U.S.C. § 924(c)(1)(A), which imposes mandatory minimum sentences for using or carrying a firearm in the course of a violent crime or a drug trafficking offense and that hikes the punishment "if the firearm is discharged" does not require proof that the offender intended to fire the gun. Court noted that statute does not mention intent and is phrased in the passive voice. Moreover, "it is not unusual to punish individuals for the unintended consequences of their unlawful acts." Here, D's gun accidentally discharged during a bank robbery, but no one was harmed. D was convicted of conspiring to commit a bank robbery and discharging a firearm during an armed robbery. Because the firearm was "discharged" during the robbery, he was properly sentenced pursuant to 924(c)(1)(A)(iii) to a 10-year mandatory minimum prison term. Held, Eleventh Circuit opinion at 517 F.3d 1224 affirmed. Stevens, J., DISSENTING; Breyer, J., DISSENTING.

TITLE: Higginson v. State

INDEX NO.: E.5.d.

CITE: (4-28-23), Ind. Ct. App., 209 N.E.3d 15

SUBJECT: 30-year sentence upheld for woman's killing of allegedly abusive husband

HOLDING: Defendant, who shot her husband, was originally charged with murder. She later pleaded guilty to Level 2 felony voluntary manslaughter. At the sentencing hearing, Defendant presented testimony from a doctor who had diagnosed her with PTSD. The doctor testified the PTSD symptoms arose as a result of her marriage. The trial court identified no mitigating factors and several aggravating factors in its sentencing decision. On appeal, Defendant argued the trial court abused its sentencing discretion by finding improper aggravators and failing to find mitigators supported by the record. On the claim of improper aggravating circumstances, the Court of Appeals agreed that the trial court's statement reiterating an essential element of the offense (i.e., the loss of life) could not be used as an aggravator to enhance the sentence. But despite this error, the Court said it was confident that the trial court would have imposed the same sentence irrespective of the improper aggravator. The Court of Appeals found no error in the trial court considering the circumstances surrounding the commission of the crime as an aggravating factor. The trial court noted in its sentencing statement that Defendant gave at least three accounts of how she retrieved her firearm and shot her husband. While "not entirely discounting her PTSD diagnosis," the trial court found that Defendant put herself in a "very volatile situation, after having been removed from it" the night before. The trial court also did not err in finding a dismissed charge in Defendant's criminal history an aggravating factor. In context, the trial court properly determined Defendant's arrest record for battery to be significant because she has not been deterred from engaging in additional domestic violent episodes despite her arrest. On Defendant's claim that the trial court failed to consider the mitigating factors that the crime was the result of circumstances unlikely to recur, was induced or facilitated due to her PTSD diagnosis, and that there are substantial grounds tending to excuse or justify the crime due to her PTSD diagnosis, the Court of Appeals found no error. The trial court gave limited mitigating weight to the factor of circumstances unlikely to recur because it could not be certain that Defendant would not react violently in the same way in case of another incident. As for Defendant's PTSD, the Court of Appeals said, "Based on our review of the record, we find that, notwithstanding the trial court's acceptance of [Defendant's] PTSD resulting from the domestic abuse she endured during her lengthy marriage to [her husband], other evidence strongly suggests that [Defendant] deliberately engaged in violent behavior, demonstrating the ability to control her actions without limitation. As noted, the trial court had the opportunity to review [the State's expert's] report, which provided that [Defendant's] behavior of returning to a home where she had endured abuse after having been removed from it the day before was inconsistent with a person who has PTSD." The Court concluded she had the capacity to control her behavior at the time of the offense, so the trial court did not err in assigning indeterminate weight to this mitigator.

Defendant also challenged the appropriateness of her 30-year maximum sentence for a Level 2 felony. The Court of Appeals found that despite having one criminal charge dismissed in 2014, Defendant's "record of arrest" reflects poorly on her character. The Court also found that an hour before she shot her husband, Defendant threatened him on Facebook. Even though Defendant pleaded guilty to voluntary manslaughter, a lesser included offense to murder, the Court of Appeals concluded she blamed her husband for her actions, and she provided multiple inconsistent accounts of how she shot him to various parties. By doing so, the Court of Appeals reasoned, she attempted to shift the blame away from herself and undermine her own responsibility for the crime, which reflects poorly on her

character. Without discussing the nature of Defendant's offense, the Court concluded Defendant failed to meet her burden of persuading her 30-year sentence, "which we do not find to be an outlier, is inappropriate in light of her character and the nature of her offense." Held: affirmed.

TITLE: Jimmerson v. State

INDEX NO.: E.5.d.

CITE: (1st Dist., 6-13-01), Ind. App., 751 N.E.2d 719

SUBJECT: Improper consideration of aggravating circumstances

HOLDING: In voluntary manslaughter prosecution, Tr. Ct. considered improper aggravators when it enhanced D's sentence by ten years. "In need of correctional or rehabilitative treatment that can best be provided by commitment to penal facility" aggravator was improperly applied because Tr. Ct. provided no individualized statement as to why it applied to D. Ct. also rejected D's juvenile criminal record as aggravator because nothing in record related specifics of juvenile offense. Day v. State, 560 N.E.2d 641 (Ind. 1990). Nevertheless, Tr. Ct. could consider D's juvenile record in assessing risk of his committing another crime & in determining his sentence. Appellate Ct. may also rely on nature & circumstances of offense in affirming enhanced sentence, even where Tr. Ct.'s stated aggravators are improper & Tr. Ct. did not rely on nature & circumstances in enhancing sentence. Mitchem v. State, 685 N.E.2d 671 (Ind. 1997). Here, nature & circumstances were slightly aggravating because, rather than avoiding confrontation with victim, D instead carried concealed deadly weapon to place where he knew victim could be found with purpose of "resolving" conflict. Ct. rejected D's claims that "strong provocation" & his allegedly low I.Q. should have been used as mitigators, which leaves his youth as sole mitigator as found by Tr. Ct. Held, 40-year sentence vacated & remanded for resentencing.

TITLE: Johnson v. State

INDEX NO.: E.5.d.

CITE: (3rd Dist., 10-30-06), Ind. App., 855 N.E.2d 1014

SUBJECT: Consideration of mental illness as both aggravator & mitigator

HOLDING: In rape prosecution, Tr. Ct. did not abuse its discretion in finding D's mental illness as a mitigator & then finding as aggravators that D did not regularly take his medication for schizophrenia & that D is a risk if he is released from prison & does not take his medication. Court disagreed with D's premise that Tr. Ct. considered his mental illness as a mitigating & two aggravating circumstances. Tr. Ct. found the mental illness itself to be a mitigating circumstance, while it found D's failure to control the mental illness with medication & his risk of re-offending if he were released from prison & did not take his medication as separate aggravating circumstances. Held, presumptive 30-year sentence affirmed; Vaidik, J., dissenting, noted that failure to take medication is a hallmark of schizophrenia, & given fact that medication noncompliance is very common in schizophrenic patients, mental illness cannot be both a mitigator & two aggravators. See Wessling v. State, 798 N.E.2d 929 (Ind. Ct. App. 2003).

RELATED CASES: Webb, 941 N.E. 2d 1082 (Ind. Ct. App. 2011) (no abuse of discretion in determination that D's mental health is not a mitigating factor, where D had a pattern of stopping his prescribed treatment and self-medicating with illicit drugs).

TITLE: Lamar v. State

INDEX NO.: E.5.d.

CITE: (2nd Dist., 10-20-09), Ind. App., 915 N.E.2d 193 (Ind. Ct. App. 2009)

SUBJECT: Reduced charges as aggravator - no error

HOLDING: D had been charged with three Class A felonies with habitual offender and substance offender count but pleaded guilty to one Class C felony and habitual substance offender count. On appeal, Court rejected argument that Tr. Ct. abused its discretion when it found that benefit he received from his plea bargain was an aggravator to his sentence. While Tr. Ct. stated that the aggravator is the reduced charges, it appears it viewed the substantial benefit received as a result of plea agreement as the aggravator. Tr. Ct. characterized this as an aggravator, but benefits D received from plea agreement more properly relate to determination of whether plea agreement is a significant mitigator. See Sensback v. State, 720 N.E.2d 1160 (Ind. 1999). Although D received maximum sentence of sixteen years, he also avoided a potential sentence of eighty years had he been convicted of all three Class A felonies and been found to be a habitual offender. D received a large benefit from plea agreement, which reduced its value as a mitigator for sentencing. Held, judgment affirmed; Robb, J., concurring in result, believes Tr. Ct. abused its discretion by affirmatively stating it was considering plea agreement to be an aggravator, but would have imposed same sentence even if it had not improperly considered this aggravator.

TITLE: Laughner v. State

INDEX NO.: E.5.d.

CITE: (1st Dist., 6-12-02), Ind. App., 769 N.E.2d 1147

SUBJECT: Improper aggravating circumstances - presumptive sentence

HOLDING: In sentencing D to presumptive term for class C felony, Tr. Ct. impermissibly found aggravating circumstances that relied exclusively on material elements of offense. Specifically, Tr. Ct. referred to nature & circumstances of case & fact that D was intending sexual contact with thirteen-year old as aggravating circumstances. Then, Tr. Ct. used these purported aggravators to offset multiple mitigating circumstances it found. Although Ct. found no authority stating such a proposition, Ct. concluded that that which cannot be used to enhance a sentence cannot be used to "balance" circumstances that may properly serve to reduce sentence as mitigators. Held, remanded for resentencing of D to less than presumptive sentence.

RELATED CASES: Davidson, 916 N.E.2d 954 (Ind. Ct. App. 2009) (if Ct. were to hold that a Tr. Ct.'s statement that the mitigator outweighed any aggravators required imposition of less than advisory sentence, that would effectively reinstate the advisory sentence as a presumptive sentence & would also be contrary to IND. CODE 35-38-1-7.1(d), which permits imposition of any sentence that does not exceed statutory or constitutional limits, "regardless of the presence or absence of aggravating or mitigating circumstances"); Eaton, App., 825 N.E.2d 1287 (Tr. Ct. erroneously sentenced D when it imposed presumptive sentence after expressly finding two mitigating circumstances & no aggravators).

TITLE: McCain v. State

INDEX NO.: E.5.d.

CITE: (06/30/2020), Ind., 148 N.E.3d 977

SUBJECT: Trial court did not impermissibly increase sentence based on disagreement with jury's verdict

HOLDING: Trial court's comments disagreeing with the jury's verdict were insufficient to taint the sentencing decision, and the sentence was not inappropriate given the nature of the crime and defendant's demonstrated character. Defendant was charged with murder, but jury convicted him of manslaughter. At sentencing, the trial court stated the verdict was a "gift" and the evidence was presented "the cleanest cut video I have ever seen of my impression of murder." Court unanimously found that although trial court's comments expressing disagreement with the jury's verdict came very close to unacceptable comment indicating judicial disagreement with the verdict, the record contained sufficient other factors that demonstrate the judge did not enhance the sentence based on that disagreement. Further, Defendant did not receive a maximum sentence, and his 45-year sentence is "substantially lower" than what it would have been for murder. Court denied Defendant relief under Appellate Rule 7(B) given Defendant's extensive criminal history, his Facebook post "showing a desire for a violent conflict" and his "point-blank shooting of a complete stranger in a crowded fast-food restaurant after getting into an argument because someone looked at him sideways.

RELATED CASES: Malone, 191 N.E.3d 870 (Ind. Ct. App. 2022) (Tr.Ct.'s comments at sentencing that D "dodged a bullet" by jury verdict of lesser offense not indicative that court was biased).

TITLE: Miller v. State

INDEX NO.: E.5.d.

CITE: (3rd Dist., 4-27-99), Ind. App., 709 N.E.2d 48

SUBJECT: Sentencing - consideration of improper aggravating factors

HOLDING: Although D was sentenced to presumptive 30-year term for possessing cocaine within 1000 feet of school, Tr. Ct. erred by using facts surrounding subsequent arrests as aggravating factor. Specifically, Tr. Ct. noted amount of cocaine & cutting agent found in D's possession at time of first arrest. Further, trial judge stated in sentencing order that large quantity of cocaine in D's possession at time of both arrests led judge to believe that D intended to deal drugs. This was improper consideration, as charges of dealing were dropped in exchange for D's plea of guilty on possession charge. Conwell, App., 542 N.E.2d 1024. Held, affirmed in part, remanded so that judge may reweigh valid aggravators against mitigating factors.

RELATED CASES: Bethea, 983 N.E.2d 1134 (Ind. 2013) (overruling law that holds a Tr. Ct. cannot aggravate a sentence based on an element of a charged dismissed as part of a plea agreement); Sexton, 968 N.E.2d 837 (Ind. Ct. App. 2012) (although two of three Court of Appeals' judges believe that it was improper for the Tr. Ct. to use D's illegal possession of the murder weapon as an aggravator because the charge of unlawful possession of a firearm by a serious violent felon was dismissed pursuant to D's plea agreement, there were other valid aggravators justifying D's maximum sentence for felony murder); Bethea, 964 N.E.2d 255 (Ind. Ct. App. 2012) (it was not impermissible for Tr. Ct. to consider one of victim's injuries as an aggravating factor even though it was an element of a charge dismissed by plea agreement); Slade, 942 N.E. 2d 115 (Ind. Ct. App. 2011) (Tr. Ct. did not err in concluding that D's sentence for Class A felony dealing in cocaine was non-suspendible below 20 years when the State dismissed its firearm sentence enhancement allegation pursuant to written plea agreement; firearm sentence enhancement allegation operates independently of Indiana's sentencing scheme); but see Patterson, App, 846 N.E.2d 723 (fact that victim died could be used to enhance sentence for robbery although murder charge was dismissed pursuant to plea agreement); Farmer, App., 772 N.E.2d 1025 (aggravators essentially circumvented plea agreement because they formed basis for dismissed charges).

TITLE: Petruso v. State

INDEX NO.: E.5.d.

CITE: (11/12/82), Ind., 441 N.E.2d 446

SUBJECT: Aggravating/mitigating circumstances - in general

HOLDING: Tr. Ct. may in its discretion increase or decrease sentences after considering aggravating or mitigating circumstances. Jones, 422 N.E.2d 1197. Ct. on appeal may revise sentence only when, in light of character of offender & nature of offense, it is manifestly unreasonable. ARSR 2. Ct. may not set aside sentence merely because it may appear severe. Here, Tr. Ct. considered PSI & evidence presented at trial. Tr. Ct. specified a number of aggravating circumstances (including D's lengthy criminal history) to support an increased term of imprisonment. Held, no abuse of discretion in aggravating sentences (attempted murder - 39 years; kidnapping 33 years).

RELATED CASES: Hammons, 493 N.E.2d 1250 (case discusses general rules re aggravating/mitigating circumstances, e.g., when findings must be part of Tr. Ct. record).

TITLE: Shotts v. State

INDEX NO.: E.5.d.

CITE: (4/27/2016), 53 N.E.3d 526 (Ind. Ct. App. 2016)

SUBJECT: Consideration of D's very high risk to reoffend and criminal history at sentencing - no error

HOLDING: In appeal of his sentence for unlawful possession of a firearm by a serious violent felon, D argued that Tr. Ct. erred by considering as aggravating circumstances: 1) the fact that D's pre-sentence investigation (PSI) report listed him as "very high risk" to reoffend according to the Indiana Risk Assessment System (IRAS), and 2) the fact he was convicted of robbery in 2009, an offense which served as the basis for his serious violent felon in possession of a firearm conviction.

There was no evidence that when the Tr. Ct. used the words "very high risk" in its written sentencing order that it meant to reference D's IRAS score. Tr. Ct. was justified in using this score to decide in what manner D should serve his sentence. There was also no evidence Tr. Ct. used D's 2009 robbery conviction to enhance his sentence, as he had a substantial criminal history aside from the robbery conviction that Tr. Ct. could have relied upon to enhance the sentence. Held, judgment affirmed in part, reversed in part on other grounds.

TITLE: Staton v. State
INDEX NO.: E.5.d.
CITE: (2nd Dist., 09-28-94), Ind. App., 640 N.E.2d 741
SUBJECT: One aggravating factor sufficient
HOLDING: Evidence D displayed tendency to violence & might commit other crimes was sufficient aggravator to enhance sentences on both counts of child molesting to maximum, & order sentences served consecutively, for total sentence of 40 years. Decision is mentioned because in process of reviewing precedent on both enhancing sentences & ordering them served consecutively, Ct. reached conclusion that only where single aggravator is particularly egregious should it be used for both purposes. While acknowledging that precedent is to affect that single aggravator can be adequate for both enhancement & consecutive sentences, Ct. observed that only one case, Cleary v. State, Ind. App., 638 N.E.2d 431 actually involved single aggravator justifying both. Held, PCR Ct.'s denial of petition affirmed, Ratliff, Sr. J., concurring in result, but disagreeing with apparent limitation on use of same aggravator.

RELATED CASES: McGuire, 77 N.E.3d 1198 (Ind. 2017) (Supreme Court could not say with confidence that Tr. Ct. would have still imposed enhanced 40-year sentence had it understood that minimum sentence was 20 years, not 30 years), Hatchett, App., 740 N.E.2d 920 (although enhanced sentence may be upheld based on one aggravating factor, where appellate court cannot say with confidence that trial judge would have imposed same enhanced sentence without consideration of other aggravators that were held improper on appeal, appellate court should remand for resentencing).

TITLE: Thorne v. State

INDEX NO.: E.5.d.

CITE: (1st Dist., 11-19-97), Ind. App., 687 N.E.2d 604

SUBJECT: Using single aggravating factor to support enhanced & consecutive sentences

HOLDING: Tr. Ct. may use single aggravating factor both to enhance sentence & to impose consecutive sentences. Pursuant to Ind. Code § 35-50-1-2(d)(2)(B), Tr. Ct. was required to order D to serve resulting sentences consecutively because he committed crime while released on bond for another crime. In addition, pursuant to Ind. Code § 35-38-1-7.1(c), it was within Tr. Ct.'s discretion to consider D's prior criminal history in enhancing sentence from presumptive term. In order to effectuate legislative intent, mandatory application of Ind. Code § 35-50-1-2(d)(2)(B) did not preclude Tr. Ct. from imposing enhanced sentence based upon that same crime. Thus, Tr. Ct. did not abuse its discretion simply because D's previous crime used as basis of consecutive sentence was also used to enhance sentence. In so holding, Ct. disagreed with Ct.'s conclusion in Smith, App., 655 N.E.2d 532, & Staton, App., 640 N.E.2d 741 (see card, this section). Held, judgment affirmed.

RELATED CASES: Cox, App., 780 N.E.2d 1150 (rather than considering fact that D was on probation when he committed crimes, it appears that Tr. Ct. was considering prior violations committed by D while he was on probation); Payne, App., 687 N.E.2d 252

TITLE: Tidmore v. State

INDEX NO.: E.5.d.

CITE: (07-21-94), Ind., 637 N.E.2d 1290

SUBJECT: Aggravated sentence not improper

HOLDING: D's aggravated 60-year sentence for felony murder, plus concurrent sentence of 50 years for conspiracy to commit murder, were not unreasonable or unsupported. Evidence revealed that to obtain money for drugs, D & friend decided to commit robbery by ordering pizza to be delivered to vacant house, & then rob delivery man. D awaited delivery man on porch, while friend hid around side of house, armed with baseball bat. When man arrived, D talked to him while friend came up behind & hit him on head with bat. After victim fell in chair, they pulled him onto floor of porch & took his money. When victim started acting like he was going to get up, D struck him in head with bat at least three times, & when car drove up, he & friend fled, taking pizza & money. Tr. Ct. found following aggravating factors: crime was committed by ambush while lying in wait; crime was premeditated; purpose of crime was to obtain illegal drugs; & reduced sentence would depreciate seriousness of senseless, brutal crime. Mitigators identified were: D was not actual striker of victim; D had no previous record; intent was not to kill victim; D was follower in operation; & D had no history of violence. Ct. rejected D's argument that acts of lying in wait, premeditation, & planning were relied on to establish element of conspiracy & therefore could not be used to enhance sentence, Townsend v. State, Ind., 498 N.E.2d 1198. Ct. found considerable evidence of conspiracy before D & friend started actual commission of crime. Although advance planning & agreement are elements of conspiracy, extent & manner of ambush & premeditation can be considered as aggravators, Concepcion v. State, Ind., 567 N.E.2d 784. Ct. therefore found judge adequately set forth aggravators to support sentence & considered mitigation in ordered sentences served concurrently. Held, conviction & sentence affirmed, Sullivan & DeBruler, JJ., dissenting on sentencing.

TITLE: Watson v. United States

INDEX NO.: E.5.d.

CITE: 552 U.S. 74, 128 S. Ct. 579, 169 L.Ed.2d 472 (2007) 12/10/2007

SUBJECT: Federal sentencing; D did not "use" firearm when traded drugs for a pistol

HOLDING: Court determined that D did not violate 18 U.S.C. ' 924(c)(1)(A), which sets a mandatory minimum sentence, for a D who, "during and in relation to any . . . drug-trafficking crime[,] . . . uses . . . a firearm," when he traded a controlled substance for a pistol. The statute does not define "uses," but the Court has previously held "a criminal who trades his firearm for drugs 'uses' it . . . within the meaning of ' 924(c)(1)' based primarily on the "ordinary or natural meaning" of the verb in context. Smith v. United States, 508 U.S. 223 (1993). Court has also held that merely possessing a firearm kept near the scene of drug-trafficking is not "use" under ' 924(c)(1) noting that the statute requires "evidence sufficient to show an active employment of the firearm by the D." Bailey v. United States, 516 U.S. 137 (1995). A person does not "use" a firearm under ' 924(c)(1)(A) when he receives it in trade for drugs. The government's position lacks authority in either precedent or regular English. Neither Smith nor Bailey decides the case. With no statutory definition, the meaning of "uses" has to turn on "everyday meaning" revealed in phraseology that strikes the ear as "both reasonable and normal." When D handed over the drugs for the pistol, the officer "used" the pistol to get the drugs, but regular speech would not say that D himself used the pistol in the trade. Court rejected government's argument that because ' 924(d)(1) authorizes seizure and forfeiture of firearms "intended to be used in" certain crimes and some of those offenses involve receipt of a firearm "use" necessarily includes receipt of a gun even in a barter transaction. Government's reliance on Smith for the proposition that the term must be given the same meaning in both subsections overreads Smith. The common verb "use" is not at odds in the two subsections but speaks to different issues in different voices and at different levels of specificity. Court also rejected government's claim that to treat receipt in trade as "use" would create unacceptable asymmetry with Smith by penalizing one side of a gun-for-drugs exchange but not the other. Policy driven symmetry cannot turn "receipt-in-trade" into "use." Whatever the tension between the prior result and the outcome here, law depends on respect for language and would be served better by statutory amendment than by racking statutory language to cover a policy it fails to reach. Ginsburg, J., filed a concurring opinion.

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.d.1. Violation of probation/parole/pardon conditions

TITLE: Davis v. State

INDEX NO.: E.4.d.1.

CITE: (1st Dist., 08-11-08), Ind. App., 892 N.E.2d 156

SUBJECT: Hearsay - sentencing hearing; Presentence Investigation Report (PIR) did not violate Crawford

HOLDING: Tr. Ct. did not err in admitting D's PIR at her sentencing hearing, and probation officer's statement that D showed little remorse. D argued that PIR violated Crawford v. Washington, 541 U.S. 36 (2004), and should not have been used because it included probation officer's hearsay testimony who was not available at sentencing hearing for cross-examination. Indiana law requires Tr. Ct. to use PIRs in its sentencing consideration. Ind. Code 35-38-1-8(a). Further, the rules of evidence (and presumably Crawford) do not apply at sentencing hearings. Finally, in response to D's objection, Tr. Ct. stated that it alone would determine D's remorse. Held, judgment affirmed.

TITLE: Tunstill v. State

INDEX NO.: E.5.d.1.

CITE: (03/21/91), Ind., 568 N.E.2d 539

SUBJECT: Sentencing aggravators-probation status & criminal history

HOLDING: When evaluating aggravators & mitigators, Tr. Ct. erred in considering arrests as part of D's criminal history, & in failing to make any mention of mitigator which was clearly supported in record. D was convicted of voluntary manslaughter, & Ct. enhanced presumptive sentence by additional 10 years through finding of 2 aggravators: that D was on probation at time of instant offense, & D's criminal history. Supreme Ct. found that although 1-year period of probation had expired before instant offense, D still had status as probationer because filing of probation violation petition for failure to pay fine & costs tolled period of probation until determination of charge. Ct.'s consideration of D's probationary status as aggravator was therefore not error.

Tr. Ct.'s consideration of D's criminal history as aggravator was based on number of previous arrests. Consideration of arrests as constituting criminal history was error. Arrests without convictions can be considered as aggravators under Ind. Code 35-38-1-7(d), which considers factors that reflect on D's character, but Ct.'s consideration of them as constituting criminal history under Ind. Code 35-38-1-7(b)(2) was improper. Arrests which don't result in convictions, unless falling within certain exceptions, do not establish criminal history because they do not constitute a determination of person's guilt. But see, Valentin, 567 N.E.2d 792, wherein Ct. noted propriety of Tr. Ct. considering dismissed or acquitted charges as part of criminal history. Held, remanded for new sentencing hearing, conviction affirmed, J. Givan DISSENTING as to conviction.

RELATED CASES: Monegan, 756 N.E.2d 499 (rather than as evidence of criminal history, Tr. Ct. properly deemed D's four prior arrests as evidence that his antisocial behavior was not deterred by numerous encounters with law); Sherwood, 749 N.E.2d 36 (prior arrest could have only been considered to extent that D's involvement with law enforcement did not deter further criminal activity); Stone, App., 727 N.E.2d 33 (Tr. Ct. improperly relied on D's prior arrest record as criminal history aggravator); Adkins, App., 703 N.E.2d 182 (prior arrests are properly considered as reflective of D's character & indicative of risk of future crime. Beason, 690 N.E.2d 277); Sherwood, 702 N.E.2d 694 (prior involvement with cocaine, consisting of single arrest, did not establish history of criminal conduct).

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.d.2. History of criminal/delinquent behavior

TITLE: Beard v. State

INDEX NO.: E.5.d.2.

CITE: (5/23/83), Ind., 448 N.E.2d 1078

SUBJECT: Aggravating circumstances - expunged juvenile record

HOLDING: Even if Tr. Ct. did erroneously consider an uncounseled juvenile disposition (see Baldasar v. IL (1980), 446 U.S. 222, 100 S. Ct. 1585, 64 L.Ed.2d 169) in support of enhanced sentence, other circumstances (age of victim, prior felony conviction) are adequate to sustain imposition of enhanced sentence. Here, D was convicted of attempted burglary & sentenced to 20 years. The sentencing judge considered D's juvenile record (which had been expunged) as one basis for adding 10 years to presumptive sentence. Held, no error. DISSENT by DeBruler contends that an expunged juvenile record cannot be used to enhance subsequent criminal activity. DeBruler would remand for a new hearing because he is unable to conclude that remaining aggravating circumstances justify additional 10 years. (D successfully completed parole following drug conviction, his only prior felony.)

RELATED CASES: White, 647 N.E.2d 684 (conviction for prior crime reversed on appeal could not serve as valid aggravator); Fugate, 516 N.E.2d 75 (D acquitted by jury on arson charge; Tr. Ct. improperly relied upon PSR in which probation officer considered D guilty of arson & Tr. Ct. itself improperly considered both D's acquittal & damage to arson victims as aggravating factor in sentencing, failing to follow mandates of statute).

TITLE: Berry v. State
INDEX NO.: E.5.d.2.
CITE: (10/31/90), Ind. App., 561 N.E.2d 832
SUBJECT: Sentencing -- due process; juvenile adjudication in which D allegedly not represented used as aggravator
HOLDING: D was convicted of attempted dealing in marijuana on school property. At sentencing hearing, Tr. Ct. noted aggravating factors were D's criminal record, consisting of two juvenile offenses & one adult offense, & imposition of reduced sentence would depreciate serious nature of crime. D contended that Tr.C t. improperly considered one of his juvenile convictions which was obtained without representation by counsel & that it should not have been used to enhance his sentence. D *cited* Baldasar, 446 U.S. 222 which held that pursuant to Scott, 440 U.S. 367, prior uncounseled conviction could not be used to enhance second misdemeanor into felony with prison term. Ct. held that this rule does not apply in present case. Use of prior conviction here was to enhance sentence, not offense. Held, Tr. Ct. did not err in using D's prior criminal record as aggravating factor. Held, no error.

Note: Baldasar, 446 U.S. 222 was expressly *overruled* by Nichols, 114 S.Ct. 1921.

TITLE: Brock v. State
INDEX NO.: E.5.d.2.
CITE: (2/26/2013), 983 N.E.2d 636 (Ind. Ct. App. 2013)
SUBJECT: Violating rules when incarcerated a valid aggravator for sentencing
HOLDING: In sentencing D, Tr. Ct. did not abuse its discretion in considering as aggravating factor D's history of violating rules when previously incarcerated. A Tr. Ct. may consider such behavior as it relates to risk that a D will commit another crime. Anderson v. State, 798 N.E.2d 875, 880-81 (Ind. Ct. App. 2003). The record before the Tr. Ct. a sufficient factual basis to support the Tr. Ct.'s finding. Held, judgment affirmed.

TITLE: Chamness v. State

INDEX NO.: E.5.d.2.

CITE: (4/27/83), Ind., 447 N.E.2d 1086

SUBJECT: Aggravating circumstances (AC) - history of criminal activity

HOLDING: Tr. Ct. did not err in considering a 1980 theft charge as an AC. Here, D was convicted of arson & sentenced to 20 years (10 + 10). D contends Ct.'s statement of reasons for sentence enhancement is inadequate. If Tr. Ct. uses Ind. Code 35-4.1-4-7(c) (2) "a history of criminal activity" to enhance a sentence, the criminal activity need not be reduced to a conviction. Griffin, 402 N.E.2d 981; McNew, 391 N.E.2d 607. Finding of prior arrest for theft was reflected in PSI. Tr. Ct.'s reference to "theft in 1980" was a specific recitation of one AC considered, complying with Page, 424 N.E.2d 1021. CONCURRING IN RESULT, DeBruler maintains that arrests, without more, cannot serve as a basis for sentence enhancement. In Griffin, evidence was presented that D actually committed offense for which he had been arrested. In McNew, D's arrests were intermingled with successful prosecutions. Judges should not infer criminal behavior from a bare arrest.

RELATED CASES: Adkins, App., 703 N.E.2d 182 (single class A misdemeanor conviction was sufficient to support maximum, consecutive sentences); Sherwood, 702 N.E.2d 694 (prior involvement with cocaine, consisting of single arrest, did not establish history of criminal conduct); Scott, 440 U.S. 367 (uncounseled misdemeanor conviction is constitutional when used as aggravator under Gideon, 372 U.S. 335, where no prison sentence imposed); Curtis, 114 S. Ct. 1732 (upholds right for D to collaterally attack prior misdemeanor convictions obtained in violation of right to counsel in Gideon, 372 U.S. 335); Ashby, 486 N.E.2d 469 (convictions obtained without counsel cannot be considered in sentencing on later conviction, *citing* US v. Tucker, (1972), 404 U.S. 443, 92 S. Ct. 589, 30 L.Ed.2d 592; held, no proof of lack of counsel, therefore, no error); Lindsey, 485 N.E.2d 71 (Tr. Ct. may consider prior criminal acts not reduced to conviction; here, Tr. Ct. used pending rape charge as AC; held, no error); Lyons 475 N.E.2d 719 (Tr. Ct. did not err in considering D's attempted escape from courthouse during trial to enhance D's conviction for attempted escape from prison); Anderson 448 N.E.2d 1180 (Tr. judge erred in considering 2 murder charges (of which D was acquitted) & uncharged shooting as AC, *citing* McNew, but other AC *cited* by Tr. Ct. justified sentence).

TITLE: Day v. State

INDEX NO.: E.5.d.2.

CITE: (10/10/90), Ind., 560 N.E.2d 641

SUBJECT: Criminal history - juvenile record

HOLDING: Tr. Ct. erred in considering D's juvenile record where delinquency petitions did not result in determinations of delinquency. D was convicted of attempted rape, criminal confinement, & 2 counts of battery, & received maximum, consecutive sentences plus an habitual enhancement. In stating its reasons for this sentence, Tr. Ct. referred to prior convictions, including various juvenile offenses. As for juvenile offenses, D's presentence report indicated that 3 had no disposition, & sentence for 4th was "released to parents," indicating informal disposition. On appeal, D argues that Tr. Ct. erred in using juvenile record as basis for enhancement. Ind. S. Ct. has held that juvenile history detailed in presentence report may constitute criminal history sufficient to enhance sentence. Evans, 497 N.E.2d 918. Here, however, Tr. Ct.'s reliance on juvenile record was error. When juvenile proceeding ends without disposition, mere fact that petition was filed alleging delinquency does not provide proof of criminal history. Indeed, even when juvenile Ct. has made delinquency determination, it is acts them-selves, & not adjudication, which constitute criminal history so as to support sentence enhancement. Jordan, 512 N.E.2d 407. Because Ind. S. Ct. cannot say with confidence that Tr. Ct. would have sentenced D to 56 years without considering juvenile record, it remands for new sentencing hearing. Givan & Pivarnik, JJ., DISSENT.

RELATED CASES: Morrell, 121 N.E.3d 577 (Ind. Ct. App. 2019) (Tr. Ct. abused its discretion in considering as a sentencing aggravator D's contacts with the juvenile justice system that were not adjudicated (found true); however, Ct. affirmed D's sentence because of other sentencing aggravators); Pitts, App., 904 N.E.2d 313 (Ind. Ct. App. 2009) (where PSI details D's juvenile charges and true findings, Tr. Ct. can use juvenile adjudication as criminal history aggravator); Anderson, App., 798 N.E.2d 875 (pre-sentence investigation report, the accuracy of which D had acknowledged, contained sufficient information to show "acts" committed by D as juvenile to constitute a criminal history to support this aggravator); Lewis, App., 759 N.E.2d 1077 (it was inappropriate for Tr. Ct. to consider D's juvenile record in determining that he had a prior criminal history which supported enhanced sentence); Allen, App., 722 N.E.2d 1246 (juvenile record with no specifics about offenses cannot constitute aggravating circumstance).

TITLE: Dillard v. State
INDEX NO.: E.5.d.2.
CITE: (4th Dist., 05-18-05), Ind. App., 827 N.E.2d 570
SUBJECT: D's burden to challenge information contained in presentence investigation (PSI) report
HOLDING: Information contained in PSI report is presumed accurate unless D challenges it in some respect. It does not matter why a D chooses to remain silent when offered the chance to dispute the accuracy of a PSI report he has had the opportunity to review: the knowing failure to object waives the issue of the report's accuracy for appellate review. A PSI report may constitute an adequate evidentiary foundation to support specific findings relative to criminal history at sentencing. Mayes v. State, 744 N.E.2d 390 (Ind. 2001).

Here, D argued that the criminal history exception to Blakely v. Washington, 124 S. Ct. 2531 (2004) did not apply because there was no evidence in the record to prove the existence of convictions cited by Tr. Ct. to support the criminal history aggravator. Although State did not provide verifying documentation relating to any of those convictions, they were listed in D's PSI report. D did not stipulate to PSI report's accuracy but invoked Fifth Amendment & refused to either confirm or dispute factual information contained in report. D had opportunity to examine PSI report & challenge any inaccuracies contained therein, pursuant to Ind. Code 35-38-1-12(b). D's failure to register an objection to information contained in report waived issue for appellate review. Ryle v. State, 819 N.E.2d 119 (Ind. Ct. App. 2004). Further, D did not allege there actually were any errors in criminal history section of his PSI report, but only that there was no competent evidence to support those assertions. The State's duty to "prove" factual assertions in the PSI report is not triggered until D, given the opportunity, disputes the accuracy of those facts.

RELATED CASES: Slade, 942 N.E. 2d 115 (Ind. Ct. App. 2011) (PSI, which contained probable cause affidavit wherein D admitted that he possessed handgun while dealing in cocaine, was sufficient to sustain Tr. Ct.'s finding that D possessed a firearm when he committed dealing in cocaine); Edrington, 909 N.E.2d 1093 (Ind. Ct. App. 2009) (a violation of D's 5th & 6th Amendment rights would have been implicated had Tr. Ct. relied solely on D's failure to object to facts in or attached to his pre-sentence report as evidence of position of trust aggravator; thus Ct. will not consider information in PSI report); Ryle, 842 N.E.2d 320 (using a D's failure to object to a presentence report to establish an admission to the accuracy of the report implicates the right against self-incrimination).

TITLE: Kelly v. State
INDEX NO.: E.5.d.2.
CITE: (8/29/83), Ind., 452 N.E.2d 907
SUBJECT: Aggravating circumstances - prior criminal history
HOLDING: Tr. Ct. did not err in using D's prior criminal history as an aggravating circumstance & as basis for conviction on habitual offender count. Such use does not violate double jeopardy. Anderson, 426 N.E.2d 674; Griffin, 415 N.E.2d 60; Ross 413 N.E.2d 252. Held, no error.

RELATED CASES: Shafer, App., 856 N.E.2d 752 (although subsequent crimes cannot be used as criminal history, they can be used to support a finding of bad character or risk D will commit more crimes); Settles, App., 791 N.E.2d 812 (Tr. Ct. could consider D's criminal history as aggravator even though his last conviction was 12 years before instant offense); Buchanan, 767 N.E.2d 967 (it is within ambit of Tr. Ct.'s discretion to view remoteness of D's prior criminal history as mitigating circumstance or it could find remoteness to not affect consideration of criminal history as aggravating circumstance).

TITLE: Lane v. State
INDEX NO.: E.5.d.2.
CITE: (3d Dist. 3/27/90), Ind. App., 551 N.E.2d 897
SUBJECT: Aggravating factor - CHINS status improper
HOLDING: Tr. Ct. erred in considering D's CHINS status as aggravator in enhancing D's sentence for theft. D pled guilty to theft of cigarette lighter & received 4-year sentence. In determining that D's sentence should be enhanced by 2 years, Tr. Ct. considered "D's long & troubled juvenile matters in CHINS." At hearing on D's motion to correct errors, Tr. Ct. *clarified* that "matters in aggravation were the allegations of improper conduct & maladjustment by the D to various placements." State argues that Tr. Ct. properly considered D's prior criminal conduct or history of criminal activity as demonstrated by juvenile record, *citing* Jordan 512 N.E.2d 407. However, in Jordan, Ind. S. Ct. relied on Simms, App., 421 N.E.2d 698, which held that "history of misdemeanor & felony activity beginning while Simms was still a juvenile" could be considered in aggravation. Juvenile history of CHINS child does not contain criminal activity envisioned by Simms & Jordan. Child need not commit crime to be adjudged CHINS; on contrary, those children are usually victims of their circumstances, which can hardly be factor used to enhance sentence. Held, Tr. Ct. erred in considering D's CHINS record. Remanded with instructions to subtract 2-year enhancement from D's sentence.

TITLE: Pedraza v. State
INDEX NO: E.5.d.2.
CITE: (05-22-08), Ind., 887 N.E.2d 77
SUBJECT: Criminal history aggravator - double enhancements permitted under advisory scheme
HOLDING: Under the advisory sentencing scheme, it is proper to use an element of a present offense and the criminal history supporting a habitual offender finding also as an aggravator. But it is improper to order two convictions enhanced based on the same prior conviction consecutively to one another. Because Tr. Ct.'s can now impose any sentence within the statutory range for the crime, regardless of the presence or absence of aggravating circumstances or mitigating circumstances, the rules prohibiting double enhancements set forth in McVey v. State, 531 N.E.2d 458 (Ind. 1988), and Townsend v. State, 498 N.E.2d 1198 (Ind. 1986), no longer apply under the advisory scheme. See Ind. Code 35-38-1-7.1(d). Whether a sentence is appropriate with double enhancements will vary from offense to offense and from one prior criminal record to another.

Here, Tr. Ct. properly used D's same criminal history as an aggravator and to support his habitual offender determination. Moreover, Tr. Ct. properly used the same prior OWI within five years to enhance D's OWI Causing Serious Bodily Injury to a Class C felony and as an aggravating circumstance, along with another prior OWI, for the same count. However, Tr. Ct. abused its discretion by running two counts consecutively where both counts were enhanced by the same prior OWI. One count was elevated to a Class C felony and the other due to D's habitual offender status based, in part, on the same 2001 OWI. Held, transfer granted, judgment affirmed in part and reversed and remanded in part with instructions to resentence D such that the 2001 OWI conviction is not used to enhance both consecutive sentences. Court of Appeals' opinion at 873 N.E.2d 1083 is affirmed in all other respects.

RELATED CASES: Gomilla, 13 N.E.3d 846 (Ind. 2014) (Court of Appeals decisions have read Pedraza too broadly to allow Tr. Ct. to use material element offense as aggravating factor to increase sentence; absent a unique circumstance, *citing* a material element of an offense as an aggravating factor to impose a sentence greater than the advisory sentence is "improper as a matter of law"; see full review in E.5.d.9); Kubina, 997 N.E.2d 1134 (Ind. Ct. App. 2013) (permissible to *cite* D's position of trust with child even though having care of dependent is element of class A felony Neglect of Dependent); Robinson, App., 894 N.E.2d 1038 (under advisory scheme, court held that the D's position of care over newborn baby was sufficient particularized circumstance of Neglect of Dependent conviction based on D's leaving the newborn baby to die after birth).

TITLE: Randall v. State

INDEX NO.: E.5.d.2.

CITE: (11/17/83), Ind., 455 N.E.2d 916

SUBJECT: Sentencing -- history of criminal behavior; no conviction necessary

HOLDING: D who was convicted of felony murder, robbery, criminal confinement, & kidnaping, was sentenced to sixty years for felony murder. D claimed that this sentence was manifestly unreasonable under circumstances because Ind. Code 35-50-2-3(a) prescribes sentence of forty years upon conviction of murder to which not more than twenty years may be added for aggravating circumstances. Ct. pointed out that history of criminal activity is aggravating circumstance according to Ind. Code 35-4.1-4-7(c)(2). Here, Ct. held that history of criminal activity was proper aggravating circumstance based on fact that D admitted that he was drug user, drug dealer & car thief, & that there was ample evidence in record (presentence investigation report outlined D's lengthy history of criminal activity) to support trial judge's finding that D had participated in life of crime. Therefore, sixty-year sentence was not manifestly unreasonable. Held, judgment vacated in part & affirmed in part.

RELATED CASES: Adkins, App., 703 N.E.2d 182 (prior arrests are properly considered as reflective of D's character & indicative of risk of future crime. Beason, 690 N.E.2d 277); Sherwood, 702 N.E.2d 694 (prior involvement with cocaine, consisting of single arrest, did not establish history of criminal conduct); Taylor, 695 N.E.2d 117 (although not convicted, prior arrest for criminal recklessness proper in consideration of criminal history); Holmes, 398 N.E.2d 1279 (Ct. upheld twenty year sentence for burglary where D admitted involvement in other home burglaries).

TITLE: Reed v. State
INDEX NO.: E.5.d.2.
CITE: (05-22-07), Ind., 866 N.E.2d 767
SUBJECT: Possession of firearm by serious violent felon (SVF) - use of predicate felony as part of criminal history; consecutive sentence
HOLDING: Trial & appellate counsel were not ineffective for failing to attack enhancement of D's sentence on grounds that among prior convictions the sentencing judge noted was the conviction that rendered him a serious violent felon. See Hatchett v. State, 740 N.E.2d 920 (Ind. Ct. App. 2000) (predicate felony supporting an SVF conviction may not also be used as part of the criminal history justifying an enhanced sentence for the same SVF offense). Ct. noted that remainder of D's extensive & serious criminal history supported enhanced sentence in this case.

D also argued that his lawyers should have tried to make new law by claiming that SVF sentences cannot be stacked. D's lawyers were representing a client who was convicted twice as a SVF in two different Ct.s for two different acts. There were a variety of arguments available about whether Tr. Ct. should run sentences consecutive to one another under Ind. Code 35-50-1-2. While generating new legal theories is good for the system, not doing so is not a violation of the Sixth Amendment. Held, transfer granted, Ct. App.' opinion at 857 N.E.2d 19 vacated, denial of post-conviction relief affirmed.

TITLE: Singh v. State

INDEX NO.: E.5.d.2.

CITE: (8/20/2015), 40 N.E.3d 981 (Ind. Ct. App. 2015)

SUBJECT: D's prior arrests properly considered as aggravating factors

HOLDING: Tr. Ct. did not abuse its discretion when it considered D's prior arrests as aggravating factors in imposing a 15-year aggregate sentence. There is no requirement to find a certain pattern of behavior demonstrated by prior arrests before Tr. Ct. may consider those arrests as aggravating factors at sentencing. Trial judges are permitted to examine specific activities of the D to give them a "feel for the kind of person D is through a thorough examination of his background." McNew v. State, 271 Ind. 214, 221, 391 N.E.2d 607, 612 (1979). Here, given D's three prior domestic violence-related arrests, Tr. Ct. was well within its discretion in expressing concern that he would engage in further acts of domestic violence in the future and in noting his apparent lack of respect for the law. Held, judgment affirmed.

TITLE: Stokes v. State
INDEX NO.: E.5.d.2.
CITE: (2nd Dist., 06-14-05), Ind. App., 828 N.E.2d 937
SUBJECT: Use of pre-sentence investigation (PSI) report to discern criminal history - no error
HOLDING: Because rules of evidence do not apply to sentencing proceedings that are conducted by a judge sitting without a jury, a judge may use a PSI to discern a D's criminal history although a PSI is hearsay. Shepard v. United States, 544 U.S. 13, 125 S. Ct. 1254 (2005), does not preclude use of criminal history information delineated in a PSI by a sentencing Ct. to enhance a sentence. Underlying concern in Shepard was judicial fact-finding of circumstances surrounding a conviction, but Ct. concluded that a Tr. Ct. may examine statutory definition, charging document, written plea agreement, transcript of plea colloquy, & any explicit factual finding by trial judge to which D assented.

Here, there is not a concern as to how an offense underlying a prior conviction was committed; rather, concern is if the D has any prior convictions. As in Dillard v. State, 827 N.E.2d 570 (Ind. Ct. App. 2005), D waived appellate review of accuracy of PSI. D confirmed that he read PSI at his sentencing hearing, but he did not comment on its accuracy & instead invoked his Fifth Amendment right against self-incrimination. Even on appeal D did not challenge accuracy of the PSI. Fact of D's prior convictions have already been proven beyond a reasonable doubt & are thus exempt from Apprendi rule as explained in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2005). Held, judgment affirmed.

RELATED CASES: Robeson, App., 834 N.E.2d 723 (Ind. T.R. 44 does not require that PSI be authenticated before it may be used in sentencing; here, D's objection to PSI was based entirely on authentication of PSI, not on its accuracy; thus, she has waived this issue for appellate review).

TITLE: Tunstill v. State

INDEX NO.: E.5.d.2.

CITE: (03/21/91), Ind., 568 N.E.2d 539

SUBJECT: Sentencing aggravators-probation status & criminal history

HOLDING: When evaluating aggravators & mitigators, Tr. Ct. erred in considering arrests as part of D's criminal history, & in failing to make any mention of mitigator which was clearly supported in record. D was convicted of voluntary manslaughter, & Ct. enhanced presumptive sentence by additional 10 years through finding of 2 aggravators: that D was on probation at time of instant offense, & D's criminal history. S. Ct. found that although 1-year period of probation had expired before instant offense, D still had status as probationer because filing of probation violation petition for failure to pay fine & costs tolled period of probation until determination of charge. Ct.'s consideration of D's probationary status as aggravator was therefore not error.

Tr. Ct.'s consideration of D's criminal history as aggravator was based on number of previous arrests. Consideration of arrests as constituting criminal history was error. Arrests without convictions can be considered as aggravators under Ind. Code 35-38-1-7(d), which considers factors that reflect on D's character, but Ct.'s consideration of them as constituting criminal history under Ind. Code 35-38-1-7(b)(2) was improper. Arrests which don't result in convictions, unless falling within certain exceptions, do not establish criminal history because they do not constitute a determination of person's guilt. But see, Valentin, 567 N.E.2d 792, wherein Ct. noted propriety of Tr. Ct. considering dismissed or acquitted charges as part of criminal history. Held, remanded for new sentencing hearing, conviction affirmed, J. Givan dissenting as to conviction.

RELATED CASES: Monegan, 756 N.E.2d 499 (rather than as evidence of criminal history, Tr. Ct. properly deemed D's four prior arrests as evidence that his antisocial behavior was not deterred by numerous encounters with law); Stone, App., 727 N.E.2d 33 (Tr. Ct. improperly relied on D's prior arrest record as criminal history aggravator); Adkins, App., 703 N.E.2d 182 (prior arrests are properly considered as reflective of D's character & indicative of risk of future crime. Beason, 690 N.E.2d 277); Sherwood, 702 N.E.2d 694 (prior involvement with cocaine, consisting of single arrest, did not establish history of criminal conduct); Meriweather, App., 659 N.E.2d 133.

TITLE: Willoughby v. State

INDEX NO.: E.5.d.2.

CITE: (4/10/90), Ind., 552 N.E.2d 462

SUBJECT: Aggravating circumstance - history of criminal activity; uncharged crimes

HOLDING: Tr. Ct. did not err in considering D's involvement in uncharged offense as aggravating circumstance at sentencing. D was convicted of murder, robbery, & confinement in connection with killing of woman whose remains were found in field near airport. At sentencing, State presented evidence that 7 years earlier, D had helped to conceal another murder by dumping body of 14-year-old girl in same field. No criminal charges were filed against D in that matter. Among aggravating circumstances Tr. Ct. found were fact that D had left girl in field & had not notified anyone in either case to let families know of location of bodies, & also that D did not show remorse for death of either victim. D received maximum, consecutive sentences totaling 130 years. D's criminal history is statutory aggravator, & uncharged crimes can be considered in that context. Stark, 489 N.E.2d 43. Here, Tr. Ct. could properly have considered D's involvement in previous murder as evidence of his having been accessory after fact, & sentencing statement indicates that Tr. Ct. enhanced D's sentence not as punishment for death of prior victim, but for concealment of her body. Held, sentencing upheld. DeBruler, J., DISSENTS.

RELATED CASES: Harlan, 971 N.E.2d 163 (Ind. Ct. App. 2012) Tr. Ct. did not abuse its discretion by *citing* as aggravating factor D's uncharged acts of molestation of CW's sister, as Tr. Ct. did not identify those acts as part of a criminal history, but rather as a non-statutory aggravating factor); Brooks, 560 N.E.2d 49 (uncharged sex offenses are particularly relevant at sentencing, indicating likelihood of repeat offenses).

TITLE: Wooley v. State

INDEX NO.: E.5.d.2.

CITE: (9-29-99), 716 N.E.2d 919 (Ind. 1999)

SUBJECT: Sentencing aggravator - criminal history

HOLDING: In murder prosecution, Tr. Ct. improperly found that D's one prior conviction for driving while intoxicated amounted to history of criminal activity. Criminal history comprised of single, nonviolent misdemeanor was not significant aggravator in context of sentence for murder. Significance of aggravating circumstances varies based on gravity, nature & number of prior offenses as they relate to current offense. Held, conviction affirmed, remanded for new sentencing hearing.

RELATED CASES: Alvies, App., 905 N.E.2d 57 (in murder and rape prosecution, Tr. Ct. abused its discretion by relying on D's juvenile record as an aggravating circumstance; adjudications for criminal trespass, battery and auto theft were "quite dissimilar" from present offenses and do not even approach the seriousness of present offenses); Ashworth, 901 N.E.2d 567 (Ind. Ct. App. 2009) (although a prior criminal history of burglary, theft and misdemeanor battery and conversion are not of sufficient gravity to justify a maximum sentence of sixty years for murder, the criminal history is sufficient to justify an enhanced sentence of fifty years); Howell, App., 859 N.E.2d 677 (following similar cases, Ct. held that 5 misdemeanor convictions were not sufficiently weighty to aggravate a Class C felony reckless homicide sentence based on the death of D's infant); Walsman, App., 855 N.E.2d 645 (history, including two juvenile adjudications for incorrigibility & possession of a legend drug, & one adult conviction for OWI, is not a sufficient aggravator for sentence on class B felony armed robbery); Baysinger, App., 854 N.E.2d 1211 (prior misdemeanor conviction for marijuana which occurred six months before murders could be used to enhance sentence for murder where motive for murder was drug dispute); Vazquez, App., 839 N.E.2d 1229 (D displayed an uninterrupted criminal record related to substance offenses & Tr. Ct. did not err in weight it gave to his criminal history as an aggravator); Ruiz, 818 N.E.2d 927 (D's four prior alcohol-related misdemeanors were at best "marginally significant" in context of class B felony child molesting); Ballard, App., 808 N.E.2d 729 (Tr. Ct. erred by enhancing D's voluntary manslaughter conviction based on his criminal history, consisting merely of four non-violent misdemeanor offenses which were all at least sixteen years old); Spiller, App., 737 N.E.2d 1231 (in murder prosecution, no error in finding D's prior criminal history as aggravator; D had 2 misdemeanor convictions, one for driving while intoxicated & another for disorderly conduct).

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.d.3. Correctional/Rehabilitative Treatment

TITLE: Bluck v. State

INDEX NO.: E.5.d.3.

CITE: (2nd Dist.; 9-22-99), Ind. App., 716 N.E.2d 507

SUBJECT: Need for correctional treatment - cannot be based on denial of offense

HOLDING: Fact that D would not admit to molesting child & some studies had shown that "average" child molester cannot be rehabilitated without admitting to molestation did not support finding that D was in need of commitment. Need for correctional treatment best served by commitment to penal facility is proper aggravator only when Tr. Ct. articulates why specific D requires treatment for period of time in excess of presumptive sentence. Ct. must base its sentencing decision on factors attributable specifically to D rather than on his identification with general class or category of offenders. Beason, 690 N.E.2d 277. Also, it is not aggravator for D, in good faith, to consistently maintain his innocence. Here, Tr. Ct. stated that D was in need of correctional treatment that could be served by commitment to penal facility because D was not suitable candidate for rehabilitative treatment due to his denial that present offense occurred. Ct. relied upon testimony from expert in other cases that rehabilitation is not possible without D admitting to molestation. Although there is literature indicating that typical sex offenders cannot be rehabilitated until they admit their behavior, profile evidence regarding "average" child molester may or may not be probative as to this specific D, & D had no fair opportunity to refute information on which Tr. Ct. relied. Thus, Tr. Ct. was not justified in finding that D required treatment for period of time in excess of presumptive sentence because he denied having committed molestations. Held, judgment affirmed in part & reversed in part; Garrard, J., dissenting in part.

Note: Although D denied guilt, Tr. Ct. properly considered lack of remorse as aggravator because there was evidence other than uncorroborated testimony of victim that established guilt.

TITLE: Mayberry v. State

INDEX NO.: E.5.d.3.

CITE: (7-19-96), Ind., 670 N.E.2d 1262

SUBJECT: Need for correctional/rehabilitative treatment in excess of presumptive term

HOLDING: As one of statutory aggravating circumstances, Tr. Ct. found that D was in need of correctional & rehabilitative treatment that could best be provided in penal facility. Ct. held that for this aggravating circumstance to justify enhanced sentence, it must be understood to mean that D is in need of correctional treatment by incarceration in excess of presumptive term. This aggravating circumstance could not justify enhanced sentence in this case, because Tr. Ct. failed to give specific or individualized statement of reason why D was in need of correctional & rehabilitative treatment that could best be provided by period of incarceration in excess of presumptive term. Robey, 555 N.E.2d 145. Held, remanded for imposition of presumptive 40-year term; Shepard, C.J., believes some enhancement of sentence is warranted.

RELATED CASES: Flammer, App., 786 N.E.2d 293 (aggravator proper where D "committed a violent & senseless criminal act that resulted in the death of his wife," & that D "should be separated from our citizens for their protection."); Peckinpough, App., 743 N.E.2d 1238 (this aggravator, standing alone, was sufficient to support imposition of consecutive sentences); Buzzard, App., 712 N.E.2d 547 (Tr. Ct.'s statement "that D could best be treated in penal facility a this removed him from society & away from children where he could not prey on children hile being treated" was sufficient to justify aggravator); Mitchem, 685 N.E.2d 671 (Tr. Ct. improperly applied this aggravator).

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.d.4. Depreciate seriousness

TITLE: Ector v. State

INDEX NO.: E.5.d.4.

CITE: (09-08-94), Ind., 639 N.E.2d 1014

SUBJECT: Depreciating seriousness of crime as aggravator

HOLDING: There was no error in enhancing D's sentence because, although Tr. Ct. could not properly rely solely on "depreciate seriousness" statutory aggravator, there were sufficient particularized individual circumstances of crime apart from general elements of offense to enhance sentence. D pled guilty to voluntary manslaughter & received enhanced sentence of 20 years. Ct. App. reversed, finding Tr. Ct. erred in basing enhancement solely on "depreciate seriousness" aggravator of Ind. Code 35-38-1-7.1(b)(4). At sentencing, Tr. Ct. found two mitigators were outweighed by aggravation, & although it discussed multiple aggravators, it used aggravating factor in singular in sentencing statement, finding imposition of reduced sentence would depreciate seriousness of crime. On appeal, D argued single aggravator could not outweigh multiple mitigators, & because he entered plea to voluntary manslaughter, lesser crime of murder; intent, premeditation, & manner of use of knife could not be used to support enhancement. State argued that D's premeditation in bringing knife to school & fact victim was in defenseless position when wounded properly supported aggravation. Although material element of crime cannot be aggravating circumstance to support enhanced sentence, particularized individual circumstances of act can constitute separate aggravating circumstance, Townsend v. State, Ind., 498 N.E.2d 1198. "Depreciate seriousness" aggravator comes in two variations. Most common variation is found in Ind. Code 35-38-1-7.1(b)(4), that imposition of reduced sentence would depreciate seriousness of crime. Ct. found this variation cannot be used to justify enhanced sentence, only when Tr. Ct. is considering imposition of less than presumptive sentence, Evans v. State, Ind., 497 N.E.2d 919. Ct. also found, however, that alternate form of aggravator focuses on imposition of enhanced sentence, & that although not enumerated statutory aggravator, it can be considered because statutory aggravators are not exclusive, Ind. Code 35-38-1-7(d). Therefore, sentence enhancement based on finding that sentence less than enhanced term sought by State would depreciate seriousness of crime has been upheld, Evans, *supra*. Here, Tr. Ct. did not make Evans finding, & therefore "depreciate seriousness" aggravator could not support sentence. Nevertheless, Ct. upheld aggravated sentence by finding Tr. Ct.'s notation of circumstances of offense was acceptable articulation of aggravators to support enhanced sentence, because they were circumstances separate & distinct from general elements of crime. Held, transfer of memorandum decision granted & Tr. Ct. affirmed.

TITLE: Evans v. State
INDEX NO.: E.5.d.4.
CITE: (10/3/86), Ind., 497 N.E.2d 919
SUBJECT: Aggravating circumstances - lesser sentence would depreciate seriousness
HOLDING: Tr. Ct. did not err in considering that sentence less than enhanced term of 50 years would depreciate seriousness of crime. List of aggravating factors at Ind. Code 35-38-1-7 includes, "imposition of a reduced sentence or suspension of the sentence & imposition of probation would depreciate the seriousness of the crime." D argues this statutory factor applies only when Ct. is considering reducing presumptive sentence, not for purpose of enhancing sentence. That is true. However, list of aggravating factors justifying enhancement is not exhaustive. Tr. Ct. may consider "nonstatutory" factors, including fact that imposition of less than enhanced sentence may depreciate seriousness of crime. Held, no error.

RELATED CASES: Powell, App., 751 N.E.2d 311 (aggravating factor of depreciating seriousness of crime was improper because there was no indication that Tr. Ct. considered imposing sentence less than presumptive); Walton, 650 N.E.2d 1134 (Tr. Ct. erred in enhancing murder sentences where sole statutory aggravator was that lesser sentence would depreciate seriousness of crime).

TITLE: Eversole v. State
INDEX NO.: E.5.d.4.
CITE: (4th Dist., 09-27-07), Ind. App., 873 N.E.2d 1111
SUBJECT: Seriousness of crime justified advisory sentence under appropriateness review
HOLDING: The advisory sentence for voluntary manslaughter was appropriate despite D's good character, guilty plea & lack of criminal history. Where the Tr. Ct. has entered a reasonably detailed sentencing statement explaining its reasons for a given sentence that is supported by the record, Ct. may only review the sentence through Appellate Rule 7(B). Here, D shot & killed his estranged wife's boyfriend after learning that his wife did not want to work out their marriage. The Tr. Ct. explained that D's lack of criminal history balanced equally with the fact that a lesser sentence than the advisory would depreciate the seriousness of the crime. Because the Tr. Ct. explained its reasoning & assigned relative value to the reasons, Ct. only reviewed the sentence for appropriateness. Although D's good character, including his guilty plea, present an arguable case for a lesser sentence, Ct. found it difficult to ignore the serious nature of the offense -- specifically that his actions resulted in the death of another person. Thus, the sentence was appropriate. Held, judgment affirmed.

TITLE: Guenther v. State
INDEX NO.: E.5.d.4.
CITE: (12/24/86), Ind., 501 N.E.2d 1071
SUBJECT: Aggravating circumstances - lesser sentence would depreciate seriousness
HOLDING: On transfer. Tr. Ct. did not err in considering heinousness of offense in enhancing presumptive sentence. Here, Tr. Ct. found imposition of reduced sentence would depreciate seriousness of crime, inasmuch as D had sexual intercourse with step-daughter which Tr. Ct. found to be heinous crime, & in light of numerous vaginal examinations performed on another step-daughter. 4th Dist. held that heinousness of crime relates to manner of its commission rather than to nature of crime itself. Ind. S. Ct. vacates 4th Dist. opinion at 495 N.E.2d 788 on this point. It is proper for Tr. Ct. to consider both manner of commission of crime & nature of it in determining whether crime could be considered heinous, meriting aggravation of presumptive sentence. Held, enhanced sentence affirmed. DeBruler DISSENTS without opinion.

TITLE: Ingle v. State

INDEX NO.: E.5.d.4.

CITE: (3-4-02), Ind. App., 766 N.E.2d 392

SUBJECT: Improper use of depreciate seriousness of crime as aggravator - no effect where other aggravators

HOLDING: Although Tr. Ct. improperly considered aggravating circumstance that imposition of reduced sentence would depreciate seriousness of crime, it properly considered seven other aggravators & determined that they outweighed two mitigators. Consideration of depreciate seriousness of crime aggravator is proper only when Tr. Ct. is considering imposition of less than presumptive sentence. Ector v. State, 639 N.E.2d 1014 (Ind. 1994). D argued that Tr. Ct. did not consider history of mental illness & lack of criminal activity for significant period before crimes occurred. However, Tr. Ct. identified & specifically noted both mitigators. Further, it was proper for Tr. Ct. to exclude evidence of D's good behavior while on death row after initial sentencing. Only evidence reflecting conditions as they existed as of date of sentencing should be considered by Tr. Ct. Edwards v. State, 518 N.E.2d 1137 (Ind. Ct. App. 1988). Held, judgment affirmed.

RELATED CASES: Ousley, App., 807 N.E.2d 758 (because Indiana Post-Conviction Rule 1(10)(b) allows Tr. Ct. to increase sentence based upon bad conduct after original sentencing date, Tr. Ct. must be able to consider good behavior which occurred during the same time period).

TITLE: Mathews v. State
INDEX NO.: E.5.d.4.
CITE: (06-28-06), Ind., 849 N.E.2d 578
SUBJECT: Depreciation of seriousness of crime as aggravator
HOLDING: Citing Walter v. State, 727 N.E.2d 443 (Ind. 2000); Huffman v. State, 717 N.E.2d 571 (Ind. 1999); Ector v. State, 639 N.E.2d 1014 (Ind. 1994); and Evans v. State, 497 N.E.2d 919 (Ind. 1986), Court held that it is not error to enhance a sentence based upon the aggravator that a sentence less than an enhanced term would depreciate the seriousness of the crime. However, this aggravator cannot justify imposition of consecutive sentences.

Note: This holding is inconsistent with and calls into question the holdings in Berry, 703 N.E.2d 154 (Ind. 1998); Hollins, 679 N.E.2d 1305 (Ind. 1997); Walton, 650 N.E.2d 1134; Powell, App, 751 N.E.2d 311; and Ingle, App., 766 N.E.2d 392.

RELATED CASES: Walsman, App., 855 N.E.2d 645 (citing Taylor v. State, 840 N.E.2d 324 (Ind. 2006), Ct. held it was improper to use seriousness of crime as aggravator).

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.d.5. Victim's age

TITLE: Kaufman v. State

INDEX NO.: E.5.d.5.

CITE: (8/13/86), Ind., 496 N.E.2d 90

SUBJECT: Sentencing -- aggravating circumstances; age of crime victim

HOLDING: D was convicted of murder & sentenced to enhanced sentence of fifty years imprisonment. D argued that Tr. Ct. created aggravating criteria without explanation of its reasoning, thereby preventing meaningful review of sentence. Ct. held, based on Tr. Ct. 's statement at sentencing in which it mentioned that victim was seven months of age, that Tr. Ct. properly considered nature of crime as required by Ind. Code 35-38-1-7. Also, sentencing judge may consider factors in aggravation which are not specifically listed in statute. Here, Ct. held it was within bounds of Tr. Ct.'s discretion to regard infancy of victim as basis for enhanced sentence. Held, conviction affirmed.

RELATED CASES: Garland, App., 855 N.E.2d 703 (Tr. Ct. did not abuse its discretion when it used the victim's "tender age" to describe the aggravator that the victim was 7 years old; comment was merely a moral-penal observation, supported by jury's finding that victim was age 7, thus it did not violate Blakely); Edwards, App., 842 N.E.2d 849 (Tr. Ct. properly considered victim's age -- fifteen months -- in relation to nature & circumstances of crime as a valid aggravating circumstance); Ray, App., 838 N.E.2d 480 (age of victim focuses on the status of the victim whereas the shaken baby aggravator focuses on the nature & circumstances of the crime, & since the policy behind each aggravator is different, use of both aggravators is permissible); Thompson, App., 793 N.E.2d 1046 (victim's age, 11, was element of child molesting, thus use of this factor was inappropriate); Kien, App., 782 N.E.2d 398 (tender age of victim was properly considered as aggravator in child molesting case); Kile, App., 729 N.E.2d 211 (Tr. Ct. properly used fact that victim was 6 years old to enhance conviction for neglect); Reynolds, 575 N.E.2d 28 (where victim's age comprises material element of crime, it cannot also constitute aggravating circumstance to support enhanced sentence); Mallory, 563 N.E.2d 640 (Tr. Ct. sufficiently particularized circumstance of child's age where age was element of neglect; fact that victim was much younger than twelve & so dependent on her parents to seek doctor's attention, was properly considered as aggravator); Goodwin, 573 N.E.2d 895 (fact that victim was thirteen at time of sex crime was proper consideration for aggravating sentence of five years; there is no clear legislative intent to preclude consideration of age of victim where victim is twelve or older, yet there is clear legislative intent to criminalize sex crimes where child is under sixteen, even where act appears to be consensual).

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.d.6. Victim mentally/physically infirm

TITLE: McCann v. State

INDEX NO.: E.5.d.6.

CITE: (6-20-01), Ind., 749 N.E.2d 1116

SUBJECT: Aggravating circumstances - victim's pregnancy

HOLDING: Victim's pregnancy, like any other circumstance that may extend harm inflicted by a crime, may be aggravating circumstance in sentencing whether or not perpetrator is aware that victim is pregnant. Pregnancy is similar to infirmity or age of victim in that D's knowledge of these circumstances is not necessary for them to qualify as aggravating. Stevens v. State, 691 N.E.2d 412 (Ind. 1997). Knowledge of victim's vulnerability adds to culpability of perpetrator, but aggravating circumstances turn on consequences to victim as well as culpability of D. Although one of aggravating circumstances was improper (prior attempts at rehabilitation), there were no mitigating circumstances & three other valid aggravating circumstances, including D's criminal history. Given these factors, Ct. could say with confidence that Tr. Ct. would have imposed same sentence, even without improper aggravating circumstance. Held, transfer granted, Ct. App.' opinion at 742 N.E.2d 998 summarily affirmed as to all other issues, sentence imposed by Tr. Ct. affirmed.

RELATED CASES: Lewis, 31 N.E.3d 539 (Ind. Ct. App. 2015) (where sentencing order did not sufficiently explain consecutive sentences, remand was unnecessary because Ct. was confident that Tr. Ct. would still impose consecutive sentences as reason for consecutive sentences - multiple victims - was apparent from face of the record); McCoy, App., 856 N.E.2d 1259 (Tr. Ct. did not err in assigning aggravating weight to the fact that the D impregnated his step-daughter as a result of the molest).

TITLE: Wilson v. State

INDEX NO.: E.5.d.6.

CITE: (1/23/84), Ind., 458 N.E.2d 654

SUBJECT: Aggravating circumstances - victim mentally/physically infirm

HOLDING: Tr. Ct. did not err in enhancing D's sentence by 5 years. Here, Tr. Ct. found 2 aggravating circumstances: (1) reduced sentence would depreciate seriousness of crime; & (2) victim was mentally or physically infirm. Tr. Ct. pointed to fact D, an armed man, pushed unarmed woman to ground, overpowered her, then shot her 5 times as evidence of infirmity. Ct. notes that technically, victim was not mentally or physically infirm. The "disparity of position" between D & victim is matter of good sense & decency & thus properly considered in determining a sentence, despite fact it is not expressly mentioned in statute (Ind. Code 35-38-1-7(b)(6)). Held, sentence affirmed.

RELATED CASES: Deloney, 938 N.E.2d 724 (Ind. Ct. App. 2010) (victim who was intoxicated on night of his murder was not "mentally infirm" for purposes of Ind. Code 35-38-1-7.1(b)(6) and his mental state could not be used as an aggravator for sentencing); Oberst, App., 748 N.E.2d 870 (no abuse of discretion in relying on victim's mental infirmity or aggravating factor; Tr. Ct. could infer from its observations whether victim was mentally infirm); Scheckel, 620 N.E.2d 681 (Tr. Ct. erroneously found that victim was in physically or mentally infirm state due to sleep or blood alcohol content where D & victim engaged in scuffle prior to murder, demonstrating that victim was not asleep, & blood alcohol content was not in record); Jenkins, 492 N.E.2d 666 (Tr. Ct. properly found that victim was mentally & physically infirm where victim was "helpless, crippled woman" who suffered angina attack during burglary of her home); Perkins, 392 N.E.2d 490 (sentencing Ct. properly found that victim was mentally & physically infirm where evidence showed that victim was thirteen months old, was suffering from malnutrition, cried a lot, was unable to stand easily, could not keep food down, & was inactive child).

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.d.8. Lack of remorse (Ind. Code 35-38-1-7(d))

TITLE: Guenther v. State

INDEX NO.: E.5.d.8.

CITE: (12/24/86), Ind., 501 N.E.2d 1071

SUBJECT: Aggravating circumstances - lack of remorse

HOLDING: On transfer. Tr. Ct. did not err in enhancing D's conviction for Class C child molesting, where D continued to deny allegations & showed absolutely no remorse. Here, 4th Dist. held "it is simply improper to use lack of remorse to enhance a sentence when accused has entered plea of not guilty." Ind. S. Ct. vacates 4th Dist.'s opinion at 495 N.E.2d 788 on this issue. Tr. Ct. found D had sexually abused his stepdaughters, some of which he admitted, showed no remorse for these activities, & in opinion of Tr. Ct. was likely to repeat this conduct. In determining whether or not to give enhanced/mitigated sentence, Tr. judge is to consider character of person being sentenced & nature of crime committed. Held, Tr. Ct. affirmed; enhanced sentence upheld. DeBruler DISSENTS without opinion.

RELATED CASES: Ketcham, App., 780 N.E.2d 1171 (D failed to prove that Tr. Ct. abused its discretion in assessing his lack of remorse too much aggravating weight); Deane, 759 N.E.2d 201 (Tr. Ct. based its finding of lack of remorse on D's demeanor at sentencing, his affront to prosecutor & disrespect for proceedings; moreover, while D maintained his innocence, as he was entitled to do, he expressed no regret or appreciation of tragedy that had occurred, regardless of who was culpable); Linger, App., 508 N.E.2d 56 (Crim L 986.2(6); Tr. Ct. erred in considering D's denial of guilt as an aggravating factor; although Tr. Ct. may consider lack of remorse as aggravating factor in imposing sentence, D's refusal to testify may not be considered to support inference of guilt, *citing Griffin v. CA* (1965)380 U.S. 609, Spranger, 498 N.E.2d 931, Gibbs, 460 N.E.2d 1217, & Hoehn, App., 472 N.E.2d 926; held, remanded for resentencing); Dockery, App., 504 N.E.2d 291 (lack of remorse is not a proper aggravating circumstance where D protests his innocence & there is no evidence to corroborate crime other than testimony of child-molest victims).

TITLE: Watkins v. State
INDEX NO.: E.5.d.8.
CITE: (1st Dist. 05/21/91), Ind. App., 571 N.E.2d 1262
SUBJECT: Sentencing aggravator - Lack of remorse
HOLDING: Where D at sentencing maintains his innocence & attributes evidence supporting conviction to perjury by victim & his mother, it is proper to consider this as sentencing aggravator showing lack of remorse. Ct. of Appeals noted that there is no general prohibition against using lack of remorse as aggravator, especially whereas, here, there is evidence of guilt in addition to victim's testimony. Held, sentence not manifestly unreasonable & affirmed. Decision reversed another issue, see Watkins, 575 N.E.2d 624 at K.3.e.3.

Note: While finding sentence not manifestly unreasonable under circumstances, J. Sullivan did not find D's statement indicated appropriate lack of remorse to consider as aggravator, noting that good faith maintenance of innocence is not proper aggravator, & that what is required is something akin to situation where D admits he committed act, but doesn't care.

RELATED CASES: Newsome, App., 797 N.E.2d 293 (lack of remorse aggravator was proper where guilt was supported by corroborated evidence that D failed polygraph & DNA results indicating D was father of CW's child); Hollen, App., 740 N.E.2d 149, *aff'd* 761 N.E.2d 398 (where only evidence that D did not act in self-defense was testimony of D's brother-in-law & victim/officer, D's maintaining his innocence did not rise to level of disdain required to justify using lack of remorse to aggravate sentence).

TITLE: Willoughby v. State

INDEX NO.: E.5.d.8.

CITE: (4/10/90), Ind., 552 N.E.2d 462

SUBJECT: Sentencing -- non-statutory aggravators; lack of remorse

HOLDING: Trial judge is not limited to considering as aggravating circumstances those listed in non-capital sentencing statute, Ind. Code 35-38-1-7. Under Ind. Code 35-38-1-7(a)(3)(B), trial judge may consider evidence of D's character. Here, D was convicted of murder & robbery, & trial judge considered D's lack of remorse as aggravating circumstance. Ct. held that trial judge did not err in finding as aggravating circumstance D's lack of remorse for victim in this case or victim in previous case involving D. Held, conviction affirmed; DeBruler, J., concurring & dissenting.

RELATED CASES: Shafer, App., 856 N.E.2d 752 (although Tr. Ct. cannot take judicial notice of testimony of D in co-D's trial to support finding of lack of remorse, there was sufficient evidence at sentencing hearing as to lack of remorse); Cox, App., 780 N.E.2d 1150 (D's assertions that State witnesses were lying about incident & that it did not occur was no more than D maintaining his innocence, & did not support Tr. Ct.'s conclusion that D was unremorseful or failed to accept responsibility for his actions); Smith, 655 N.E.2d 532 (where D made no effort to admit guilt & trial judge did not point to any conduct or words which could be construed as equivalent of "I don't care" as opposed to "I didn't do it," Tr. Ct. could not consider lack of remorse as aggravating factor in imposing sentence); Dockery, 504 N.E.2d 291 (not proper aggravator where D protests innocence at all stages of trial & evidence of criminal acts comes solely from victims without any corroborating evidence, physical or otherwise); Bewley, 572 N.E.2d 541 (lack of remorse by person who maintains his innocence must be regarded as only modest aggravator).

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.d.9. Other (Ind. Code 35-38-1-7(d))

TITLE: Alexander v. State

INDEX NO.: E.5.d.9.

CITE: (4th Dist., 11-22-05), Ind. App., 837 N.E.2d 552

SUBJECT: Illegal alien status as aggravating circumstance

HOLDING: In murder prosecution, Tr. Ct. did not err in considering D's status as an illegal alien as an aggravating circumstance. D argued that Tr. Ct. should not have considered this factor, in as much as his parents brought him into the United States as a child, & he had no choice in the matter. However, D was "certainly not a youngster" when he committed this offense, & he could have rectified his illegal alien status by returning to his native country or by applying for a visa in this country. Moreover, record shows that D had a seemingly valid Indiana driver's license when he was arrested. In light of D's status as an illegal alien in this country, he could only have obtained that license by presenting false documentation to the Bureau of Motor Vehicles & committing perjury on the application. As a result, these circumstances demonstrate D's patent disregard for laws of this country & this State. Ct. also held that Tr. Ct. properly considered D's flight from jurisdiction while on bond awaiting trial on other pending charges as aggravating circumstance. Held, conviction & fifty-five-year sentence affirmed. Mathias, J., concurring to note D's rights under 1963 Vienna Convention on Consular Relations. Mathias urges law enforcement authorities to inform foreign nationals of their right to consular contact, & to make such advice standard operating procedure in order to help establish efficient & objectively fair notice & contact process that compliments Sixth Amendment indigent right to counsel.

RELATED CASES: Bonilla, 907 N.E.2d 586 (Ind. Ct. App. 2009) (in light of D's illegal entry into this country and his failure to follow the laws once here, advisory sentence for dealing in cocaine was not inappropriate); Sanchez, App., 891 N.E.2d 174 (aggravator of illegal alien status supported enhanced sentence despite mitigator of lack of criminal history and acceptance of responsibility through plea agreement); Samaniego-Hernandez, App., 839 N.E.2d 798 (being an illegal alien is itself more properly viewed as an aggravator than as a mitigator).

TITLE: Biddinger v. State
INDEX NO.: E.5.d.9.
CITE: (5th Dist., 04-25-06), Ind. App., 846 N.E.2d 271, *sum. aff'd* 868 N.E.2d 407
SUBJECT: Aggravated battery - Improper aggravator & overlooked mitigator
HOLDING: In aggravated battery prosecution, Tr. Ct. erred in considering type of weapon & ammunition he used to kill victim as an aggravating factor. Because D was legally entitled to carry a large caliber weapon loaded with hollow-point bullets, Tr. Ct. erred in considering that conduct to be an aggravating factor. "The lawful exercise of one's constitutional rights is not, & must not be, a factor in aggravation or mitigation in determining a criminal sentence." People v. McCumber, 477 N.E.2d 525 (Ill. App. Ct. 1985). Given four remaining aggravators, Tr. Ct.'s error was harmless because it would have imposed same sentence even if it had not considered inappropriate aggravator. Held, judgment affirmed.

TITLE: Burrage v. United States

INDEX NO.: E.5.d.9.

CITE: (1/27/2014), 134 S.Ct. 881 (U.S. S. Ct. 2014)

SUBJECT: Tr. Ct. misconstrued causation element of sentencing aggravator, death "resulting from" ingesting heroin

HOLDING: In sentencing D for dealing heroin, the Tr. Ct. erred under 21 U.S.C. § 841(b)(1)(C) by enhancing D's sentence to the minimum-maximum of twenty years. It incorrectly concluded that the statutory trigger for the enhancement - when a person's death "results from" ingesting a controlled substance - meant that the government had to merely show that the heroin D sold to the victim was a contributing cause of death, not the actual or "but for" cause of death. Ordinarily, "results from" requires the government to show "that the harm would not have occurred in the absence of - that is, but for - the D's conduct." University of Tex. Southwestern Medical Center v. Nassar, 133 S. Ct. 2517, 2525 (2013). The Court previously ruled that similar statutory phrases - "because of," "based on" and "by reason of" - to impose "but for" causation. See id.; see also Safeco Ins. Co. of America v. Burr, 551 U.S. 47, 63 (2007) and Gross v. FBL Financial Services, Inc., 557 U.S. 167, 176 (2009). Congress could have written the law to require the government show only that the criminal act was a substantial or contributing factor in causing a person's death but chose not to, opting for a phrase "that imports but-for causality." Judgment reversed and remanded. Scalia, J., joined by Roberts, C.J., and Kennedy, Thomas, and Breyer, J.J., which Alito, J., joined in part; Ginsburg, J., concurring in judgment, joined by Sotomayor, J.

TITLE: Crenshaw v. State
INDEX NO.: E.5.d.9.
CITE: (9/14/82), Ind., 439 N.E.2d 620
SUBJECT: Aggravating circumstances - factor that elevates offense may also enhance
HOLDING: Tr. Ct. is not precluded from considering as aggravating factor a circumstance of the crime which automatically upgrades felony from one class to another. Here, fact bodily injury occurred during commission of robbery was properly used by Ct. to aggravate sentence (Class A felony conviction) 20 years. Ct. rejects D's argument that dual usage is "redundant & cruel & unusual punishment." McNew, 391 N.E.2d 607 (sentence enhanced because serious bodily injury resulted); Warfield, 417 N.E.2d 304 (sentence enhanced because robber armed). Held, no error.

NOTE: distinction made in McNew between Ind. Code 35-4.1-4-7(a) [Ct. "shall" consider nature & circumstances of crime] & Ind. Code 35-4.1-4-7(c) [Ct. "may" consider: (c)(2) history of criminal activity; (c) (4) depreciate seriousness of crime]. Be aware of Tr. Ct.'s wording of reason sentence aggravated (nature & circumstances of crime committed vs. depreciate seriousness of crime) for appeal purposes.

TITLE: Davies v. State

INDEX NO.: E.5.d.9.

CITE: (11-28-01), Ind. App., 758 N.E.2d 981

SUBJECT: Intentional killing as aggravator - can be considered in death penalty or LWOP eligible cases even where material element of crime

HOLDING: Generally, factor constituting material element of crime cannot also be used as aggravator to support enhanced sentence. Stone v. State, 727 N.E.2d 33. However, S.Ct. has carved out narrow exception in cases where D is eligible for either death penalty or life without parole but is instead sentenced to term of years. Harden v. State, 576 N.E.2d 590. Here, Tr. Ct. found that killing was intentional & could have sentenced D to life in prison without parole. Instead, Tr. Ct. sentenced him to term of years & properly considered aggravators. Held, judgment affirmed.

TITLE: Drake v. State

INDEX NO.: E.5.d.9.

CITE: (6/27/90), Ind., 555 N.E.2d 1278

SUBJECT: Non-statutory aggravating circumstances -- acts during trial

HOLDING: D was granted request to leave to find character witness & never returned. D was then convicted of child molesting & criminal confinement. Tr. Ct. enhanced presumptive thirty year sentence to fifty years & stated that D's attempt at fleeing jurisdiction, by stealing car & leading high speed police chase which could have resulted in injury or death warranted enhancement. Tr. Ct. took into consideration D's criminal history, as well as theft of car & subsequent attempt to flee jurisdiction while trial was pending. Ct. held that since these were proper reasons for enhancement, Tr. Ct. did not err. Held, conviction affirmed.

TITLE: Durham v. State
INDEX NO.: E.5.d.9.
CITE: (3d Dist. 7/14/87), Ind. App., 510 N.E.2d 202
SUBJECT: Aggravating circumstances - emotional & psychological effects upon victim
HOLDING: Tr. Ct. did not err in using emotional & psychological effects of D's acts of molestation upon his stepdaughter as aggravating circumstance to enhance sentence by 3 years. Emotional & psychological effects of criminal behavior are not listed in Ind. Code 35-38-1-7 as an aggravating circumstance. Ind. S. Ct. in Hogan 409 N.E.2d 591, approved use of extreme physical, mental, & emotional harm done to victims as aggravating circumstance. Effect of crime upon victim was held to be proper consideration in Caccavallo 436 N.E.2d 775 & Bresson, App., 498 N.E.2d 91. Held, no abuse of discretion.

RELATED CASES: McCoy, App., 856 N.E.2d 1259 (fact that stepdaughter was impregnated & then experienced a miscarriage due to the molest was a proper aggravator); Boyd, 546 N.E.2d 825 (fact that D brutally raped & sodomized victim for three hours, required victim to perform several deviate acts, subjected victim to several acts of vaginal & anal penetration, & threatened victim whole time with gun was sufficient aggravating factor); Middlebrook, App., 593 N.E.2d 212 (fact that D was father & step-father of victims, & was therefore in position of trust, was sufficient aggravator to enhance Class C felony to 8 years, relying on Tague (1989), Ind., 539 N.E.2d 480.

TITLE: Edgecomb v. State

INDEX NO.: E.5.d.9.

CITE: (11-1-96), Ind., 673 N.E.2d 1185

SUBJECT: Position of trust as aggravator

HOLDING: Tr. Ct. erred in finding as aggravating circumstances that D was in position of trust with victim, & that facts of crime were particularly heinous. D was not in position of trust, but was merely victim's neighbor who occasionally borrowed things from victim & casually conversed with her. "Neighbor" relationship, without more, is not "position of trust" warranting consideration as aggravating circumstance. Further, factors which possibly made crime "particularly heinous" were covered by "victims advanced age" & "disparity between ages of victim & perpetrator" aggravators. Weight of legitimate aggravating factors did not outweigh mitigating factors as to justify maximum 60-year sentence for felony murder. Held, remanded for imposition of 40-year sentence; Dickson, J., dissenting.

RELATED CASES: Bisard, 26 N.E.3d 1060 (Ind. Ct. App. 2015) (in *citing* "violation of public trust" as a sentence aggravator for D, who was a police officer, the Tr. Ct. cited a proper, legal aggravator that was also supported by the record); Amalfitano, 956 N.E.2d 208 (Ind. Ct. App. 2011) (record supported D's position of trust with victim as aggravator, where for six months D kept 65-year-old woman with dementia locked in utility closet in grossly inhuman conditions (and allowed his sons to beat her daily) in order to steal her social security benefits and prescription drugs); Roney, 872 N.E.2d 192 (fact that victim & D were unacquainted, without any evidence of random violence, is not an aggravator); Stout, App., 834 N.E.2d 707 (no error in finding D's violation of his position of trust with his stepdaughter, & Ct. strongly disagreed with D's argument that this should not be aggravator because acts of molestation are commonly committed by stepfathers); Reyes, App., 828 N.E.2d 420 (D admitted to being victim's friend & was more than a person who "occasionally borrowed things" or "casually conversed" with victim; D used his relationship with victim to gain access to victim's home); Cloum, App., 779 N.E.2d 84 (no error in assigning aggravating weight to D's violation of his "duty to safeguard & protect his mate," & of his obligation "to nurture, sustain, & provide an atmosphere in which his & victim's children can flourish." No error in recognizing that fact that children's father killed mother has potential for harming children above & beyond harm they may have suffered had victim been killed by someone else); Marshall, App., 643 N.E.2d 957 (breach of position of trust proper aggravator for sentence on child molest conviction against police officer who was counseling child on drugs & alcohol); Collins, App., 643 N.E.2d 375 (where D was convicted of molesting his daughter, Ct. held that Tr. Ct. properly considered D's former occupation as police officer as aggravator where D was trained in law & placed in position of trust); Young, App., 640 N.E.2d 95 (upheld violation of position of trust as aggravator; physician convicted of rape on patient using his position & knowledge of medicine); Campbell, App., 551 N.E.2d 1164 (where D, in capacity as university business manager, was convicted on several counts of theft & forgery, violation of his position of trust & confidence within local community were proper aggravating factors warranting consecutive sentencing).

TITLE: Gomillia v. State

INDEX NO: E.5.d.9.

CITE: (8/12/2014), 13 N.E.3d 846 (Ind. 2014)

SUBJECT: Cannot use element of offense to increase sentence absent unique circumstances

HOLDING: *Citing* a material element of an offense as an aggravating factor to impose a sentence greater than the advisory sentence is "improper as a matter of law," Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007), unless there are unique circumstances that justify deviating from the advisory sentence. Townsend v. State, 498 N.E.2d 1198, 1201 (Ind. 1986); Pavey v. State, 477 N.E.2d 957 (Ind. Ct. App. 1985). Court of Appeals decisions interpreting Pedraza v. State, 887 N.E.2d 77 (Ind. 2008) as allowing this read Pedraza too broadly.

Here, while armed with a handgun, D and an accomplice forced their way into E.K.'s home, demanded money and jewelry, and forced her to perform fellatio at gunpoint. D then threatened to rape E.K., but decided to ransack her home and take jewelry, two televisions, a laptop, and an ATM card. D plead guilty to robbery and criminal deviate conduct ("CDC") as an A felony; the offense is an A felony when the person committing the offense "threaten[s] the use of deadly force." In sentencing D to more than the advisory sentence the Tr. Ct. *cited* "the threats to this lady, the terror you inspired in her."

Apparently finding "unique circumstances," the Supreme Court upheld the higher sentence, explaining as follows: "we do not read the Tr. Ct.'s general reference to '[t]he threats to this lady' as necessarily equating to the 'threat of force' element in the criminal deviate conduct conviction.

As a practical matter the victim was threatened the moment two young men burst into her home wielding weapons and demanding money and jewelry." Further, other circumstances of the crime justified a sentence in excess of the advisory sentence. Held, transfer granted, Court of Appeals' opinion on this issue at 933 N.E.2d 306 vacated, judgment affirmed.

RELATED CASES: Phipps, 90 N.E.3d 1190 (Ind. 2018) (while D.'s convictions cannot be used to enhance his sentence ..."the particular facts the ongoing nature and length of [his] criminal conduct can properly be considered as aggravation"); Mannix, 54 N.E.3d 1002 (Ind. Ct. App. 2016) (applying Gomillia's rationale to enhancement of a sentence based on an element of a separate offense).

TITLE: Hammons v. State

INDEX NO.: E.5.d.9.

CITE: (6/25/86), Ind., 493 N.E.2d 1250

SUBJECT: Enhanced sentence to compensate erroneous verdict

HOLDING: Tr. Ct. erred in enhancing voluntary manslaughter sentence to compensate for erroneous jury verdict. Here, at first sentencing hearing, Tr. judge stated he believed evidence supported murder conviction, therefore, he would sentence D to maximum term. At second hearing, Tr. judge also made on-the-record statements indicating he was sentencing more harshly to compensate for erroneous verdict. In Gambill, 436 N.E.2d 301, Ct. ordered Tr. judge to resentence D to presumptive term where record "manifest[ed] that Tr. Ct. enhanced sentence by reason of consideration beyond pale of his authority. ... In doing so, he invaded province of jury." Ct. finds action in this case more like act of compensation for jury's decision apparent in Gambill than the skepticism shown in Wilson, 458 N.E.2d 654 (judge not resolutely opposed to jury verdict of voluntary manslaughter but attributed verdict to good performance of defense counsel). Held, cause remanded with instructions to resentence D to presumptive term for voluntary manslaughter.

RELATED CASES: Phelps, 24 N.E.3d 525 (Ind. Ct. App. 2015) (although there also existed valid aggravators such as D's criminal history and probation violations, Tr. Ct.'s stated disagreement with the not-guilty verdict on the greater offense renders the Tr. Ct.'s maximum sentence a suspect enhancement; sentence revised to from 8 years to 6 years in the DOC); Bethea, 983 N.E.2d 1134 (Ind. 2013) (Hammon does not apply to charges dismissed pursuant to plea agreements); Hamman, 504 N.E.2d 276 (Crim L 1208.6(1), 1181.5(8) enhancement of voluntary manslaughter & battery convictions "was clearly the result of improper considerations" where Tr. judge's statements (set forth in opinion) indicated his disagreement with jury's verdict; held remanded with instructions to sentence D to presumptive sentence for each of 3 counts, sentences to run consecutively given "grave outcome" of D's actions - 2 people were killed & another was seriously injured; Pivarnik DISSENTS without opinion); Haskett, App., 467 N.E.2d 32 (Crim L 1208.6(1); Ct. rejects D's contention that Tr. Ct. meted out maximum sentence because he successfully eluded habitual & because additional serious charges were dismissed prior to trial).

TITLE: Howell v. State

INDEX NO.: E.5.d.9.

CITE: (3/13/2018), 2018 Ind. 97 N.E.3d 253 (Ind. Ct. App. 2018)

SUBJECT: Voluntary manslaughter conviction properly enhanced for using a firearm in commission of offense

HOLDING: Tr. Ct. did not err in enhancing D's voluntary manslaughter sentence pursuant to Indiana's Firearm Enhancement Statute, Ind. Code § 35-50-2-11. Subsection (i) of statute prohibits more than one offense in a single episode of criminal conduct from being subject to the firearm sentencing enhancement where, as here, a D is convicted of more than one of the offenses that would otherwise be eligible for the enhancement. Court rejected D's interpretation of subsection (i) to bar a sentencing enhancement for an offense when that offense was committed with other offenses comprising a single episode of criminal conduct. Even accepting D's interpretation of subsection (i), Court concluded that D's voluntary manslaughter offense in Vanderburgh County was not part of a single episode of criminal conduct with respect to his attempted robbery and theft offenses in Warrick County. Held, judgment affirmed in part and reversed in part on other grounds.

TITLE: Inman v. State
INDEX NO.: E.5.d.9.
CITE: (8/29/85), Ind., 482 N.E.2d 451
SUBJECT: Aggravating circumstances - D is dangerous person
HOLDING: Record supports Tr. Ct.'s conclusions that D's behavior was that of a "dangerous person" & that he was in need of correctional/rehabilitative treatment best provided at an institution. Here, statement of reasons shows D armed himself (2 guns) & entered into a situation he knew was dangerous. After he was "robbed," he pursued & shot & killed one of his alleged assailants, rather than seeking police assistance. D's act of shooting into truck in hospital parking lot endangered "passing drivers, pedestrians & even persons inside the hospital." Held, 20-year sentence for voluntary manslaughter upheld.

TITLE: Johnson v. State

INDEX NO.: E.5.d.9.

CITE: (10-29-97), Ind., 687 N.E.2d 345

SUBJECT: Aggravating circumstances - invasion of victim's home; bludgeoning

HOLDING: Invasion of victims' home, representing place of security in minds of most, can plausibly be used by Tr. Ct. as aggravating circumstance. Tr. Ct. is not limited to using only statutory aggravating factors to enhance sentences. Ind. Code 35-38-1-7.1(d); Shields, 523 N.E.2d 411. Moreover, Tr. Ct.'s use of word "bludgeoning" to describe D's crime sufficiently articulated aggravating aspects of crime to qualify as proper aggravating factor. However, fact that D hoped to deprive victims of their money was improperly listed as aggravating factor.

Ct. also rejected claim that consecutive, enhanced sentences are manifestly unreasonable when only one of two perpetrators is prosecuted for crime. Under facts of case, trial judge was not compelled to find that D was merely accomplice who unwittingly became involved in actions beyond his control. Held, judgment affirmed.

TITLE: Kien v. State

INDEX NO.: E.5.d.9.

CITE: (3rd Dist., 1-28-03), Ind. App., 782 N.E.2d 398

SUBJECT: Maintaining innocence - improper aggravator; corroborating evidence not overwhelming

HOLDING: Tr. Ct. erred in considering fact that D maintained his innocence throughout child molesting trial as aggravating circumstance. Here, there was corroborating medical evidence that victim had been subject to sexual abuse with penetration. However, D did not dispute that victim had been sexually abused, only that he was not guilty party. Victim's brother testified that he witnessed sex act between D & victim, but no other witness or evidence, other than brother's testimony, linked D to crimes. Facts here closely resemble those in Hollen v. State, 740 N.E.2d 149 (Ind. Ct. App. 2000), where Ct. held that even though there was corroborating evidence of D's guilt, it did not necessarily follow that innocence defense was maintained in bad faith to justify enhanced sentence. Likewise here, although there was testimony indicating that D committed acts, it was not so overwhelmingly condemning that it can be said that D maintained his innocence in bad faith. Further, Tr. Ct. should not have relied upon portion of psychologist's evaluation which was based solely on D's denial of guilt. In addition, fact that molestation occurred on multiple occasions was improper aggravator because D was convicted of each act & fact which comprises material element of crime may not also be used & aggravating circumstance to support enhanced sentence. Stewart v. State, 531 N.E.2d 1146 (Ind. 1988). However, Tr. Ct. properly relied upon what commission of separate crimes of molestation revealed about D's character when he had time to reflect upon harm he was causing to victim. Ct. also found that extreme effect of crime on victim's brother & tender age of victim were properly considered as aggravators. Held, judgment affirmed in part & reversed in part & remanded.

TITLE: Kingery v. State
INDEX NO.: E.5.d.9.
CITE: (12-22-95), Ind., 659 N.E.2d 490
SUBJECT: Use of "post-act premeditation" as aggravator
HOLDING: Tr. Ct. could properly infer that D was engaged in "post-act premeditation" in attempting to hide his ownership of gun used in victim's robbery & murder. After murder, D told detective that he didn't own gun because he didn't believe in guns. Later, D reported to police that his gun had been stolen. Tr. Ct. found that D engaged in post-act meditation because he was attempting to conceal his ownership of particular gun used in crime. Based on detective's testimony at trial, Tr. Ct. was entitled to find this aggravating circumstance. Ct. also vacated class B robbery conviction because jury was not instructed on that offense. Held, murder conviction affirmed, robbery conviction vacated & remanded for resentencing as class C felony.

TITLE: Lewis v. State

INDEX NO.: E.5.d.9.

CITE: (5th Dist., 11-21-01), Ind. App., 759 N.E.2d 1077

SUBJECT: Invalid aggravating factor - impact on unrelated victim's family

HOLDING: In murder prosecution, in which D was found guilty of criminal confinement & battery against victim 1, Tr. Ct. erred in considering alleged murder & other crimes against victim 2 (Maxwell) as aggravating circumstance supporting D's enhanced sentence. Tr. Ct. allowed Maxwell's mother to testify at sentencing, despite fact that D had not been found guilty of any crime against Maxwell. Maxwell was not "victim" of crimes for which D was being sentenced, thus Maxwell's mother's testimony was irrelevant to appropriate sentence for his crimes against victim 1. Even if Ct. could consider mother's testimony as relevant & properly given, she did not testify to any particular impact beyond that which one would expect family member of murder victim to experience, which is accounted for in presumptive sentence. Simmons v. State, App., 746 N.E.2d 81. Error in allowing mother's testimony was further compounded when Tr. Ct. obviously relied upon fact & circumstances of Maxwell's death, as evidenced by Ct.'s sentencing statement. Held, affirmed in part, reversed & remanded for resentencing.

TITLE: Linger v. State

INDEX NO.: E.5.d.9.

CITE: (4th Dist. 6/1/87), Ind. App., 508 N.E.2d 56

SUBJECT: Non-statutory aggravating circumstances - D stole from employer

HOLDING: Tr. Ct. erred in aggravating D's sentence based upon fact D stole from his employer where he was in a position of trust. In 1971, legislature chose to consolidate theft statutes & did not differentiate between embezzlement, theft by deception, or other forms of theft. Here, Ct. finds Tr. judge, in merely reciting element as automatic aggravating circumstance, was legislating & creating automatic 4-year sentence for that form of theft. Element of crime may not be used as aggravating factor to enhance sentence. Townsend, 498 N.E.2d 1198 (possession of gun & threatening victim, which were elements of crimes charged, could not alone be considered as aggravating circumstances). Ct. also notes Tr. Ct. failed to articulate for all 4 theft counts, that it evaluated & balanced mitigating factors against aggravating factors to determine if mitigating circumstances offset aggravating circumstances. Held, conviction affirmed; cause remanded for resentencing.

RELATED CASES: Harris, Ind., 659 N.E.2d 522 (Linger inapplicable where D was not being sentenced for theft; no abuse of discretion by concluding that D's previous employment by victim was aggravating circumstance).

TITLE: Madden v. State
INDEX NO.: E.5.d.9.
CITE: (5th Dist., 6-26-98), Ind. App., 697 N.E.2d 964
SUBJECT: Improper aggravators - harmless error
HOLDING: Tr. Ct. erred in *citing* D's eligibility for death penalty as aggravating circumstance & stating that D took valued member from community. Ind. Code 35-50-2-9 provides that it is aggravating circumstance making D eligible for death penalty when D "intentionally" kills victim while committing offense of robbery. Here, D was charged with & pled guilty to "knowingly" killing victim. This "knowing" murder committed during robbery did not render him eligible for death penalty. Other aggravating circumstance cited by Tr. Ct. was improper because value of victim's life is component of statutory presumptive sentence. Tr. Ct. is not required to determine which victim's life is valuable to community & which is not. Ct. affirmed sentence because D's history of criminal activity was valid aggravating circumstance. Vacated conviction may be utilized as aggravator in later sentencing hearing. Edwards, App., 518 N.E.2d 1137. Held, judgment affirmed.

TITLE: May v. State

INDEX NO.: E.5.d.9.

CITE: (12/31/86), Ind., 502 N.E.2d 96

SUBJECT: Aggravating circumstances - threat to victims/multiple offenses/care & planning

HOLDING: Tr. Ct. did not err in aggravating D's sentence based upon: (1) real threat of harm to victim; (2) 5 separate robberies were committed; & (3) D used care in planning commission of offenses. Here, D contends real threat of harm was due solely to use of weapons, which was inherent in elevating charge from Class C robbery to Class B; there was only one transaction & one criminal intent (D robbed 5 people in drinking establishment); & there was no evidence of planning. Ind. Code 35-38-1-7 permits Tr. Ct. to aggravate sentence. This may be due to reasons listed in statute, although Ct. is not limited to these considerations. Held, no abuse of discretion.

TITLE: Nybo v. State

INDEX NO.: E.5.d.9.

CITE: (3rd Dist., 12-9-03), Ind. App., 799 N.E.2d 1146

SUBJECT: Improper sentence - use of immunized testimony & personal belief

HOLDING: Maximum eight-year sentence for neglect of dependent was inappropriate, where Tr. Ct. improperly considered D's immunized testimony from her husband's murder trial, & improperly considered as aggravators victim's age (a material element of the offense), & her murder, with which D was not charged. Based solely on D's immunized testimony, Tr. Ct. concluded that D sought to: 1) avoid taking responsibility for her adopted daughter's death; & 2) concluded, without any definitive evidence in support thereof, that D was not victim of an abusive relationship because her evasive testimony at her husband's trial was evidence of her attempt to protect her husband. Ct. concluded that Tr. Ct. relied heavily upon D's immunized testimony & its own personal belief, after sitting through husband's trial, in reaching conclusion that State had been too lenient in charging D to justify its imposition of maximum sentence. If Tr. Ct. was displeased with D's plea agreement, it had discretion to reject it. On other hand, it cannot accept plea agreement, then punish D at sentencing for State's perceived leniency in striking deal in first place. Trial judge's desire to send a personal philosophical or political message is not a proper reason to aggravate a sentence. Gregory-Bey v. State, 669 N.E.2d 154 (Ind. 1996). Held, sentence vacated & remanded with instruction to enter presumptive sentence of four years; Barnes, J., dissenting.

RELATED CASES: Neff, App., 832 N.E.2d 1006, sum. Aff'd, 849 N.E.2d 556 (Tr. Ct. improperly relied on D's immunized testimony when it found as aggravator that D failed to rehabilitate).

TITLE: Petruso v. State

INDEX NO.: E.5.d.9.

CITE: (11/12/82), Ind., 441 N.E.2d 446

SUBJECT: Sentencing -- nonstatutory aggravators; police officer as victim

HOLDING: D was convicted of attempted murder & kidnaping. After considering presentence report & evidence presented at trial, Tr. Ct. specified as aggravating circumstance that D attempted to murder police officer in performance of his duty. D claimed that there was no evidence of his intent to murder officer adduced at trial. Ct. held that element of intent required to constitute murder may be inferred from use of deadly weapon in manner likely to cause death or great bodily harm. Armstrong, 429 N.E.2d 647. Necessary intent may be inferred from nature of attack upon victim & circumstances surrounding crime. Roberson, 430 N.E.2d 1173. Therefore, Ct. held that there was evidence sufficient to support inference of D's intent. Held, conviction affirmed.

RELATED CASES: Castor, 587 N.E.2d 1281 (D can only be sentenced to death for murdering law enforcement officer if trier of fact is convinced beyond reasonable doubt that, at time of shooting, D knew that he was shooting at law enforcement officer); Moore, 479 N.E.2d 1264 (death penalty can be imposed where D either knew or should have known that his victim was law enforcement official).

TITLE: Penick v. State

INDEX NO.: E.5.d.9.

CITE: (12/19/95), Ind., 659 N.E.2d 484

SUBJECT: Sentencing -- non-statutory aggravators; serious injuries suffered by victim

HOLDING: D was convicted of murder pursuant to guilty plea & he appealed his sentence which entailed enhanced & consecutive sentences. D argued that one aggravator that death was painful & torturous, was inappropriate. D conceded that victim suffered some pain but argued that virtually all murders involve pain or torture & that this was not element particular to facts of this case which could be used to justify imposition of enhanced & consecutive sentences. However, infliction of grave injury & pain over extended period of time is sufficient to support aggravating factor. Loveless, 642 N.E.2d 974. Victim in this case remained conscious & responded to questions from D when his chest & abdomen were cut open & when one co-D tried to cut out his heart. Thus, there was sufficient evidence to support this aggravator. Held, enhanced sentence affirmed.

RELATED CASES: Moore, 569 N.E.2d 695 (enhancement of rape sentence beyond presumptive was proper based on two aggravating factors: D deliberately burned victim with cigarette & inflicted psychological injury upon her); Dillon, 492 N.E.2d 661 (fact that victim was severely beaten & injured supported finding of serious injuries as aggravating circumstance); Lang, 461 N.E.2d 1110 (seriousness of injury was proper aggravator where D intended to injure elderly victim who had shown him great deal of kindness & victim never regained capacity to live normal life).

TITLE: Rust v. State

INDEX NO: E.5.d.9.

CITE: (4/30/85), Ind., 477 N.E.2d 262

SUBJECT: Aggravating circumstances (AC) - double jeopardy

HOLDING: Enhancement of presumptive sentence did not subject D to double jeopardy. Here, Tr. Ct. *cited* kidnapping as one factor justifying enhancement of presumptive sentence for felony-murder (underlying felony was kidnapping). Had this been sole basis for enhancement, D would have been punished twice for same offense. Elmore, 382 N.E.2d 893. See also Bish, 421 N.E.2d 608 (punishment for each offense may be enhanced by same factors; such enhancement does not result in multiple punishments for same offense). Ct. finds Tr. Ct. also considered brutality of murder & other circumstances of crime. Held, no error.

RELATED CASES: Gomilla, 13 N.E.3d 846 (Ind. 2014) (absent unique circumstances, material element of offense cannot also serve as aggravating factor for sentencing; see full review, this section); Pedraza, 887 N.E.2d 77 (under advisory scheme, element of offense or habitual offender status can be used as aggravator, but two sentences enhanced by the same crime cannot be run consecutively); Sanders, App., 713 N.E.2d 918 (fact that D used gun in carjacking was properly used as aggravator because use of force, & not gun, was element of crime); Townsend, 498 N.E.2d 1198 (Crim L 986(3), 1208.6(1,4); fact which comprises material element of crime may not also constitute AC to support enhanced sentence; however, particularized individual circumstances may constitute separate AC, *citing* Green, 424 N.E.2d 1014, Washington, 422 N.E.2d 1218, & Pavey, App., 477 N.E.2d 957; here, Ct. remands for new sentencing order/statement, finding 2 of 3 AC (possession of gun & threatening victim) were elements of crime of which D was convicted & standing alone could not support enhanced sentence; Pivarnik, joined by Givan, DISSENTS).

TITLE: Simmons v. State

INDEX NO.: E.5.d.9.

CITE: (5th Dist., 3-15-01), Ind. App., 746 N.E.2d 81

SUBJECT: Aggravating factors - impact upon victim & family

HOLDING: In imposing maximum fifty-year sentence for D's child molesting conviction, Tr. Ct.

found as aggravating factor "the circumstances surrounding the family & the stress that the family has undergone, & also the tremendous impact that this action has had upon a minor child." Generally, impact that victim or family experiences as result of particular offense is accounted for in presumptive sentence. Mitchem, 685 N.E.2d 671. To validly use victim impact evidence to enhance presumptive sentence, Tr. Ct. must explain why impact in case at hand exceeds that which is normally associated with crime. Davenport, 689 N.E.2d 1226. In this case, while Ct. acknowledged significant impact offense obviously had on complaining witness, it could not say that it was distinct from impact felt by similarly situated victims. Thus, Tr. Ct.'s reliance upon this factor was erroneous. Held, conviction affirmed, remanded with instructions to modify sentence to term of forty years incarceration.

RELATED CASES: Fitzgerald, App., 805 N.E.2d 857 (in sexual misconduct with minor prosecution, where 14 year-old victim became pregnant & had a baby because of D's offense, aggravating circumstance that offense may have impeded victim's ability to pursue her goals was not supported by evidence); Leffingwell, App., 793 N.E.2d 307 (Tr. Ct. improperly considered impact on victim's family as aggravator); Rodriguez, App., 785 N.E.2d 1169 (Tr. Ct. improperly considered impact of death of victim on her family as aggravator); Hildebrandt, App., 770 N.E.2d 355 (Tr. Ct. improperly relied upon impact suffered by victims as aggravating factors).

TITLE: Taylor v. State
INDEX NO.: E.5.d.9.
CITE: (6-12-97), Ind., 681 N.E.2d 1105
SUBJECT: Use of lying in wait as aggravating circumstance
HOLDING: Tr. Ct. properly considered as aggravating circumstance fact that D was lying in wait for victim on night she was killed. Lying in wait may be considered as aggravating circumstance. Kingery, 659 N.E.2d 490. Aggravating factors set forth under Ind. Code 35-38-1-7.1 do not limit matters Tr. Ct. may consider in determining sentence. Bivins, 642 N.E.2d 928. Held, conviction & sentence affirmed.
RELATED CASES: Taylor, 695 N.E.2d 117 (lying in wait falls within such high range of aggravation that it outweighed mitigating factors & was adequate to support maximum sentence imposed).

TITLE: Vanyo v. State

INDEX NO.: E.5.d.9.

CITE: (7/7/83), Ind., 450 N.E.2d 524

SUBJECT: Aggravating circumstances - general deterrence

HOLDING: Five-year enhancement of 10-year sentence for dealing in controlled substance was not error where Tr. judge cited as aggravating circumstances that lesser sentence would depreciate seriousness of offense, D was over 50, held responsible jobs in county, was well known in his area & to give lesser sentence would set bad example for younger people who might be inclined to participate in sale of illegal drugs. Ind. Code 35-4.1-4-7 does not limit matters Tr. Ct. may consider in determining sentence. McManus, 433 N.E.2d 775; Coleman, App., 409 N.E.2d 647. Tr. Ct. has authority to determine weight of aggravating/mitigating circumstances & sentence D accordingly. Dorton, 419 N.E.2d 1289; Dean, 398 N.E.2d 1270. Held, no error. DISSENT by DeBruler finds enhancement manifestly unreasonable because it penalizes D for years of decent law-abiding conduct & speculates that presumptive sentence would excite criminal behavior in an amorphous segment of society. DeBruler would remand for imposition of standard 10-year sentence.

RELATED CASES: Gregory-Bey, 669 N.E.2d 154 (sentencing Ct. cannot enhance sentence to send personal, political, or philosophical message).

TITLE: White v. State

INDEX NO.: E.5.d.9.

CITE: (3/15/95), Ind. App., 647 N.E.2d 684

SUBJECT: Sentencing -- aggravating factors; HIV transmission

HOLDING: D was convicted of child molestation. Tr. Ct. decided cases on other grounds but discussed sentencing errors because of risk that they may reoccur. As for sentencing aggravators, considered, among other things, risk of spreading HIV as aggravator during sentencing. Ct. held that this aggravator did not apply because record contained no evidence that D had HIV, knew he had virus, or received risk counseling. All three elements must be present for this aggravator to apply. Ind. Code 35-38-1-7.1(a)(8)(B)-(C). Held, conviction reversed on other grounds.

RELATED CASES: Ridenour, 639 N.E.2d 288 (Tr. Ct. improperly relied on aggravating factor of creating risk of transmission of HIV, absent evidence that D knew he was carrying virus, received risk counseling, or in fact was carrying virus).

TITLE: Williams v. State
INDEX NO.: E.5.d.9.
CITE: (4th Dist., 7-7-04), Ind. App., 811 N.E.2d 462
SUBJECT: Use of D's race as aggravating circumstance
HOLDING: In felony murder prosecution, Tr. Ct. abused its discretion when it considered D's race to be an aggravating circumstance. At sentencing hearing, Tr. Ct. found that D's crime had a specific impact on community, stating: "frankly, I think that [D's] behavior has set back racial relations to some extent because an African-American...murdered an elderly woman...I think in light of these facts of this case, it's going to make people [even] more concerned about people of color being in their neighborhoods because of what happened in this particular case." While trial judge's concern over race relations in community is laudable, his use of D's race to address that concern during sentencing proceedings was impermissible. Beno v. State, 581 N.E.2d 922 (Ind. 1991). Ct. could not conclude that this invalid aggravating circumstance played an unimportant role in Tr. Ct.'s decision to aggravate D's sentence. Held, judgment reversed & remanded for resentencing.

TITLE: Witmer v. State

INDEX NO.: E.5.d.9.

CITE: (12-23-03), Ind., 800 N.E.2d 571

SUBJECT: Racial motivation as aggravating circumstance

HOLDING: In affirming D's maximum sentence for murder, Ct. held that choosing a victim based on race can be a valid aggravating circumstance. As D & Co-D drove around town, they discussed shooting an African American to earn a tattoo of a spider web. D told Co-D that one earns the tattoo by killing a black person. D drove close to victim & Co-D shot him several times. At sentencing, Tr. Ct. pointed out that victim was "executed because he [was] black & he [was] there." U.S. Constitution does not prohibit a trial judge from taking into account elements of racial hatred in a murder case. Barclay v. Florida, 463 U.S. 939 (1983). D had ample opportunity to try to stop senseless murder of victim. Instead, he provoked situation by encouraging Co-D to earn a tattoo. Held, transfer granted, Ct. App.' memorandum opinion on sentencing issues summarily affirmed, sentence affirmed.

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.e. Court's statement of reasons (Ind. Code 35-38-1-3)

TITLE: Anglemyer v. State
INDEX NO.: E.5.e.
CITE: (06-26-07), Ind., 868 N.E.2d 482
SUBJECT: Statement of reasons required under amended sentencing statutes
HOLDING: Under Indiana's new statutory sentencing regime, Tr. Cts. are required to issue sentencing statements whenever imposing sentence for a felony offense. Sentencing statement must include a reasonably detailed recitation of Tr. Ct.'s reasons for imposing a particular sentence. If recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating & aggravating circumstances & explain why each circumstance has been determined to be mitigating or aggravating. The standard of review on appeal of a Tr. Ct.'s sentencing decision is abuse of discretion.

One way in which a Tr. Ct. may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a statement that explains reasons for imposing a sentence-- including a finding of aggravators & mitigators-- but record does not support reasons, or sentencing statement omits reasons that are clearly supported by the record & advanced for consideration, or reasons given are improper as a matter of law. Under those circumstances, remand for resentencing may be appropriate remedy if Ct. cannot say with confidence that Tr. Ct. would have imposed same sentence without considering aggravators that were held improper on appeal. Unlike the pre-Blakely statutory regime, Tr. Ct. cannot now be said to have abused its discretion in failing to properly weigh aggravating & mitigating factors. In other words, the relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse. But D may challenge appropriateness of his sentence on grounds outlined in Appellate Rule 7(B).

Here, rather than overlooking D's mental illness as a mitigator, Tr. Ct. determined that it was not significant & thus would not be a factor influencing Tr. Ct.'s sentencing decision. To extent D complains that Tr. Ct. abused its discretion in failing to give his proffered mitigating factor greater weight, this claim is not available for appellate review. Ct. was not persuaded that nature of offense or character of offender justifies reducing D's sixteen-year aggregate sentence for Class B felony robbery & Class C felony battery. Held, transfer granted, Ct. App.' opinion at 845 N.E.2d 1087 vacated, judgment affirmed.

See also: Windhorst v. State, 868 N.E.2d 504 (Ind., 2007) (Tr. Ct. did not enter sentencing statement sentenced D to advisory term without explaining its reasons; even if Tr. Ct. were on notice of its obligation to enter a sentencing statement, Ct. nonetheless would not be inclined to remand for resentencing because Ct. App. exercised option of reviewing D's sentence under Ind. Appellate Rule 7(B) & Ct. summarily affirmed that portion of opinion); McDonald v. State, 868 N.E.2d 1111 (Ind., 2007) (where, as here, Tr. Ct.'s reason for imposing sentence includes a finding of aggravating & mitigating factors, they must be supported by the record & consistent with what Indiana Ct's have traditionally deemed as either aggravators or mitigators; oral & written sentencing statements in this case were "meticulously detailed," & even if Tr. Ct. erred in identifying aggravators, remand for resentencing is not required because Tr. Ct. would have imposed same sentence without regard to challenged aggravators).

Note: 2014 amendment to IC 35-38-1-1.3 superseded Anglemyer to the extent it required sentencing statements for felony advisory sentences.

RELATED CASES: Terrell, ___ N.E.3d ___ (Ind. Ct. App. 2021) (advisory sentence for child molesting not inappropriate despite erroneous failure to find lack of criminal history mitigator); Anglemyer, 875 N.E.2d 218 (on rehearing, Ct. *clarified* that a D who pleads guilty does not forfeit the opportunity to claim on appeal that Tr. Ct. should have considered his guilty plea a mitigating circumstance even though the D failed to assert this claim at sentencing); Ramos, App., 869 N.E.2d 1262 (Tr. Ct. erred in failing to enter a sentencing statement setting forth its reasons for imposing an executed sentence of ten years); Vega, 119 N.E.3d 193 (Ind. Ct. App. 2019) (finding that child molest victim and her family suffered additional emotional or mental harm from D's callous statements to police was not supported by the record); Dilts, 80 N.E.3d 182 (Ind. Ct. App. 2017) (Tr. Ct. did not use same facts to sentence D for Count 2 child molesting as it did for Count 1 child molesting, so it did not abuse its discretion in imposing the same 36-year sentence for Count 2 as it had for Count 1); Bushhorn, 971 N.E.2d 80 (Ind. 2012) (47-year aggregate sentence for Class A felony kidnapping, two counts of Class B felony criminal confinement and Class B felony attempted escape was neither inappropriate nor an abuse of discretion; Ct. of Appeals erroneously reduced D's sentence under App.R 7(B) to 35 years); Caraway, 959 N.E.2d 847 (Ind. Ct. App. 2011) (Tr. Ct. abused its discretion by failing to consider D's guilty plea to Murder when imposing a maximum sentence; at 977 N.E.2d 469, Ct. affirmed maximum sentence given after remand, agreeing with Tr. Ct.'s reasoning why guilty plea was given little weight); Webb, 941 N.E. 2d 1082 (Ind. Ct. App 2011) (D did not advance his age, remorse and willingness to pay restitution for consideration in Tr. Ct. so he waived these issues for appeal); Smith, 908 N.E.2d 1251 (Ind. Ct. App. 2009) (Tr. Ct. does not necessarily abuse its discretion when it does not announce that it is considering D's guilty plea as a mitigating factor, because the guilty plea may not be due significant mitigating weight; here, D exchanged his guilty plea for substantial benefit, thus no error in not finding guilty plea a mitigating factor); Berry, App., 904 N.E.2d 365 (sentencing statement not required for probation revocations, see full review at F.1.e.2); King, App., 894 N.E.2d 265 (Ct. *clarified* that inappropriate sentence claims & abuse of discretion claims are to be analyzed separately); Taylor, App., 891 N.E.2d 155 (both the Tr. Ct.'s findings that child molesting occurred in presence of other children and that harm to child was greater than ordinary were not supported by the record, and thus, the Tr. Ct. abused its discretion in relying on them); Loos, App., 875 N.E.2d 387 (although the word "aggravating" was not used by the Tr. Ct., the Ct.'s description of the D's criminal history & violent act was sufficiently specific); Anglemyer, 875 N.E.2d 218 (on rehearing, Ct. *clarified* that a D who pleads guilty does not forfeit the opportunity to claim on appeal that Tr. Ct. should have considered his guilty plea a mitigating circumstance even though the D failed to assert this claim at sentencing); Ramos, App., 869 N.E.2d 1262 (Tr. Ct. erred in failing to enter a sentencing statement setting forth its reasons for imposing an executed sentence of ten years).

TITLE: Berry v. State

INDEX NO.: E.5.e.

CITE: (1/8/2015), 23 N.E.3d 854 (Ind. Ct. App. 2015)

SUBJECT: Trial court did not issue overbroad stay-away order as part of D's sentence

HOLDING: In sentencing for criminal trespass, trial court's statement ordering Defendant to stay away from all properties managed by the Indianapolis Housing Agency (IHA) was merely a reminder of the ban but not part of an obligation imposed on Defendant by trial court as part of Defendant's sentence. "Technically speaking," the stay-away order was included in Defendant's sentence, as it was included in the abstract of judgment and the chronological case summary. But trial court explained that Defendant could be charged with felony trespass if she went back to Barton Tower or any other IHA property. Trial court did not appear to include that information when it pronounced Defendant's sentence, which included community service work.

Distinguishing Hurd v. State, 9 N.E.3d 720 (Ind. Ct. App. 2014), Court concluded that the trial court was reminding Defendant of IHA's ban and not imposing its own stay away order. Held, judgment affirmed.

TITLE: Brewer v. State

INDEX NO.: E.5.e.

CITE: (3-3-95), Ind., 646 N.E.2d 1382

SUBJECT: Maximum sentence manifestly unreasonable

HOLDING: In murder prosecution, Tr. Ct.'s imposition of 60-year sentence was manifestly unreasonable. Tr. Ct. gave insufficient weight to fact that D voluntarily surrendered himself to police 14 years after crime & provided full confession. Because of this major mitigating factor, maximum sentence was unreasonable considering character of offender. Held, conviction affirmed, sentence vacated, & remanded to Tr. Ct. for imposition of 50-year sentence.

TITLE: Bush v. State

INDEX NO.: E.5.e.

CITE: (5th Dist., 7-31-00), Ind. App., 732 N.E.2d 250

SUBJECT: Sentencing - statement of reasons not required for presumptive sentence

HOLDING: In Wiggins v. State, 727 N.E.2d 1, Ct. App. held that when Tr. Ct. adjusts presumptive sentence by suspending portion of that sentence, record should disclose what factors were considered to be mitigating or aggravating circumstances. Wiggins Ct. then concluded that it is necessary in such instance for Tr. Ct. to explain its sentencing decision. Here, Tr. Ct. imposed presumptive sentence for Class C felony & then suspended three years. Ct. declined to follow Wiggins insofar as it would require recitation of mitigating circumstances in order to justify suspension of all or part of presumptive sentence. Held, judgment affirmed.

RELATED CASES: Gist, App., 804 N.E.2d 1204 (if Tr. Ct. finds aggravators & mitigators, concludes they balance, & imposes presumptive sentence, then pursuant to Ind. Code 35-38-1-3, Tr. Ct. must provide a statement of reasons for imposing the presumptive sentence; see full review, this section).

TITLE: Dilts v. State
INDEX NO.: E.5.e.
CITE: (6/21/2017), 80 N.E.3d 182 (Ind. Ct. App. 2017)
SUBJECT: No abuse of discretion in 36-year sentence
HOLDING: Tr. Ct. did not use same facts to sentence Defendant for Count 2 child molesting as it did for Count 1 child molesting, so it did not abuse its discretion in imposing the same 36-year sentence for Count 2 as it had for Count 1.

Defendant was convicted of two counts of child molesting; the Tr. Ct. vacated his conviction on Count 2 on double jeopardy grounds and sentenced him to 36 years on Count 1. On the State's cross-appeal, the Court reinstated Defendant conviction for Count 2 and remanded for re-sentencing. The Tr. Ct. imposed a 36-year term and ordered Defendant to serve it consecutively to the sentence for Count 1.

In imposing sentence for Count 2, the Tr. Ct. did not rely on the same facts it used to impose sentence for Count 1. When it sentenced Defendant on Count 2, the Tr. Ct. relied on facts related only to Count 2, Defendant's acts of oral sex and digital penetration, and recited no facts related to Count 1, Defendant's intercourse with the child. Further, the State presented additional evidence at the second sentencing hearing, such as the impact Defendant's crimes were having on the child even two years later. Held, judgment affirmed.

RELATED CASES: Anglemyer, 868 N.E.2d 482 (Ind. 2007), (under Indiana's new statutory sentencing regime, Tr.Cts. are required to issue sentencing statements whenever imposing sentence for a felony offense. In 2014, the legislature superseded Anglemyer by amending I.C. 35-38-1-1.3 to no longer require sentencing statements for felony advisory sentences); Bushhorn, 971 N.E.2d 80, (Ind. 2012) (47-year aggregate sentence for Class A felony kidnapping, two counts of Class B felony criminal confinement and Class B felony attempted escape was neither inappropriate nor an abuse of discretion; Ct. of Appeals erroneously reduced D's sentence under App.R 7(B) to 35 years); Caraway, 959 N.E.2d 847 (Ind. Ct. App. 2011) (Tr. Ct. abused its discretion by failing to consider D's guilty plea to Murder when imposing a maximum sentence; at 977 N.E.2d 469, Ct. affirmed maximum sentence given after remand, agreeing with Tr. Ct.'s reasoning why guilty plea was given little weight); Webb, 941 N.E. 2d 1082 (Ind. Ct. App 2011) (D did not advance his age, remorse and willingness to pay restitution for consideration in Tr. Ct. so he waived these issues for appeal); Smith, 908 N.E.2d 1251 (Ind. Ct. App. 2009) (Tr. Ct. does not necessarily abuse its discretion when it does not announce that it is considering D's guilty plea as a mitigating factor, because the guilty plea may not be due significant mitigating weight; here, D exchanged his guilty plea for substantial benefit, thus no error in not finding guilty plea a mitigating factor); Berry, App., 904 N.E.2d 365 (sentencing statement not required for probation revocations, see full review at F.1.e.2); King, App., 894 N.E.2d 265 (Ct. *clarified* that inappropriate sentence claims & abuse of discretion claims are to be analyzed separately); Taylor, App., 891 N.E.2d 155 (both the Tr. Ct.'s findings that child molesting occurred in presence of other children and that harm to child was greater than ordinary were not supported by the record, and thus, the Tr. Ct. abused its discretion in relying on them); Loos, App., 875 N.E.2d 387 (although the word "aggravating" was not used by the Tr. Ct., the Ct.'s description of the D's criminal history & violent act was sufficiently specific); Anglemyer, 875 N.E.2d 218 (on rehearing, Ct. *clarified* that a D who pleads guilty does not forfeit the opportunity to claim on appeal that Tr. Ct. should have considered his guilty plea a mitigating circumstance even though the D failed to assert this claim at sentencing); Ramos, App., 869 N.E.2d 1262 (Tr. Ct. erred in failing to enter a sentencing statement setting forth its reasons for imposing an executed sentence of ten years).

TITLE: Flowers v. State

INDEX NO.: E.5.e.

CITE: (2/10/88), Ind., 518 N.E.2d 1096

SUBJECT: Limitations on sentencing - resentencing after appeal

HOLDING: Tr. Ct. did not err in entering same total sentence on remand despite fact that class of 3 offenses was dropped. At trial, D was convicted of attempted murder & Class A robbery, burglary, & attempted rape. D received presumptive 30-year sentences on burglary, robbery, & attempted rape convictions, to run concurrently. These were to run consecutive to 50-year sentence for attempted murder, for total of 80 years. On appeal, robbery & burglary were reduced to Class B felonies, & attempted rape to Class C. On remand, Tr. Ct. re-sentenced without new evidence or hearing, & determined that 80 years was still appropriate sentence for offenses D committed. Tr. Ct. entered 10-year presumptive sentence, enhanced by 5 years, on each Class B felony, to run consecutive to each other & to 50-year attempted murder sentence. Eight-year sentence for attempted rape was to run concurrently. D argues he was entitled to receive same treatment under new sentences as under original - presumptive sentences to run concurrently. However, Ind. S. Ct. merely directed Tr. Ct. to enter convictions & appropriate sentences for reduced charges. On remand, Tr. Ct. properly applied same aggravating factors to all charges. Because total sentence was not increased, D's double jeopardy argument fails. [Citations omitted.] Held, Tr. Ct. affirmed. DeBruler, J., & Shepard, J., CONCUR & DISSENT.

RELATED CASES: Gootee, 942 N.E. 2d 111 (Ind. Ct. App. 2011) (no abuse of discretion in reworking concurrent & consecutive scheme on remand in order to arrive at same aggregate sentence that Tr. Ct. had imposed at D's first sentencing); Greer, 680 N.E.2d 526 (when D appeals from judgment imposing multiple felony convictions & obtains reversal of conviction enhanced by HO finding, State may reposition HO enhancement on remaining conviction); Coble, 523 N.E.2d 228 (D's habitual offender - enhanced sentence on Count II vacated; on remand, Tr. Ct. enhanced sentences on both Count I & II, & made them run consecutively; held, Count I cannot be enhanced; otherwise, resentencing is proper.)

TITLE: Gist v. State

INDEX NO.: E.5.e.

CITE: (1st Dist., 3-19-04), Ind. App., 804 N.E.2d 1204

SUBJECT: Sentencing - statement of reasons for presumptive sentence; claim of inappropriate sentence despite plea agreement

HOLDING: If Tr. Ct. does not find any aggravators or mitigators & imposes presumptive sentence, then Tr. Ct. does not need to set forth its reasons for imposing presumptive sentence. Pope v. State, 740 N.E.2d 1247 (Ind. Ct. App. 2000). However, if Tr. Ct. finds aggravators & mitigators, concludes they balance, & imposes presumptive sentence, then pursuant to Ind. Code 35-38-1-3, Tr. Ct. must provide a statement of reasons for imposing the presumptive sentence.

Here, Tr. Ct. did not set forth its reasons for imposing presumptive term of ten years for conspiracy to commit robbery as Class B felony. In light of State's concession at sentencing that two mitigators were present, it is unclear whether Tr. Ct. did not find any aggravators or mitigators or whether Tr. Ct. found aggravators & mitigators but concluded that they balanced. Thus, Ct. remanded to Tr. Ct. for more definite sentencing statement in light of State's concession. Ct. also held that where, as here, a D is sentenced in accordance with a plea agreement -- an agreement he voluntarily entered into, Ct. cannot say that sentence is inappropriate. Held, judgment affirmed in part & reversed in part.

RELATED CASES: Nguyen, App., 837 N.E.2d 153 (Tr. Ct. is not obligated to state its reasons for imposing sentence pursuant to plea agreement, but when it decides to adjust an imposed sentence by suspending a portion of it, record should disclose what factors were considered by trial judge to be mitigating or aggravating circumstances).

TITLE: Hardebeck v. State

INDEX NO.: E.5.e.

CITE: (10/11/95), Ind. App. , 656 N.E.2d 486

SUBJECT: Statement of reasons required for enhanced sentence

HOLDING: Tr. Ct. is not required to state basis for imposing presumptive sentence for conviction.

Hansford, 490 N.E.2d 1083. However, when Tr. Ct. exercises its discretion to enhance presumptive sentence, record must disclose factors Tr. Ct. considered to justify imposition of enhanced sentence.

Jones, 600 N.E.2d 544. Here, D was convicted of murdering five members of his family & sentenced to two hundred & forty years. Tr. Ct. sentenced D to presumptive forty year term on each count & enhanced each of other four counts by ten years to fifty year terms, all to be served consecutively.

During sentencing hearing, Tr. Ct. enumerated aggravating & mitigating factors, provided reasons for, & weighed those factors. Ct. held that Tr. Ct. found several valid aggravating & mitigating factors, & sentencing statement further provided specific reasons for those findings. Held, conviction affirmed.

TITLE: Hill v. State

INDEX NO.: E.5.e.

CITE: (11/17/86), Ind., 499 N.E.2d 1103

SUBJECT: Written statement not required

HOLDING: Tr. Ct. did not err in failing to include statement of reasons supporting enhanced sentence in its order book. In non-death penalty cases, separate written findings, setting forth reasons for enhanced sentence, are not required to be set forth in order book entry, provided that otherwise full & adequate statement of reasons for selecting sentence imposed is provided in transcript of sentencing proceedings. Ind. Code 35-38-1-3 does not expressly mandate that statement of reasons be separately set forth in order book. Other cases have upheld sentences so long as adequate sentencing statement was included in sentencing hearing transcript. See e.g., Howard, 459 N.E.2d 29; Gajdos, 462 N.E.2d 1017; Frappier, 448 N.E.2d 1188; Pine, 408 N.E.2d 1271; Rowley, 394 N.E.2d 928; Gardner, 388 N.E.2d 513. Held, sentence revised for other reasons. Pivarnik, joined by Givan, DISSENTS on this issue, finding no reason to abandon rule that statement of reasons be in writing.

RELATED CASES: Dowell, 873 N.E.2d 59 (where there is conflict between oral & written statements, Ct. has option of crediting the statement that accurately pronounces the sentence or remanding for resentencing); Marshall, 621 N.E.2d 308 (oral sentencing statement is clear representation of Tr. Ct.'s findings of aggravating circumstances; transcript is more accurate than sentencing order).

TITLE: Hollen v. State

INDEX NO.: E.5.e.

CITE: (1-23-02), Ind., 761 N.E.2d 398

SUBJECT: Sentencing - statement of reasons; assigning specific weight to each aggravating & mitigating circumstance not required

HOLDING: Tr. Ct. is not required to assign in a statement accompanying enhanced sentence specific weight to each aggravating & mitigating circumstance. However, assigning relative weights facilitates appellate review in cases where Tr. Ct. has improperly employed one or more invalid aggravating circumstances. In this case, Tr. Ct.'s use of D's purported lack of remorse as aggravating circumstance was improper, but Tr. Ct. properly found as aggravators that D is unlikely to respond to probation & probability that D will commit another crime. Single aggravating circumstance can be sufficient to sustain a sentence imposed using additional invalid aggravating circumstances. On transfer of Ct. App.' opinion at 740 N.E.2d 149, S. Ct. did not read opinion as mandating additional requirements for required sentencing statement. Rather, Judge Bailey's opinion was straightforward expression of difficulty appellate Ct. has in reviewing an enhanced sentence where one or more aggravating circumstances have been improperly employed. In such cases, if Tr. Ct. does not assign specific weight to each aggravating & mitigating circumstance, appellate Ct. can consider whether Tr. Ct.'s sentencing decision would have been same without invalid aggravator. However, Ct. noted that reweighing pursuant to review & revise power, or remanding for new sentencing statement, will sometimes be required. Held, transfer granted, Ct. App.' opinion summarily adopted, judgment affirmed.

TITLE: Jackson v. State
INDEX NO.: E.5.e.
CITE: (11/23/2015), 45 N.E.3d 1249 (Ind. Ct. App. 2015)
SUBJECT: Sentencing - statement of reasons must include circumstances of crime
HOLDING: Tr. Ct. abused its discretion by issuing a maximum sentence based solely on D's conduct apart from the circumstances of the crime. In order for an appellate court to carry out its function of reviewing the Tr. Ct.'s exercise of sentencing discretion, the appellate court must be advised of the reasons for the imposition of the sentence and this necessarily requires a statement of facts which are peculiar to the particular D and the crime, as opposed to general impressions or conclusions.

Here, D pled guilty to Dealing in a Schedule II Controlled Substance and his sentence was deferred pending completion of the drug court program. Approximately one year later, D was terminated from the program for smoking Spice and driving another drug court participant to purchase Spice. Tr. Ct. sentenced D to the maximum of twenty years in the DOC. In its reasoning, the Tr. Ct. acknowledged D's criminal history - comprised of a felony conviction and two misdemeanor convictions - and otherwise focused exclusively on D's conduct since his admission to the drug court program. Because the Tr. Ct. does not have the option of selecting a sentence based solely on the D's conduct apart from the circumstances of the crime, the Tr. Ct.'s reasoning was inadequate. Held, judgment reversed and remanded with instructions to sentence D for the offense to which he pled guilty, accompanied by a sentencing statement that is adequate to facilitate appellate review.

TITLE: May v. State

INDEX NO.: E.5.e.

CITE: (5th Dist., 09/23/91), Ind. App., 578 N.E.2d 716

SUBJECT: Enhanced sentence - findings necessary

HOLDING: Tr. Ct.'s explanation for enhancing sentences inadequate because it merely recited statutory aggravating factors & did not contain "specific & detailed reasons" for deviating from presumptive sentence. D was convicted of 5 Class B felonies, 2 Class D felonies, & 1 Class A misdemeanor. For each conviction, D received maximum, & all sentences to be served consecutively, for 107 years, the maximum sentence. Tr. Ct. noted risk of commission of another crime; D's prior criminal history, personality & nature; nature & circumstances of crimes; D's prior criminal record; statements of victims; imposition of lesser sentence would depreciate seriousness of crime; D was in need of long term imprisonment; & likelihood of D's rehabilitation was slight. Ct. said nothing more specific than this. Ct. App. found stated reasons fell short of adequate explanation for enhanced sentence which includes at least: 1) list of significant aggravating & mitigating factors; 2) specific reasons why each is aggravating or mitigating; & 3) evaluation & balancing of factors. Here denial of liberty was extreme & explanation very general. Held, convictions affirmed, case remanded for entry of specific, detailed reasons for enhancement, or entry of presumptive sentences.

RELATED CASES: Newman, App., 690 N.E.2d 735 (Tr. Ct.'s sentencing statement was sufficient to support enhancement); Reynolds, App., 657 N.E.2d 438 (Tr. Ct. provided adequate justification in imposing maximum, consecutive sentences); Scheckel, 655 N.E.2d 506 (resentencing judge's explanation for enhancing murder sentence was inadequate); Ray, App., 585 N.E.2d 36 (even where imposition of consecutive sentence mandatory under Ind. Code 35-50-1-2(b), statement on record of reasons for imposing such sentence still required). Mundt, App., 612 N.E.2d 566, (Ct.'s finding that D's prior record indicated enhanced sentence appropriate, not erroneous because transcript sufficiently revealed specific incidents Tr. Ct. was relying on for enhancement); Duval, 540 N.E.2d 34 (there was indication that sentencing Ct. engaged in evaluative process without sufficiently articulating reasons for sentence enhancement; also, record indicated that sentence was not manifestly unreasonable; purposes underlying specificity requirement were satisfied).

TITLE: McElroy v. State

INDEX NO.: E.5.e.

CITE: (05-02-07), Ind., 865 N.E.2d 584

SUBJECT: Statement of reasons- conflicting oral & written statements must be read together

HOLDING: Tr. Ct. did not abuse its discretion by imposing maximum, concurrent sentences for two counts of reckless homicide & one count of criminal recklessness. The appellate Ct.'s generally examine both the written & oral sentencing statements to discern the findings of the Tr. Ct., but have not pronounced a bright line rule that an oral sentencing statement trumps a written one. Here, D pled guilty in exchange that all counts be run concurrently. D admitted to recklessly lighting a lighter in an enclosed truck full of people who had no means of escape & in which lacquer thinner was spilled on the floor. Two people died & eleven others, including D, were destroyed mentally, physically & financially from the resulting fire. Tr. Ct. sentenced D to the maximum under the plea agreement. Tr. Ct.'s written sentencing statement was different than the oral sentencing statement in that the written statement included, as aggravators, D's criminal history & the risk he would reoffend. The oral sentencing statement found D's lack of criminal history a mitigator. Reviewing the oral & written statements together, Tr. Ct. failed to support with facts & reasons its finding that there is a risk D would reoffend. Further, D's prior history of arrests for theft & marijuana did not support a finding of criminal history as an aggravator. However, Tr. Ct. properly found the nature & circumstances of the crime, including the impact on the victims, to be one aggravator that outweighed the mitigators of D's acceptance of responsibility through the guilty plea, lack of criminal history & hardship on his dependants. D did not take full responsibility for his actions, but rather attributed some of the blame to others. Held, transfer granted, memorandum opinion of Ct. App. Vacated, judgment affirmed.

RELATED CASES: Dowell, 873 N.E.2d 59 (where there is conflict between oral & written statements, Ct. has option of crediting the statement that accurately pronounces the sentence or remanding for resentencing)

TITLE: Morgan v. State
INDEX NO.: E.5.e.
CITE: (12-31-96), Ind., 675 N.E.2d 1067
SUBJECT: Sentencing - failure to properly consider mitigating circumstances
HOLDING: Tr. Ct. failed to adequately explain reasons for its sentencing decision, as required by Ind. Code 35-38-1-3. Law requires that Tr. Ct.: 1) identify all significant mitigating & aggravating circumstances; 2) specifically explain why it found each circumstance; & 3) balance circumstances to determine sentence. Dumbsky, 508 N.E.2d 1274. Here, Tr. Ct. suspended part of D's sentence, but judge did not specifically identify mitigating circumstances or show any specific indications of a balancing process. Held, transfer granted, Ct. App.' decision at 648 N.E.2d 1164 affirmed in part & vacated in part; remanded for more adequate explanation of sentencing decision.

RELATED CASES: Laughner, App., 769 N.E.2d 1147 (that which cannot be used to enhance a sentence cannot be used to "balance" circumstances that may properly serve to reduce sentence as mitigators); Jackson, 752 N.E.2d 45 (Tr. Ct. did not err when, after remand, it again imposed presumptive sentence after finding six mitigating factors & only one aggravating factor, i.e., that imposition of a reduced sentence would depreciate seriousness of crime; consideration of this statutory factor is available where, as here, the Tr. Ct. contemplates reducing a sentence from the presumptive); Collins, App., 740 N.E.2d 143 (Ct. remanded because record did not provide any basis to review identification & balancing of aggravators & mitigators); Jackson, 728 N.E.2d 147 (even though D received presumptive sentence for murder, Ct. remanded for resentencing because there was no basis for Ct. to determine whether Tr. Ct. properly weighed aggravating circumstances against mitigating circumstances); Bluck, 716 N.E.2d 507 (Ct.'s imposition of maximum sentence was erroneous because it did not give any weight to fact that this was D's first conviction).

TITLE: Phelps v. State

INDEX NO.: E.5.e.

CITE: (1/15/2015), 24 N.E.3d 525 (Ind. Ct. App. 2015)

SUBJECT: Sentencing discretion - court's disagreement with jury verdict

HOLDING: Trial court abused its discretion when it imposed the maximum sentence for a Class C felony after expressing disagreement with the jury's verdict finding Defendant not guilty of a Class A felony. Our Supreme Court has repeatedly found an abuse of discretion where trial court made a statement at the sentencing hearing expressing disagreement with the jury's decision to acquit the defendant of a greater offense. See Grambill v. State, 436 N.E.2d 301 (Ind. 1982); Hammons v. State, 493 N.E.2d 1250 (Ind. 1986). The presence of aggravating circumstances justifying an enhanced sentence does not wash away the stain left by a trial court's blatant disagreement with the jury verdict at sentencing. Here, Defendant was charged with Class A felony Cocaine Dealing. The jury acquitted him of the Class A felony, but found him guilty of the lesser included Class D felony Cocaine Possession. At sentencing, trial court expressly disagreed with the verdict and said that Defendant's attorneys "did a really good job" of confusing the jury. Trial court then sentenced Defendant to the maximum of eight years. Although there also existed valid aggravators, such as Defendant's criminal history and probation violations, trial court's stated disagreement with the not-guilty verdict on the greater offense renders the maximum sentence a suspect enhancement. Thus, Court revised Defendant's sentence to six years in the DOC. Held, judgment reversed and remanded with instructions to vacate Defendant's sentence, sentence Defendant to six years with the DOC, and to correct the order of judgment of conviction, which erroneously indicates that Defendant was convicted of a Class A felony.

TITLE: Robinson v. State

INDEX NO.: E.5.e.

CITE: (5/22/85), Ind., 477 N.E.2d 883

SUBJECT: Tr. Ct.'s statement of reasons (SOR)

HOLDING: Tr. Ct.'s SOR must: (1) identify all significant mitigating (M) & aggravating (A) circumstances (C); failure to find either when clearly supported by record may give rise to belief they were overlooked, hence not properly considered (Page, 424 N.E.2d 1021); (2) include specific reason why each C is M or A; & (3) MCs must be weighed against ACs to determine if ACs offset MCs; some articulation of balancing process must appear in record (Abercrombie, 417 N.E.2d 316). Here, Ct. finds Tr. Ct.'s SOR (set forth in opinion) clearly indicates identification, explanation & weighing of MCs & ACs & supports D's 60-year sentence for murder. Held, no error.

RELATED CASES: Hollen, 761 N.E.2d 398 (Tr. Ct. is not required to assign in a statement accompanying enhanced sentence specific weight to each aggravating & mitigating circumstance; see full review, this section); Wiggins, App., 727 N.E.2d 1 (remanded based on Tr. Ct.'s failure to provide adequate sentencing statement); Meriweather, App., 659 N.E.2d 133 (although Tr. Ct. should have recited incidents comprising criminal history, record revealed that Tr. Ct. engaged in required evaluative process in enhancing sentence); Ervin 535 N.E.2d 138 (mere tracking of 2 statutory ACs held sufficient); Henderson, 489 N.E.2d 68 (where record indicates judge engaged in evaluative process, sentence can be affirmed even though judge fell short in SOR); Deamus, 479 N.E.2d 1319 (Crim L 986(3); deficiency in SOR held "trivial obstacle to review;" aggravators obvious from record); Coggain, 477 N.E.2d 283 (where written guilty plea includes specific sentencing recommendation, Tr. Ct. need not state any ACs to justify imposing maximum sentence, *citing* Phillips, 441 N.E.2d 207); Jones, 467 N.E.2d 681 (Tr. Ct.'s SOR held sufficient to justify sentence despite fact RDC/probation office recommended minimum time; DeBruler, joined by Prentice, DISSENTS); Farina, 442 N.E.2d 1104 (incidents comprising history of criminal activity must be specifically recited/judge's conclusion of need for treatment requires statement of facts to evidence its validity, *citing* Kern, 426 N.E.2d 385; held, remanded with instructions to supplement SOR or modify enhanced sentences); Spinks, 437 N.E.2d 963 (statement made nunc pro tunc only nominally adequate for review, but aggravation of sentence affirmed); Linger, App., 508 N.E.2d 56 (SOR required as to all counts, see card at E.5.d.9); Hoage, App., 479 N.E.2d 1362 (statute does not require written findings in misdemeanor cases); Stover, App., 621 N.E.2d 664 (Where Tr. Ct. indicated it had read presentence & Sentencing Resource Center reports & considered doctor's evaluation, but gave no specific reasons for sentences, it failed to specifically identify relevant mitigators & aggravators as required).

TITLE: Richardson v. State

INDEX NO.: E.5.e.

CITE: (4/14/83), Ind., 447 N.E.2d 574

SUBJECT: Ct.'s statement of reasons - same judge on remand

HOLDING: Where Ct. remands cause to Tr. Ct. for adequate statement of aggravating circumstances to support enhanced sentence, it is not error for new Tr. judge to assume jurisdiction if judge who imposed sentence is not available to carry out remand order. Here, D received consecutive sentences. Ct. ordered Tr. judge to articulate reason for sentence. (Richardson, 429 N.E.2d 229.) Judge Hall who imposed sentence had retired. Following remand, successor judge (Hunt) held a hearing at which D objected to assumption of jurisdiction. Judge Hunt ruled that Judge Hall was "not available." See TR 63(A). Counsel did not object. Ct. agrees with general proposition that same judge should enter subsequent orders, but finds present case turns on facts rather than law. Record does not show Judge Hall was either available or willing to carry out Ct.'s order. Held, no error.

TITLE: Shackelford v. State

INDEX NO.: E.5.e.

CITE: (5th Dist., 11-22-93), Ind. App., 622 N.E.2d 1340

SUBJECT: Enhanced sentence not supported on record

HOLDING: Tr. Ct. failed to give adequate reasons for enhancing D's sentence & used improper aggravators in its consideration. When enhanced sentence is imposed, Ct. must make specific & individualized statement of reasons, & record must show determination was based on consideration of facts of specific crime, aggravating & mitigating circumstances involved, & relation of sentence to objectives to be served, Robey, 555 N.E.2d 150. Tr. Ct. stated it had considered presentence report & statutory criteria, & filed form called "Reasons for Sentence Imposed," pre-printed form listing various statutory aggravators & mitigators with various appropriate ones checked off. Tr. Ct. also stated application of Sentencing Guidelines indicated sentence should be enhanced to fifteen years. Findings of Tr. Ct. were insufficient to support enhancement of sentence, because nothing in record revealed evidence considered in determining mitigators & aggravators existed. Statutory factors were not specifically related to D or facts of crime committed. Age of victim being considered as aggravator also was improper because it was element of offense of child molesting & standing alone could not therefore be aggravator. Additionally, Ct. noted consideration of fact that imposition of reduced sentence would depreciate seriousness of crime as aggravator was improper, & that this factor is to be considered only when Ct. is considering reduction of sentence, Shoup, App., 570 N.E.2d 1298. Held, two counts reversed & remanded for more specific statement of proper aggravators or imposition of presumptive sentence.

TITLE: Stewart v. State.

INDEX NO.: E.5.e.

CITE: (8-31-01), Ind. App., 754 N.E.2d 608

SUBJECT: Misdemeanor sentencing - articulation of aggravating/mitigating circumstances

HOLDING: Tr. Ct's. are not required to articulate aggravating & mitigating circumstances when they impose a sentence for a misdemeanor conviction. Unlike felony statutes, misdemeanor statutes do not establish a presumptive sentence, but only state the maximum allowable sentence. Without a presumptive sentence from which to start, Tr. Cts. have nothing to enhance or reduce. In construing a statute, Ct.'s foremost duty is to determine & give effect to true intent of legislature, & it is just as important to recognize what a statute does not say as it is to recognize what it does say. Peele v. Gillespie, 658 N.E.2d 954 (Ind. Ct. App. 1995). Ind. Code 35-38-1-3 provides that before sentencing a person for a felony, the Ct. must conduct a hearing to consider the facts & circumstances relevant to sentencing & if the Ct. finds aggravating or mitigating circumstances it must include a statement of the Ct.'s reasons for selecting the imposed sentence. The statute excludes misdemeanor sentencing by implication & therefore, an articulation of aggravating & mitigating circumstances is not required. Held, judgment affirmed.

TITLE: Ward v. State
INDEX NO.: E.5.e.
CITE: (11/9/2018), 113 N.E.3d 1242 (Ind. Ct. App. 2018)
SUBJECT: Sentencing statements not required for felony advisory sentences
HOLDING: Ind. Code § 35-38-1-1.3 no longer requires Tr. Ct.s to issue sentencing statements that address aggravating and mitigating circumstances when imposing the advisory sentence for a felony conviction. Thus, with respect to sentencing statements for felony advisory sentences, the 2014 statutory amendment superseded Anglemyer v. State, 868 N.E.2d 482 (Ind.), *clarified* on reh'g on other grounds, 875 N.E.2d 218 (Ind. 2007). The appellate court can still review the appropriateness of an individual's sentence under Appellate Rule 7(B) when the Tr. Ct. does not enter a sentencing statement. Ecklebarger v. State, 51 N.E.3d 169 (Ind. 2016).

Here, Tr. Ct. did not abuse its discretion when it sentenced D to the advisory sentence of three years for a Level 5 felony without issuing a sentencing statement. Held, judgment affirmed.

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.f. Suspendibility (Ind. Code 35-50-2-2)

TITLE: Ables v. State

INDEX NO.: E.5.f.

CITE: (3rd Dist., 05-25-06), Ind. App., 848 N.E.2d 293

SUBJECT: Suspendibility of sentence - D in constructive possession of firearm

HOLDING: Tr. Ct. did not abuse its discretion in finding that D's sentence for dealing in cocaine conviction was non-suspendable for possessing a firearm pursuant to Ind. Code 35-50-2-2(b). While Indiana Cts. have not addressed the meaning of "possessed" in relation to this statute, the issue has been addressed in other contexts with Cts. determining possession can be actual or constructive. D argued that she did not have exclusive control of a vehicle because the undercover officer was also present. Even if exclusive control cannot be assumed, D's inferred knowledge can be found by the facts that she was in the vehicle in which the gun was found, was found in close proximity to the gun, reached down when she saw officers approaching, & admitted that the gun was in the center console with her cell phone. Further, given the close proximity of the gun to D & her furtive gestures of reaching downward, the State presented sufficient evidence to show that she was able to reduce the gun to her personal possession. See, e.g., Holmes v. State, 785 N.E.2d 658 (Ind. Ct. App.2003). Held, judgment affirmed.

TITLE: Ashley v. State

INDEX NO.: E.5.f.

CITE: (4th Dist., 11-7-01), Ind. App., 757 N.E.2d 1037

SUBJECT: Suspendibility - out-of-state juvenile adjudications

HOLDING: Tr. Ct. erred when it determined that D's juvenile conviction in Georgia precluded it from suspending any portion of his sentence under Ind. Code 35-50-2-2.1. Statute precludes Tr. Ct. from suspending sentence for felony for person with disqualifying juvenile record, i.e., one Class A felony or B felony, two Class C or Class D felonies, or one Class C & one Class D felony, & less than three years have elapsed between commission of prior juvenile acts & felony for which person is being sentenced. Ct. assumed that it was intent of legislature to utilize Indiana law to determine if juvenile acts, if committed by adult, would constitute Class A or Class B felony in Indiana. In this case, D's Georgia juvenile conviction was for unlawful possession of cocaine with intent to distribute which would constitute Class B felony in Indiana. Because less than three years has elapsed between D's Georgia juvenile conviction & his current conviction, Tr. Ct. was correct in finding that Ind. Code 35-50-2-2.1 applied to D's sentence. However, Tr. Ct. erred in determining that statute precluded it from suspending any part of D's sentence. As is true under Indiana's general suspension statute, Ind. Code 35-50-2-2, under juvenile suspension statute Tr. Ct. may suspend that portion of person's sentence that is in excess of minimum sentence. Saintignon, 749 N.E.2d 1134. Held, affirmed in part & reversed & remanded in part.

TITLE: Gardiner v. State

INDEX NO.: E.5.f.

CITE: (04-30-10), 928 N.E.2d 194 (Ind. 2010)

SUBJECT: Suspendibility - AMS does not count as a D felony

HOLDING: A conviction for a Class D felony on which judgment is later entered as a Class A misdemeanor does not prevent the Tr. Ct. from modifying a sentence below the statutory minimum on the grounds that the D has a prior unrelated felony conviction. A sentence may not be suspended below the minimum sentence where "[t]he crime committed was a Class A or Class B felony and the person has a prior unrelated felony conviction." Ind. Code 35-50-2-2(b)(1)(emphasis added). Under its plain terms the statute speaks in the present tense.

Here, while D had pending charges for a Class D felony in Hamilton County, she was charged in another county with Class A felony dealing in methamphetamine. D pleaded guilty to the Class D felony, but the prosecutor agreed that if she fulfilled her conditions of probation, there would be no objection to reducing the felony to a misdemeanor. A few months later, D was convicted and sentenced on the Class A felony. Subsequently, the Hamilton County Tr. Ct. reduced D's Class D felony conviction to a Class A misdemeanor under provisions of the plea agreement. The entry of judgment of conviction upon the misdemeanor offense constitutes a new and different judgment effectively vacating the prior Class D felony. As a consequence, by the time D filed her petition to modify the Class A felony, her Class D felony conviction was a matter of the past. Thus, as a matter of statutory construction, for purposes of the non-suspension statute, D no longer has a prior unrelated felony conviction. Held, transfer granted, Court of Appeals' opinion at 903 N.E.2d 552 vacated, remanded for Tr. Ct. to reconsider suspending D's sentence below statutory minimum to the extent its decision was influenced by its assumption it had no discretion to sentence otherwise.

RELATED CASES: Moss, 6 N.E.3d 958 (Ind. Ct. App. 2014) (Tr. Ct. should have granted D's motion to dismiss enhancement of A misdemeanor possession of handgun without a license to a C felony because predicate felony used to enhance the gun charge, D felony theft in a different court, was later reduced to an A misdemeanor pursuant to AMS; it was irrelevant that modification of theft conviction occurred after State charged D with the gun offenses because when the Tr. Ct. handling the theft case granted AMS, it vacated the D felony conviction).

TITLE: Guthery v. State

INDEX NO.: E.5.f.

CITE: (12/22/2021), Ind. Ct. App., 180 N.E.3d 339

SUBJECT: Same prior conviction may be used to find conviction non-suspendible and as predicate offense for n habitual offender enhancement

HOLDING: Trial court did not abuse its discretion in finding defendant's sentence for dealing in methamphetamine to be non-suspendable under the minimum for a Level 2 felony and for enhancing that sentence for being a habitual offender based in part on the same predicate felony. The felony suspendability statute, Ind. Code § 35-50-2-2.2(a) and (b), is not a progressive penalty statute, as it does not expand the sentencing range for an offense; rather, it limits the discretion of the trial court to order a sentence to be suspended, all within the existing sentencing range for the offense. Therefore, the felony suspendability statute is not a sentencing enhancement statute to which double-enhancement analysis applies.

TITLE: Haggenjos v. State

INDEX NO.: E.5.f.

CITE: (11/4/82), Ind., 441 N.E.2d 430

SUBJECT: Suspendibility - attempted murder

HOLDING: Sentence for attempted murder is nonsuspendible. Here, D contends murder (specifically nonsuspendible under Ind. Code 35-50-2-2) & attempted murder (not expressly nonsuspendible under statute) are not one and the same, *citing* Smith, App., 427 N.E.2d 11 (conviction for attempted possession is not a conviction for possession, thus former cannot serve to enhance penalty for subsequent possession conviction in light of language of Ind. Code 35-48-4-14(c)). Ct. rejects argument, *citing* Kee, 438 N.E.2d 993 (duress defense not available to Ind. Code 35-42 crimes; attempted murder is defined by reading Ind. Code 35-41-5-1 (attempt) & Ind. Code 35-42-1-1 (murder) in conjunction). Held, nonsuspended sentence affirmed. DISSENT by DeBruler contends Ind. Code 35-50-2-2 means what it says: murder is nonsuspendible. Attempted murder is not murder.

RELATED CASES: Strong, App., 903 N.E.2d 164 (Haggenjos still controls as Ct's interpretation of Ind. Code 35-50-2-2, thus Tr. Ct. correctly concluded that it could not suspend D's minimum six-year sentence for attempted robbery); Dvorak, ___/___ (recognizing that the law as to suspendibility of attempt violent crimes is unclear and that cases, such as State ex rel. Camden v. Gibson Circuit Court, 640 N.E.2d 696 (Ind. 1994), calls the into question Haggenjos).

TITLE: Henning v. State

INDEX NO.: E.5.f.

CITE: (5/17/85), Ind., 477 N.E.2d 547

SUBJECT: Suspendibility - Tr. Ct. error

HOLDING: Tr. Ct. erred in determining that D's sentence for Class A robbery (bodily injury) was nonsuspendible. Had D been charged with causing serious bodily injury, then sentence would have been suspendible. Inasmuch as it is apparent Tr. Ct. was under erroneous conception that precluded his consideration of suspending any part of D's sentence, Ct. remands cause for sole purpose of such consideration. Held, remanded.

RELATED CASES: Collins, 583 N.E.2d 761 (HSO enhancement may be suspendible, see card at E.8.b).

TITLE: Hill v. State
INDEX NO.: E.5.f.
CITE: (5th Dist., 6-12-01), Ind. App., 751 N.E.2d 273
SUBJECT: Erroneous conclusion that D's sentence was not suspendable
HOLDING: Tr. Ct. improperly concluded that at least half of D's sentence was not suspendable. Ind. Code 35-50-2-2(b)(3), which limits authority to suspend sentence, applies where D is completely discharged from probation, imprisonment, or parole for prior unrelated felony, & then commits Class D felony within three years of complete discharge of prior unrelated felony. It is improper for Tr. Ct. to conclude that sentence is not partially suspendable where, as here, D has not been discharged from probation, imprisonment, or parole for prior unrelated felony at time instant offense occurred. Held, affirmed in part, remanded in part with instructions for consideration of suspending D's sentence. Sullivan, J., concurring.

TITLE: Huff v. State

INDEX NO.: E.5.f.

CITE: (1st Dist. 1/11/83), Ind. App., 443 N.E.2d 1234

SUBJECT: Suspending - conspiracy to deliver

HOLDING: Dealing in cocaine as a Class A felony is nonsuspendible under Ind. Code 35-50-2-2(4).

Conspiracy to deliver cocaine is suspendible. Conspiracy (defined in Ind. Code 35-41-5-2) is a separate offense from underlying offense; separate sentences are required upon conviction for both. Williams, 426 N.E.2d 662; Elmore, 382 N.E.2d 893; Weekley, App., 415 N.E.2d 152; Collier, App., 362 N.E.2d 871.

Here, state contends Tr. Ct. erred in suspending portion of D's sentence for conspiracy to deal in cocaine, *citing* no authority. Ct. holds plain meaning of statute is that sentence may be suspended unless crime is listed as exception to suspendibility. [Cf. Haggenjos, 441 N.E.2d 430 (sentence for attempted murder not suspendible).] Held, no error.

TITLE: Laney v. State

INDEX NO.: E.5.f.

CITE: (5th Dist., 06-22-07), Ind. App., 868 N.E.2d 561

SUBJECT: Accomplice's sentence non-suspendible

HOLDING: Tr. Ct. properly concluded that any portion of D's sentence below the minimum six-year sentence for class B felony child molesting was non-suspendable, regardless of fact that she was convicted as an accessory rather than the actual perpetrator. There is no distinction between accessory & perpetrator of crime. Rather, both commit the offense, & a person who aids another person to commit a crime is as guilty of the principal offense as the actual perpetrator. Farris v. State, 753 N.E.2d 641 (Ind. 2001). The same rationale applies under Indiana's non-suspendability statute. Because there is no separate crime of being an accessory or aiding & abetting the perpetrator of a crime, it was unnecessary for Ind. Code 35-50-2-2 to expressly state that it also applies to felony convictions obtained under an accomplice liability theory. The legislature could have chosen to expressly exclude such convictions, but it did not. Ct. also found no error in allowing State to amend charging information changing alleged basis of D's liability from that of a principal to that of an accessory nine days before trial. Held, judgment affirmed.

TITLE: Miller v. State
INDEX NO.: E.5.f.
CITE: (02-24-11), 943 N.E.2d 349 (Ind. 2011)
SUBJECT: Suspendibility limit for Class A felony child molesting does not define minimum sentence
HOLDING: Ind. Code § 35-50-2-2(i) specifies that only the portion of a sentence for class A felony child molesting that exceeds thirty years may be suspended, but the statute does not require a minimum sentence of thirty years. Hampton v. State, 921 N.E.2d 27, 20-31, (Ind. Ct. App. 2010) *trans. denied*.

Here, D was convicted of two counts of child molesting, one as a class A felony. On the class A felony, the Tr. Ct. initially imposed a sentence of thirty years with ten years suspended to probation. Tr. Ct. amended D's sentence to thirty years executed with no portion suspended after the State asserted that Ind. Code § 35-50-2-2(i) required a minimum sentence of thirty years and permitted suspension of only the part of a sentence longer than thirty years. Ind. Code 35-50-2-2(l) provides: "If a person is (1) convicted of child molesting (IC 35-42-4-3) as a class A felony against a victim less than 12 years of age; and (2) at least twenty-one (21) years of age; the court may suspend only that part of the sentence that is in excess of thirty years."

Tr. Ct. correctly amended the initial sentence because it was not authorized, as section 2(l) specifies that only that portion of the sentence exceeding thirty years may be suspended. The amended sentence - thirty years with no time suspended - was authorized but Tr. Ct.'s reason for amending the sentence was incorrect; the Tr. Ct. accepted the State's erroneous argument that section 2(l) required a minimum sentence of thirty years. The Court of Appeals rejected this interpretation in Hampton v. State, 921 N.E.2d 27, 20-31 (Ind. Ct. App. 2010) *trans. denied*, and Supreme Court concluded that Hampton correctly decided the issue. Held, transfer granted, portion of Court of Appeals' memorandum opinion addressing sentencing issue vacated and remainder of opinion summarily affirmed; remanded for sentencing consistent with opinion.

ITILE: Saintignon v. State

INDEX NO.: E.5.f.

CITE: (6-27-01), Ind., 749 N.E.2d 1134

SUBJECT: Suspendibility - previous juvenile dispositions

HOLDING: Tr. Ct. erred in concluding that it had no authority to suspend any portion of D's maximum sentence for class D felony because of D's extensive juvenile record. Ct. read general suspension statute, Ind. Code 35-50-2-2, & juvenile record suspension statute, Ind. Code 35-50-2-2.1, in *pari materia*, & concluded that Legislature intended that Tr. Ct.'s authority to suspend sentence in excess of minimum sentence applies to person with disqualifying juvenile records in same way as to persons with disqualifying adult records. Held, transfer granted, Ct. App.' opinion at 734 N.E.2d 711 reversed on this issue & summarily affirmed as to other issues, remanded for further proceedings; Dickson, J., dissenting.

RELATED CASES: Ashley, App., 757 N.E.2d 1037 (Tr. Ct. erred when it determined that D's juvenile conviction in Georgia precluded it from suspending any portion of his sentence).

TITLE: Schenk v. State

INDEX NO.: E.5.f.

CITE: (1st Dist., 11-14-08), Ind. App., 895 N.E.2d 1271

SUBJECT: Minimum sentence for OWI non-suspendable - prior offense under old recodified statute

HOLDING: D's prior OWI conviction, under a repealed but recodified statute, constituted a "prior conviction" for purposes of determining that six months of his sentence was non-suspendable. If a person commits felony operating a vehicle while intoxicated under Ind. Code 9-30-5 and the person has accumulated at least two prior unrelated convictions under Ind. Code 9-30-5, Tr. Ct. may suspend only that part of the sentence that is in excess of the minimum sentence (here, six months). Ind. Code 35-50-2-2(b)(4)(R).

D argued that because his 1988 OWI conviction was pursuant to Ind. Code 9-11-2 and not Ind. Code 9-30-5, Ind. Code 35-50-2-2 does not apply because subsection (b)(4)(R) refers to "two (2) prior unrelated convictions under Ind. Code 9-30-5." However, savings clause in 1991 recodified statute stated that "[i]f this act repeals and replaces a provision in the same form or in a restated form, the substantive operation and effect of that provision continues uninterrupted." P.L. 2-1991, § 111. Noting that sections Ind. Code 9-30-5-1 through Ind. Code 9-30-5-3 restate the penalty provisions previously set forth in sections Ind. Code 9-11-2-1 through Ind. Code 9-11-2-3, the savings clause preserves OWI convictions under Ind. Code 9-11-2 for consideration under Ind. Code 35-50-2-2(b)(4)(R). Thus, Tr. Ct. did not err in finding D's 1988 OWI conviction qualified as one of the two OWI convictions under Ind. Code 35-50-2-2(b)(4)(R), which mandates a non-suspendable six month sentence on D's Class D felony. Held, judgment affirmed.

TITLE: Simmons v. State

INDEX NO.: E.5.f.

CITE: (8-6-02), Ind. App., 773 N.E.2d 823

SUBJECT: Operating While Intoxicated (OWI) - suspendability; interplay between Ind. Code 35-50-2-2 & Ind. Code 9-30-5-15

HOLDING: Tr. Ct. did not err in ordering D to serve six months of sentence for OWI as Class D felony in secure detention. D contended that statutory requirement that person convicted of OWI with at least two prior OWI convictions must serve at least six months imprisonment, enacted in 1996, was repealed by 1999 statutory enactment stating that upon third OWI, Tr. Ct. shall order that person be imprisoned for at least ten days. In 1996, Legislature amended general suspension statute, Ind. Code 35-50-2-2, by adding subsection (b)(4)(Q), which states that Ct. may only suspend part of sentence that is in excess of minimum sentence for OWI with two prior OWI convictions. In 1999, Legislature rewrote Ind. Code 9-30-5-15 & added in addition to any criminal penalty imposed for offense under chapter, Ct. shall order person imprisoned for at least ten days if person has two prior OWI convictions. Ct. held that 1999 statute is "gap-filler" & operates to require minimum term of imprisonment in situations where general suspension statute is inapplicable, which could occur if person has been convicted of OWI more than twice, but not as felony. Further, 1999 statute states that it is "in addition to" not "instead of," which indicates that statute is to be construed in conjunction with general statutory criminal sentencing scheme, which includes general suspendability statute. Held, judgment affirmed.

RELATED CASES: Woodward, App., 798 N.E.2d 260 ("prior unrelated convictions" as used in general suspension statute does not impose a sequential requirement concerning dates of commission & conviction relative to predicate offenses, except that those convictions must be entered before judgment was entered on current offense).

TITLE: Snider v. State

INDEX NO.: E.5.f.

CITE: (8-2-01), Ind. App., 753 N.E.2d 721

SUBJECT: Suspension - minimum sentence as applied to D felony

HOLDING: Tr. Ct. properly sentenced D, who pled guilty to class D felony, to a non-suspendable one year on in-home detention followed by six months probation. D argued that his minimum sentence under Ind. Code 35-50-2-7(a) should be six months & that Tr. Ct. incorrectly concluded that minimum non-suspendable portion of sentence for class D felony was one year rather than six months. "Minimum sentence" is a specialized term of art & although D's assertion is generally correct, the more specific statute applicable to suspended sentences is appropriate in these circumstances. Ind. Code 35-50-2-2(b)(3) states that Tr. Ct. may suspend minimum sentence for Class D felonies. Further, Ind. Code 35-50-2-1(c)(5) defines "minimum sentence," for D felonies, as used in that chapter, to be one year. When general & specific statutes conflict in their application to a particular subject matter, specific statute will prevail over general statute. WorldCom Network Servs., Inc. v. Thompson, 698 N.E.2d 1233 (Ind. Ct. App. 1998). Held, judgment affirmed.

TITLE: Stanek v. State
INDEX NO.: E.5.f.
CITE: (3d Dist. 03/11/92), Ind. App., 587 N.E.2d 736
SUBJECT: Suspendibility of Habitual Offender (HO) Enhancement
HOLDING: Because D's HO enhanced sentence was attached to Class C felony Operating While Suspended for Life (OWS-L), which was non-suspendible due to prior imprisonment within 7 years, Tr. Ct. had no authority to suspend any portion of enhanced sentence. D was convicted of OWS-L & found to be HO. He received sentence of 4 years on OWS-L, enhanced by twenty years for HO determination. Held, conviction & sentence affirmed, Sullivan, J., dissenting.

Note: In dissent, Justice Sullivan argued that Ind. Code 35-50-2-8(f) permits suspension of enhanced portion of sentence, as long as enhancement is not reduced to less than 5 year executed term mentioned in Ind. Code 35-50-2-8(e), finding that if it did not, it would be redundant. Justice Sullivan considered Marsillett, 495 N.E.2d 699, & found it to have held only that suspension of sentence in that case was not permitted by what is now subsection "e," & did not that suspension was impermissible under subsection "f."

TITLE: Winbush v. State

INDEX NO.: E.5.f.

CITE: (2nd Dist., 10-28-02), Ind. Ct. App., 776 N.E.2d 1219

SUBJECT: Amended suspendability statute - doctrine of amelioration

HOLDING: Tr. Ct. properly held that D's sentence for dealing in cocaine as Class A felony was nonsuspendable. Version of Ind. Code 35-50-2-2 in effect at time D committed offense prohibited Tr. Ct. from suspending any portion of sentence in excess of minimum sentence if felony committed was dealing in cocaine. D argued that Tr. Ct. should have sentenced him according to amended version of statute in effect at time of his sentencing, which would not have prohibited Tr. Ct. from suspending part of minimum sentence. Doctrine of amelioration allows D to be sentenced under more lenient provisions of statute in effect at time of sentencing rather than be sentenced under more harsh statute in effect at time offense was committed. Richards v. State, 681 N.E.2d 208 (Ind. 1997). However, case law has interpreted amendment to statute to be ameliorative only if maximum penalty under new version of statute is shorter than maximum penalty under old version of statute. Hellums v. State, 758 N.E.2d 1027 (Ind. Ct. App. 2002). Ct. admitted it was difficult to hold that D should not receive advantage of reduced incarceration which would be available to him under amended version of statute. However, Ct. is bound by those cases in which Ct's. have declined to expand doctrine of amelioration beyond application in only those instances in which maximum sentence is reduced. While it would seem logical that doctrine of amelioration be applied in this case, as D would have received more lenient sentence, Ct. may not expand its application until authorized to do so by Indiana S.Ct. Held, judgment affirmed.

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.g. Consecutive/concurrent (Ind. Code 35-50-1-2)

TITLE: Anderson v. State

INDEX NO.: E.5.g.

CITE: (5/26/83), Ind., 448 N.E.2d 1180

SUBJECT: Consecutive sentences - aggravating circumstances

HOLDING: Tr. Ct. did not err in using same aggravating circumstances used to enhance sentence to impose consecutive sentences. Here, D was convicted of attempted murder, 3 counts of armed robbery & criminal confinement. The presumptive sentences were enhanced (10 years for Class A felony; 5 years for each Class B felony) & ordered served consecutively, resulting in a sentence of 100 years. Alternative ways of increasing a particular sentence are not mutually exclusive under IN's present sentencing statutes. Humes, 426 N.E.2d 379; Washington, 422 N.E.2d 1218; Bish, 421 N.E.2d 608; Inman, 393 N.E.2d 767. Tr. Ct. has discretion to determine whether sentences are to be served concurrently or consecutively. Ind. Code 35-50-1-2(a). Held, sentence is not manifestly unreasonable.

RELATED CASES: Owens, 916 N.E.2d 913 (Ind. Ct. App. 2009) (violent nature of crimes justified consecutive sentences); Lavoie, App., 903 N.E.2d 135 (the heinous nature of the offenses justified consecutive sentences).

TITLE: Ashby v. State

INDEX NO.: E.5.g.

CITE: (3rd Dist., 04-17-09), 904 N.E.2d 361 (Ind. Ct. App. 2009)

SUBJECT: Maximum, consecutive sentences - abuse of discretion

HOLDING: Tr. Ct. erred when it sentenced D to three consecutive twenty-year maximum sentences following his 1999 open guilty plea to Class B felony robbery while armed with a deadly weapon. D was remorseful and received nothing in exchange from State for pleading guilty. At time of sentencing, Tr. Ct. was required to identify and balance aggravators and mitigators and to exercise its discretion to determine the appropriate sentence. On several occasions, Tr. Ct. expressly recognized D's remorse, yet failed to recognize either the remorse or his open guilty plea as mitigating circumstances. Tr. Ct.'s statements relating to absence of mitigating factors were inconsistent with its prior statements at same hearing and constitute an abuse of discretion. Tr. Ct. explained that it was placing burden on D to "earn" a sentence modification, which Court found "was contingent on too many variables, including whether the same judge would be on the bench at the time D was directed to write his letter to the court." Further, although Tr. Ct. has power to modify sentences under Ind. Code 35-38-1-17, that power is limited by the requirement of prosecutor's consent after passage of one year. Thus, Tr. Ct. could not legally do that which it was advising D it would do (reduce his sentence) if D took advantage of available educational and vocational opportunities while incarcerated. Held, reversed and remanded for resentencing.

TITLE: Ballard v. State

INDEX NO: E.5.g.

CITE: (4th Dist.; 9-17-99), Ind. App., 715 N.E.2d 1276

SUBJECT: Erroneous consecutive sentences - crime of violence

HOLDING: Tr. Ct.'s imposition of fourteen-year consecutive sentence was erroneous because it exceeded presumptive sentence for felony which was one class higher than most serious felony of which D convicted. Except for crimes of violence, total consecutive terms of imprisonment to which D is sentenced for felony convictions arising out of episode of criminal conduct shall not exceed presumptive sentence for felony which is one class higher than most serious of felonies for which person has been convicted. Ind. Code 35-50-1-2(c). Ind. Code 35-50-1-2(a) lists specific offenses which are "crimes of violence." Ind. Code 35-50-1-2(b) defines "episode of criminal conduct" as offenses or connected series of offenses that are closely related in time, place, & circumstances. Here, D entered apartment without permission & beat up two people who were in apartment. D was convicted of residential entry, Class D felony, battery, Class D felony, & battery, Class C felony, & Tr. Ct. ordered D to serve three consecutive sentences, resulting in fourteen years. Although aggravated battery is listed as crime of violence, neither battery as Class D felony nor Class C felony are included in list. Thus, D was not convicted of any crime of violence, & limitation on consecutive sentences set forth in Ind. Code 35-50-1-2(c) applies. In addition, all of convictions were part of same criminal episode because complete account of batteries cannot be related without mention of residential entry & battery was committed as direct result of residential entry. Therefore, D's 14-year sentence was erroneous because it exceeded ten years, which is presumptive sentence for Class B felony. Held, judgment reversed & remanded.

RELATED CASES: Gober, 163 N.E.3d 347, (Ind. Ct. App.) (because neglect of a dependent resulting in death is not "a crime of violence" as specified in I.C. 35-50-1-2(a), Tr.Ct. was constrained to impose an aggregate sentence of no more than 42 years under subsection (d) because the two counts arose from a single episode of criminal conduct); Wood, 988 N.E.2d 374 (Ind. Ct. App. 2013) (State conceded that D's 5-year cumulative sentence for five convictions of Class D felony possession of child pornography violates cap imposed by Ind. Code 35-50-1-2(c), thus Ct. remanded for imposition of sentence that does not exceed four years); Vermillion, 978 N.E. 2d 459 (Ind. Ct. App. 2012) (consecutive 8-year sentences for Class C felony sexual misconduct with a minor violated Ind. Code 35-50-1-2(c) prohibiting, except for crimes of violence, an aggregate sentence that exceeds advisory sentence of felony one class higher); Maxwell, App., 731 N.E.2d 459 (Tr. Ct.'s imposition of 123-year sentence for attempted murder, confinement & criminal recklessness convictions was erroneous because it exceeded statutory authority to impose consecutive sentences; crimes are not included among list of violent crimes exempt from statutory limit on consecutive terms).

TITLE: Berry v. State
INDEX NO.: E.5.g.
CITE: (12-30-97), Ind., 689 N.E.2d 444
SUBJECT: Consecutive sentence to unrelated conviction - no error
HOLDING: Tr. Ct. had authority to impose sentence consecutive to sentence in unrelated case in separate Ct. even though two sentences were not contemporaneously imposed. In 1994, legislature amended Ind. Code 35-50-1-2(c) to provide that Ct. may order terms of imprisonment to be served consecutively even if sentences are not imposed at same time. Held, convictions & sentence affirmed; Sullivan & Selby, JJ., dissenting, arguing that 1994 amendment eliminated "same time" requirement imposed by Kendrick, 529 N.E.2d 1311, but not "same Ct." requirement.

TITLE: Banton v. State

INDEX NO.: E.5.g.

CITE: (6/5/79), Ind. App., 390 N.E.2d 687

SUBJECT: Effect of failure to specify consecutive sentences where mandatory

HOLDING: Where terms of imprisonment are required to be served consecutively under Ind. Code 35-50-1-2, failure to specify in commitment order that terms were to run consecutively does not exempt D from serving sentences consecutively where record shows that D is within provisions of Ind. Code 35-50-1-2. Held, denial of petition for postconviction relief affirmed.

RELATED CASES: Perry, 379 N.E.2d 53 (absent proof in record of sentencing hearing that D committed crime after having been arrested for another crime, or evidence that he committed crime before date that he was discharged from probation, parole, or term of imprisonment imposed for another crime, serving of consecutive sentences should be challenged as erroneous).

TITLE: Barker v. State

INDEX NO.: E.5.g.

CITE: (3rd Dist., 11-15-93), Ind. App., 622 N.E.2d 1336

SUBJECT: Consecutive multiple sentences not required when on probation

HOLDING: Ind. Code 35-50-1-2(b), mandating consecutive sentences if D commits another crime while on probation, requires only that sentence imposed in instant case be consecutive to remainder of sentence imposed on probation violation, not that multiple instant sentences be imposed consecutively to each other. D was sentenced to 50 years for rape, 50 years for criminal deviate conduct, 20 years for robbery, & 10 years for burglary; all to run consecutively, for total of 130 years. At sentencing, Tr. Ct. said because offenses were committed while on probation, they would all have to be consecutive. State conceded this was not accurate, but argued that aggravators were sufficient to support discretionary consecutive sentences. Ct. found that because Tr. Ct. appeared to base consecutive sentence order on mistaken interpretation of statute, remand for specific & individualized statement of whether facts supported imposition of consecutive terms was required.

TITLE: Baskin v. State
INDEX NO.: E.5.g.
CITE: (4th Dist. 02/27/92), Ind. App., 586 N.E.2d 938
SUBJECT: Consecutive sentencing prohibited
HOLDING: Because D was not on parole, probation, or serving term of imprisonment, Ct. lacked authority to impose sentence which would run consecutively to sentences for prior offenses. D was charged with burglary on March 11, 1987, & next day he was sentenced on other offenses. In August 1987, he was found guilty on the burglary charge & sentenced to 18 years, to be served consecutively to sentences for other offenses.

Tr. Cts. may not order consecutive sentences without statutory authorization, Kendrick, 529 N.E.2d 1311. Discretionary authority of Ind. Code 35-50-1-2(a) allows for consecutive sentences only where Ct. is contemporaneously imposing 2 or more sentences in its Ct. Bartruff, 553 N.E.2d 485, Seay, 550 N.E.2d 1284, Saylor, App., 565 N.E.2d 348, Killian, 512 N.E.2d 411. Because D was not eligible for consecutive sentences under mandatory provisions of Ind. Code 35-50-1-2(b), Tr. Ct.'s order making sentence consecutive to those for prior offenses was erroneous. Held, reversed.

Note: Statute was amended in 1994 to provide authority for consecutive terms of imprisonment even if sentences are not imposed at same time).

RELATED CASES: Newsome, App., 654 N.E.2d 11 (Tr. Ct. lacked authority to order sentence for conspiracy charge to be served consecutively to sentence imposed for previous escape conviction, where Tr. Ct. was not "meting out two sentences." Niksich v. State, App., 596 N.E.2d 268 (Where mandatory provisions of Ind. Code 35-50-1-2 were not involved, Ct. could not make 10 years of 30-year sentence imposed, consecutive to previously imposed sentence).

TITLE: Becker v. State

INDEX NO.: E.5.g.

CITE: (5th Dist., 5-18-98), Ind. App., 695 N.E.2d 968

SUBJECT: Consecutive sentences - single criminal episode; serious bodily injury

HOLDING: In determining whether Tr. Ct. had authority to impose consecutive sentences for crimes arising out of single episode of criminal conduct under Ind. Code ' 35-50-1-2(a), reviewing Ct. must determine whether any of convictions for which D received consecutive sentences constitute convictions for which D: 1) received enhanced penalty because felony resulted in serious bodily injury &, if so, 2) that D knowingly or intentionally caused serious bodily injury. Here, Tr. Ct.'s sentencing statement justified D's enhanced, consecutive sentences totaling ninety-two years by stating: 1) that D had prior rape conviction, 2) that D was on probation at time of offense, & 3) that society needed to be protected from D. However, sentencing statement did not specify that victim suffered serious bodily injury, that D intended to cause serious bodily injury or that sentences were enhanced because of serious bodily injury. Moreover, because sentencing statement did not refer to victim's injuries or circumstances of crime & D's class B felony convictions did not require State to prove serious bodily injury, circumstance of case did not clearly establish required facts. Held, conviction affirmed; remanded for resentencing with instructions that Tr. Ct. enter more specific sentencing statement in accordance with Ind. Code 35-50-1-2(a).

RELATED CASES: Becker, App., 719 N.E.2d 858 (on remand, Tr. Ct. erred in imposing consecutive sentences totaling 92 years, in excess of its statutory authority under Ind. Code 35-50-1-2(a)); Haggard, App., 810 N.E.2d 751 (D's appellate counsel was ineffective for failing to argue that a conviction for unlawful use of body armor should have been grouped with several other charges to constitute a single episode of criminal conduct).

TITLE: Breaston v. State

INDEX NO.: E.5.g.

CITE: (6-16-09), 907 N.E.2d 992 (Ind. 2009)

SUBJECT: Consecutive sentences - HO enhancements in unrelated trials

HOLDING: Tr. Ct. erred by ordering consecutive HO enhancements following two unrelated criminal trials. Even when underlying sentences are required to run consecutively under Ind. Code 35-50-1-2(d) (requiring consecutive sentences when a person commits a second crime after being arrest for, but before, being discharged from a first crime), a Tr. Ct. cannot order HO enhancements attached to the first and second crimes consecutively. Here, after D was arrested for escape, he committed theft, a Class D felony. The D was convicted of escape to which an HO enhancement was attached. Subsequently in a different trial, D was convicted of theft to which a second HO enhancement was attached. The Tr. Ct. ran the sentence for the theft, including the HO enhancement, consecutive to the sentence for the escape, including the HO enhancement. Although the D committed theft to which the second HO enhancement was imposed after being arrest for, but before, being discharged from the escape charge, Ind. Code 35-50-1-2(d) does not expressly authorize multiple HO enhancements to be imposed consecutively. Thus, the HO enhancement attached to theft should have ran concurrently to the HO enhancement attached to the escape, even if Ind. Code 35-50-1-2(d) requires the underlying sentences for the theft and escape to run consecutively. Held, judgment reversed and remanded with instructions that the Tr. Ct. order the HO enhancement in this case to be served concurrently with the prior enhancement and to re-sentence the D in accordance with this opinion; Court of Appeals' opinion at 893 N.E.2d 6 (Ind. Ct. App. 2008), summarily affirmed in all other respects.

RELATED CASES: Lumbley, 74 N.E.3d 234 (Ind. Ct. App. 2017) (sentence enhancements for use of a firearm can be run consecutively unless a single episode of criminal conduct is present), Young, 57 N.E.3d 857 (Ind. Ct. App. 2015) (because there is no statutory authorization for stacking general and specialized habitual offender enhancements, Ct. remanded with instructions to run the habitual and repeat sexual offender enhancements concurrently).

TITLE: Cannon v. State

INDEX NO.: E.5.g.

CITE: (12/28/2018), 117 N.E.3d 643 (Ind. Ct. App. 2018)

SUBJECT: Consecutive sentences affirmed - state-sponsored criminal activity

HOLDING: Under first cause number, State-sponsored drug purchase investigation was complete and arrest warrant issued. Upon execution of arrest warrant, smell of marijuana triggered search warrant resulting in second case. Court of Appeals states second case is not derivative of first case because in first case investigation was complete and warrant was for arrest. Second case was separate, triggered by smell of marijuana and subsequent search warrant with no nexus to the first case. Therefore, consecutive sentences affirmed. In so holding, Court distinguishes this case from Beno and its progeny, which held that the State cannot create separate State-sponsored criminal activity and then run sentences from the separate State-sponsored activity consecutively.

RELATED CASES: Mullins, 142 N.E.3d 317 (Ind. Ct. App. 2020) (distinguishing Beno, Ct. noted that D's Level 4 felony conviction was entirely unrelated traffic stop that was in no way related to the controlled buys).

TITLE: Clemons v. State

INDEX NO.: E.5.g.

CITE: (6/29/18), 105 N.E.3d 1139 (Ind. Ct. App.)

SUBJECT: Consecutive sentences permissible for crimes closely related in time, place, and circumstance

HOLDING: Trial court did not abuse its discretion in imposing consecutive sentences for Level 5 felony domestic battery and Level 6 felony invasion of privacy - even though the crimes were closely related in time, place, and circumstance - because the seven-year aggregate sentence did not exceed the seven-year statutory maximum for D's most serious offense, Level 5 domestic battery. See Ind. Code § 35-50-1-2(d)(2). Held, judgment affirmed.

TITLE: Cole v. State

INDEX NO.: E.5.g.

CITE: (2nd Dist.; 06-05-06), Ind. App., 850 N.E.2d 417

SUBJECT: Consecutive sentences -- resisting law enforcement & possession of precursors part of same criminal episode

HOLDING: Tr. Ct. erred in sentencing D to six years for two Class D felonies arising out of same criminal episode. Except for crimes of violence, a consecutive term cannot exceed the presumptive sentence for felony which is one class of felony higher than most serious of felonies which person has been convicted. Episode of criminal conduct is defined as "offense or a connected series of offenses that are closely related in time, place & circumstance." Ind. Code 35-50-1-2(b). Singleness of criminal episode should be based upon whether alleged conduct was so closely related in time, place & circumstance that a complete account of one charge cannot be related without referring to the details of the other charge. Thoroughly reviewing case law & recognizing a split in Ct. App. as to whether a possession offense committed simultaneously with another offense is deemed part of one criminal episode, Ct. agreed with cases that held simultaneous possession & another offense can constitute one criminal episode.

Here, D was convicted of two Class D felonies, resisting law enforcement with a vehicle & possession of precursors (ammonia). When police attempted to stop D for outstanding warrant on habitual traffic violator charge, D fled in vehicle that had tank of ammonia in it. D's possession of ammonia occurred at same time & place as his act of fleeing from police & would not have been discovered had D not been driving while being habitual traffic offender & fled, & therefore, was one episode of criminal conduct. Held, judgment reversed & remanded with instructions to reduce aggregate sentence to no more than four years.

RELATED CASES: Evans, 81 N.E.3d 634 (Ind. Ct. App. 2017) (D's crimes of unlawful possession of a syringe and escape were part of two distinct criminal episodes because a full account of the individual crimes can be given without reference to the other), Dimmit, 25 N.E.3d 203 (Ind. Ct. App. 2015) (Ct. reduced D's 11-year aggregate sentence for felony battery, misdemeanor battery and criminal gang activity to 10 years, which is statutory maximum for consecutive terms).

TITLE: Coleman v. State
INDEX NO.: E.5.g.
CITE: (08-26-11), 952 N.E.2d 377 (Ind. Ct. App. 2011)
SUBJECT: Conspiracy to commit robbery is not a crime of violence for purposes of consecutive sentencing

HOLDING: In an issue of first impression, Court held that conspiracy to commit robbery is not a crime of violence for purposes of consecutive sentencing and because D's crimes were part of a single episode of criminal conduct under Ind. Code 35-50-2-3c, his sixty-year sentence exceeded the advisory sentence of fifty-five years for the next felony class (murder) under Ind. Code 35-50-2-3(a). D told his girlfriend to give a gun to one of the participants in an attempted robbery, and he drove the would-be robbers to a home that reportedly contained money and marijuana. One of the robbers entered the home, shooting two women and two young children with the gun that D's girlfriend provided. D pled guilty in an open plea to Class A felony conspiracy to commit robbery and class B felony possession of a firearm by a serious violent felon ("SVF"). Tr. Ct. imposed consecutive sentences totaling sixty years, forty-five years for conspiracy to commit robbery and fifteen years for the SVF conviction.

Ellis v. State, 736 N.E.2d 731, 737 (Ind. 2000), held that although murder is a delineated crime of violence, attempted murder was not. The legislature later amended Ind. Code 35-50-1-2(a) to include attempted murder as a crime of violence. However, it did not say that an attempt to commit other crimes of violence were crimes of violence. Thus, Court addressed whether a conspiracy was akin to an attempt or aiding and abetting or whether it was a separate offense.

Court rejected the State's argument that: 1) a conviction for conspiracy to commit a crime is like aiding or abetting another person's commission of a crime and 2) because there is no distinction between criminal liability between a principal and an accomplice, conspiring to commit a crime is merely an alternative basis to establish a D's liability for a crime, not a separate crime. Indiana treats crime of conspiracy to commit an offense as separate from the underlying offense. For example, a conspiracy conviction does not require proof that a D or a cohort actually committed or even attempted to commit the underlying crime. Conn v. State, 948 N.E.2d 849, 853 (Ind. Ct. App. 2011). "The legislature reasonably may have concluded that because conspiracies do not necessarily result in actual harm to a victim, and often require less proof of detrimental conduct in order to convict a D than as to the completed crime, it would not include conspiracies to commit a 'crime of violence' within the definition of 'crime of violence.' Of course, the particular conspiracy in this case had brutally violent, tragic results. Nonetheless, we are not authorized to create fact-specific exceptions to the plain language of Indiana Code Section 35-50-1-2. Thus, we must direct that Coleman's aggregate sentence cannot exceed fifty-five years, the advisory sentence for the next highest class of offense, murder. This may be accomplished by reversing Coleman's forty-five-year conspiracy sentence and directing that it be reduced to forty years, to run consecutively to the fifteen-year SVF sentence for a total of fifty-five years." Held, judgment reversed.

TITLE: Cowens v. State

INDEX NO.: E.5.g.

CITE: (2nd Dist., 10-6-04), Ind. App., 817 N.E.2d 255

SUBJECT: Blakely holding does not apply to consecutive sentences

HOLDING: D filed a petition for rehearing alleging that imposition of consecutive sentences in this case was a violation of the holding in Blakely v. Washington, 124 S.Ct. 2531 (2004). Blakely applied rule set forth in Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), that any fact that increases penalty for crime beyond statutory maximum, other than fact of prior conviction, must be submitted to jury & proved beyond a reasonable doubt. The relevant "statutory maximum" for Apprendi purposes is the maximum a judge may impose based solely on facts reflected in jury verdict or admitted by the D. Blakely, 124 S.Ct. at 2537. Ct. held that Blakely is not implicated in the situation where a Tr. Ct. orders consecutive sentences based upon its discretion as granted by Ind. Code 35-50-1-2(c). Thus, Ct. declined to extend Blakely holding to consecutive sentences. Held, judgment affirmed.

RELATED CASES: Smylie, 823 N.E.2d 679 (because Indiana's statutes do not erect any target of presumption concerning concurrent or consecutive sentences, there is no constitutional problem with consecutive sentencing so long as Tr. Ct. does not exceed combined statutory maximums; see full review at D.9.a or E.4.c).

TITLE: Diaz v. State

INDEX NO.: E.5.g.

CITE: (4th Dist., 12-30-05), Ind. App., 839 N.E.2d 1277

SUBJECT: More specific statement for consecutive sentencing

HOLDING: D pled guilty to possession of methamphetamine with intent to deliver & dealing methamphetamine weighing three grams or more. On appeal, Ct. remanded for a more specific sentencing order but would not reverse finding of consecutive sentences. Tr. Ct. sentenced D to the presumptive on the first count & to a "mitigated sentence" of 20 years on the second Class A felony. Tr. Ct. found four aggravators: 1) that D was an illegal alien; 2) there were multiple cases against him; 3) a gun was found in D's apartment along with a substantial amount of meth; & 4) D was in the county for the purpose of selling drugs. As mitigators, Ct. found D's relatively young age, his acceptance of responsibility for his criminal conduct, & his complete lack of criminal history. Relying on Wentz v. State, 766 N.E.2d 351 (Ind.2002), D contended that a sentencing Ct. may not order consecutive sentences where it finds aggravators & mitigators balance. Here, because Tr. Ct. found a mitigated sentence as to one count & a presumptive sentence as to the other, D argued the Tr. Ct. must have found the aggravators & mitigators were in equipoise & so consecutive sentences could not be ordered. Ct. found Wentz distinguishable because in that case the sentencing Ct. specifically made a finding that the aggravators & mitigators were equal. Ct. agreed that sentencing judge must have determined that the mitigators outweighed the aggravators as to the count involving the mitigated sentence. The other conviction is not as clear as in a case with multiple convictions where a judge determines the aggravators outweigh the mitigators, a judge has three options. He may: 1) impose an enhanced sentence within the guidelines for the class of offense; 2) impose the presumptive sentence but order all or part of the sentences to run consecutive to one another; or 3) impose both enhanced & consecutive sentencing. Here, the record is not clear whether the Tr. Ct. chose the second option or whether he found the factors in equipoise as to the first count. The most specific statement in the sentencing order stated, "The Ct. declines to enter an aggravated sentence on Count I or Count II." Ct. found this was not clear enough to discern the Tr. Ct.'s intent. Ct. was unwilling to accept any ambiguity in order because "consecutive sentencing in this case does appear to impose a harsh punishment on this D." Held, judgment remanded to allow Tr. Ct. to state his balancing of aggravators & mitigators more specifically.

TITLE: Dowdell v. State

INDEX NO.: E.5.g.

CITE: (2/24/2017), 70 N.E.3d 884 (Ind. Ct. App. 2017)

SUBJECT: Appellate counsel not ineffective re sentencing claim

HOLDING: Appellate counsel was not ineffective for failing to make an argument regarding Defendant's sentence. The trial court imposed less than presumptive sentences for Defendant's two Murder convictions and presumptive sentences for his Attempted Murder convictions. The trial court then found the aggravating and mitigating circumstances were in equipoise, yet it still ran the sentences consecutively. See Marcum v. State, 725 N.E.2d 852 (Ind. 2000) (consecutive sentences improper under such circumstances). However, Marcum does not apply because here, after finding the aggravating and mitigating circumstances were balanced, the trial court then found an additional aggravating factor, the violent nature of Defendant's double murders. See Gleaves v. State, 859 N.E.2d 766, 770-71 (Ind. Ct. App. 2007). Held, judgment affirmed.

TITLE: Dragon v. State

INDEX NO.: E.5.g.

CITE: (8-28-02), Ind. App., 774 N.E.2d 103

SUBJECT: Improper consecutive sentences - second offense committed before sentencing on first

HOLDING: Tr. Ct. lacked statutory authority to sentence D to consecutive sentences. While D was housed in county jail awaiting sentencing on one crime, he committed second crime & was ordered to serve sentence on second crime consecutive to sentence on first crime. Ind. Code 35-50-1-2(b)(1) requires imposition of consecutive sentences when D is on probation, parole, or serving term of imprisonment at time other offenses were committed. Newsome v. State, 654 N.E.2d 11 (Ind. Ct. App. 1995). Moreover, D who has not been sentenced for offense one at time offense two is committed does not fall under mandatory sentencing provisions of Ind. Code 35-50-1-2(b)(1). Sides v. State, 490 N.E.2d 318 (Ind. 1986). Because D here committed second offense before being sentenced on first offense, consecutive terms were not mandatory under statute. Also, consecutive sentences were not permitted under Ind. Code 35-50-1-2(a). Although there was no dispute that same Ct. accepted D's guilty pleas & entered sentencing in both cases, the offenses were neither originally part of same charging information nor closely related. D's offenses were in no way related as they were in cases where consecutive sentences were appropriate under subsection (a) of statute. Buell v. State, 668 N.E.2d 251 (Ind. 1996). Held, reversed & remanded for re-sentencing.

RELATED CASES: Williams, App., 787 N.E.2d 461 (Tr. Ct. erred in determining that sentence for failure to return to lawful detention was required to be served consecutively to D's sentence in another case; statute mandating consecutive sentences applies only if D has already been sentenced on first crime).

TITLE: Ellis v. State

INDEX NO.: E.5.g.

CITE: (10-18-00), Ind., 736 N.E.2d 731

SUBJECT: Consecutive sentences - attempted murder is not crime of violence; limitation only applies between two crimes which are not crimes of violence

HOLDING: Attempted murder is not crime of violence for purposes of limitation on consecutive sentences. Total of consecutive terms of imprisonment to which D is sentenced for felony convictions arising out of episode of criminal conduct shall not exceed presumptive sentence for felony which is one class of felony higher than most serious of felonies for which person has been convicted. Ind. Code 35-50-1-2(c). "Crimes of violence" is defined term, straightforward list, including such crimes as murder & aggravate battery; however, list does not include attempted murder. Ind. Code 35-50-1-2(a). If legislature had intended to include attempted murder in list of crimes of violence, it would have done so.

Limitation on consecutive sentencing applies to consecutive sentencing between two attempted murders, but it does not apply to consecutive sentencing between attempted murders & murder. Rule of lenity requires that criminal statutes be strictly construed against State. Walker, 668 N.E.2d 243 (Ind. 1996). Adhering to this rule, Ct. held that exempted from consecutive sentence limitation are (1) consecutive sentencing among crimes of violence, & (2) consecutive sentencing between crime of violence & those that are not crimes of violence. However, limitation should apply for consecutive sentences between & among those crimes that are not crimes of violence. Here, Tr. Ct. sentenced D to maximum sentences for two attempted murders & murder, with all sentences running consecutively. All convictions arose out of one criminal episode. Because two attempted murders are not crimes of violence, Tr. Ct. erred in running them consecutively. But, because limitation did not apply between murder & attempted murders, Tr. Ct. did not err in running murder consecutively to attempted murders. Held, judgment affirmed in part & reversed in part & remanded to Tr. Ct. to sentence D to 65 years for murder, to be served consecutively with 55 year sentence for attempted murders; Boehm, J., dissenting in part on basis that attempted murder is crime of violence.

RELATED CASES: Hollins, App., 790 N.E.2d 100 (D's convictions for attempted murder & burglary were exempted from consecutive sentence limitation, because penalty for offenses was enhanced based on serious bodily injury inflicted upon victim); Fight, App., 759 N.E.2d 1131 (D's conviction for attempted murder of police officer was exempted from term of imprisonment limitation imposed by Ind. Code 35-50-1-2, & thus Tr. Ct. did not err in sentencing D to aggregate term of eighty years); Greer, 684 N.E.2d 1149 (statutory limitation on consecutive terms of imprisonment will apply to attempted murder conviction unless D received enhanced penalty because felony resulted in serious bodily injury if D knowingly or intentionally caused serious bodily injury).

TITLE: Farris v. State

INDEX NO.: E.5.g.

CITE: (6-16-09), Ind., 907 N.E.2d 985 (Ind. 2009)

SUBJECT: Consecutive sentences - HO enhancements in related trials

HOLDING: Counsel was ineffective for failing to oppose consecutive habitual offender ("HO") enhancements where the enhancements arose from separate trials on related charges. The State is barred from seeking multiple, pyramiding habitual offender sentence enhancements by bringing successive prosecutions for charges which could have been consolidated for trial. Seay v. State, 550 N.E.2d 1284, 1289 (Ind. 1990). Here, D was charged with robbery and alleged to be a HO. After his co-D cooperated with the police and agreed to testify against D, D instructed a third party to kill the co-D. The third party went to co-D's home and shot four people. D was arrested for the murders. D was convicted in separate trials of the robbery and the murder, and sentenced to consecutive sentences, including consecutive HO enhancements. Even though the State did not delay the murder trial for the improper purpose of seeking multiple enhancements, the Tr. Ct. ordered consecutive HO enhancements for charges that could have been consolidated for trial when it ordered the HO enhancements in the murder and aggravated battery conviction to be served consecutively to the enhancement in the robbery conviction. Had counsel opposed the imposition of the second HO enhancement consecutive to the first, Seay would have required the motion to be granted and D would not have been ordered to serve an additional thirty-year HO enhancement on the murder charge. Thus, the Tr. Ct. abused its discretion in failing to grant D's petition for post-conviction relief. Held, judgment of post-conviction court reversed, and in all other respects, the Court of Appeals' memorandum opinion is summarily affirmed.

TITLE: Fields v. State

INDEX NO.: E.5.g.

CITE: (1st Dist., 04-18-05), Ind. App., 825 N.E.2d 841

SUBJECT: Consecutive sentences - conspiracy & offense committed during execution of conspiracy

HOLDING: Conspiracy to commit a burglary & a robbery that is attempted during the burglary amount to a single episode of criminal conduct for purposes of consecutive sentence limitation found in Ind. Code 35-50-1-2(c). Statute limits total consecutive terms for non-violent felony convictions arising out of an episode of criminal conduct to the presumptive sentence for the next higher felony. Moreover, Ellis v. State, 736 N.E.2d 731 (Ind. 2000), appears to prohibit three consecutive sentences where, as here, an episode of criminal conduct includes one crime of violence (class A felony burglary) & two crimes that are not crimes of violence (attempted robbery & conspiracy to commit burglary). Ind. Code 35-50-1-2(b) defines "episode of criminal conduct" as offenses or connected series of offenses that are closely related in time, place, & circumstances.

State argued that attempted robbery & conspiracy to commit burglary were not part of same episode of criminal conduct, because attempted robbery took place when D & his accomplice entered house & attacked victims, while conspiracy occurred at least three days earlier & overt act in furtherance of conspiracy was "scoping out" the victims' house. Citing United States v. Hobbs, 136 F.3d 384 (4th Cir. 1998), & United States v. Thomas, 211 F.3d 316 (6th Cir. 2000), Ct. disagreed & held that D's conspiracy to commit burglary & attempted robbery that took place as conspiracy was carried out amount to a single episode of criminal conduct. While the formulation of the conspiracy & execution of conspiracy took place in different locations, the two offenses did not involve multiple victims or multiple criminal objectives. Both offenses had the same victims & the same objectives, to break into the victims' home & take their property. When D broke into victims' home he was not entering into a second crime with a fresh purpose nor does that act reflect a subsequent conscious decision to commit another crime. Held, remanded with instructions to resentence D to not more than 105 years, representing a maximum of fifty years for burglary & a maximum of 55 years for other crimes.

Note: Ct. *sua sponte* held that D was improperly convicted of conspiracy to commit burglary as a Class A felony because factual basis for guilty plea supported only a conviction of conspiracy as a Class B felony. Allegation of "scoping" in charging information as act in furtherance of D's conspiracy to commit burglary supports a plea of guilty to a conspiracy to commit a felony in a dwelling, but does not support a plea of guilty to a conspiracy to commit a felony resulting in bodily injury.

RELATED CASES: Green, App., 850 N.E.2d 977 (Field's co-D's crimes of conspiracy to commit burglary & attempted robbery were a single episode of criminal conduct).

TITLE: Frazier v. State

INDEX NO.: E.5.g.

CITE: (3d Dist. 8/26/87), Ind. App., 512 N.E.2d 215

SUBJECT: Consecutive sentences

HOLDING: Tr. Ct. erred in ordering sentence to run consecutively with sentence not yet imposed in second case. Ct's. cannot impose consecutive sentences absent statutory authority. Royal, 369 N.E.2d 390. Ind. Code 30-50-1-2 gives Tr. Ct. discretion to order 2 terms served consecutively. Statute applies only where at least 2 terms are involved. Second sentence must already have been imposed or must be imposed contemporaneously. See Hennings, 465 N.E.2d 1142. (Tr. Ct. need not advise D of any possibility of consecutive sentences in first of 2 felony convictions, when, at time of guilty plea, sentence on second offense had not yet been imposed). Criminal laws must be strictly construed. Held, judgment modified & affirmed. Ct. notes that its ruling has no bearing on whether Tr. Ct. in second case properly imposed consecutive sentences.

TITLE: Gilliam v. State

INDEX NO.: E.5.g.

CITE: (3rd Dist., 02-24-09), 901 N.E.2d 72 (Ind. Ct. App. 2009)

SUBJECT: Consecutive sentences upheld for three counts of nonsupport

HOLDING: Tr. Ct. did not err in imposing twenty-four-year consecutive sentences for nonsupport of his eight dependent children. *Citing Boss v. State*, 702 N.E.2d 782 (Ind. Ct. App. 1998), D argued that his nonpayment of support was one bad act, or a single episode of criminal conduct. An "episode of criminal conduct" is defined as "offenses or a connected series of offenses that are closely related in time, place, and circumstance." *Williams v. State*, 891 N.E.2d 621 (Ind. Ct. App. 2008). Here, from January 1, 2001 to December 31, 2004, D failed to pay court-ordered support, resulting in three separate and distinct households being deprived of support for dependent children. D's failure to pay child support for three children under count I can be related without reference in any way to details of his failure to pay child-support for two children under count II, or for three children under count III. D did not demonstrate that his offenses constituted a single episode of criminal conduct. Held, judgment affirmed; Barnes, J., concurring in result.

RELATED CASES: *Grimes*, 84 N.E.3d 635 (Ind. Ct. App. 2017) (D's 18 convictions for incest were not part of single episode, so Tr. Ct. did not err in imposing 18 consecutive sentences; see full review, this section).

TITLE: Grimes v. State

INDEX NO.: E.5.g.

CITE: (9/5/2017), 84 N.E.3d 635 (Ind. Ct. App. 2017)

SUBJECT: 18 convictions for incest not part of single episode

HOLDING: D's 18 convictions for incest were not part of a single episode of criminal conduct, so the Tr. Ct. did not err in imposing 18 consecutive sentences, which, along with sentences for other crimes, resulted in an aggregate sentence of 111 years. See Ind. Code 35-50-1-2(c), (d). During a nine-week period, D had intercourse with his 14-year-old daughter, S.G., 18 times. At trial, S.G. gave a detailed description of each separate act of sexual intercourse. The 18 times D had intercourse with S.G. were not so closely related in time, place, and circumstance that a complete account of one incest charge could not be related without referring to the details of the other incest charges. See Williams v. State, 891 N.E.2d 621, 631 (Ind. Ct. App. 2008). Therefore, because D's offenses were not simultaneous or contemporaneous, his offenses do not constitute a single episode of criminal conduct. Cf. Harris v. State, 861 N.E.2d 1182 (Ind. 2007) (holding that convictions for sexual misconduct with a minor constituted one episode of criminal conduct because the acts, involving two victims, took place in the same bed, five minutes apart). Held, judgment affirmed.

RELATED CASES: S.B., 175 N.E.3d 1199 (Ind. Ct. App. 2021) (sparse evidence of the timeframe for the acts of incest to which D pleaded guilty reasonably supported that the charged offenses did not constitute a single episode of criminal conduct).

TITLE: Haggard v. State

INDEX NO.: E.5.g.

CITE: (3/3/83), Ind., 445 N.E.2d 969

SUBJECT: Consecutive sentences - when mandated

HOLDING: A consecutive sentence is not mandatory unless D was on probation, parole or serving a term of imprisonment at the time the other offenses were committed. Ind. Code 35-50-1-2; Mott, 402 N.E.2d 986; Dolan, App., 420 N.E.2d 1364; Garrett, App., 411 N.E.2d 692. Here, D was out on bond when he committed offenses. Ct. notes that Ind. Code 35-50-1-2(a) allows Tr. judge to impose consecutive sentence upon articulating reasons for so doing. Held, cause remanded with instructions to state reasons for imposing consecutive sentences, or alternatively, to sentence D concurrently.

RELATED CASES: Pawloski, App., 555 N.E.2d 851; LeMaster, 498 N.E.2d 1185 (Pardon 74; where parolee commits acts which give rise to multiple convictions, Ind. Code 35-50-1-2 does not require sentence for these convictions to be served consecutively to each other); Groff, 488 N.E.2d 711 (Tr. Ct. properly imposed consecutive sentences where D was on appeal bond at time he committed second offense); Hutchinson, 477 N.E.2d 850 (Crim L 1210 (3,4); Tr. Ct. erred in ordering D to serve sentence consecutively where D committed offense while temporarily out of jail attending funeral, but before he had been sentenced on first offense); Petruso, 441 N.E.2d 446 (Tr. Ct. did not abuse discretion in ordering sentences for attempted murder (39 years) & kidnapping (33 years) to be served consecutively); Ramirez, App., 455 N.E.2d 609 (Crim L 1042; where D failed to object at sentencing hearing or raise issue in MCE, D waived issue of propriety of consecutive sentences).

TITLE: Hardley v. State

INDEX NO.: E.5.g.

CITE: (5th Dist., 09-26-08), Ind. App., 893 N.E.2d 1140

SUBJECT: Erroneous imposition of concurrent sentences - issue raised on cross-appeal

HOLDING: Tr. Ct. erred in ordering sentences D received in two different cause numbers to be served concurrently. D was charged with theft, released on his own recognizance and then committed and was charged with criminal confinement and battery. Tr. Ct. found D guilty of multiple offenses but ordered all counts served concurrently. This was improper in light of Ind. Code 35-50-1-2(d), which provides: "[i]f, after being arrested for one (1) crime, a person commits another crime...upon the person's own recognizance[,] the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed." Thus, sentences from two cause numbers were required to be served consecutively. To the extent Hoggatt v. State, 805 N.E.2d 1281 (Ind. Ct. App. 2004), suggests that State must challenge a sentence within thirty days, Majority declines to follow it. State may challenge an illegal sentence in a cross-appeal, even when the defect is not facially apparent. Held, judgment affirmed in part, reversed and remanded to order sentences to be served consecutively. Sullivan, S.J., concurring in part and dissenting in part.

TITLE: Harris v. State

INDEX NO.: E.5.g.

CITE: Ind., 897 N.E.2d 927 (Ind. 2008)

SUBJECT: Maximum, consecutive sentence for two counts of child molesting inappropriate

HOLDING: In sentencing D to consecutive 50-year terms for two counts of Class A felony child molesting, Tr. Ct. did not explain why the aggravating circumstances warranted consecutive sentences as opposed to enhanced concurrent sentences. Thus, Tr. Ct. fell short of the requirement that it explain its reasons for selecting the sentence it imposed. See Lander v. State, 762 N.E.2d 1208 (Ind. 2002).

Rather than remanding for new sentencing order, Court exercised its authority to review and revise D's sentence under App. R. 7(B). Court found ongoing nature of D's crimes coupled with his position of trust with victim was sufficiently aggravating to justify enhanced sentences. Regarding character of offender, Court noted that the two counts of molestation were identical and involved same child. Though D's criminal history involving theft and driving offenses "is not inconsequential," Court concluded that his convictions are not significant aggravators in relation to a Class A felony. Ruiz v. State, 818 N.E.2d 927 (Ind. 2004). Court found aggravating circumstances sufficient to warrant imposing enhanced sentences for child molesting. However, Court did not find the aggravating circumstances sufficient to justify imposing consecutive sentences totaling 100 years. Held, transfer granted, memorandum Court of Appeals' opinion summarily affirmed as to other issues, remanded with instructions to revise sentence to 50 years for each count of child molesting to be served concurrently; Boehm, J. concurring in result.

TITLE: Harris v. State

INDEX NO.: E.5.g.

CITE: (3d Dist. 09/10/92), Ind. App., 598 N.E.2d 639

SUBJECT: Consecutive sentences, order of imposition immaterial

HOLDING: It was not error for Tr. Ct. to order sentence imposed upon revocation of probation to be served consecutively to sentence imposed for burglary committed while on probation, even though revocation occurred after sentencing on burglary. In March 1991, D was placed on probation for burglary conviction, and while on probation he committed another burglary. He pled guilty to second burglary in December 1991 and was sentenced to 15 years. State filed petition to revoke probation on first burglary conviction, probation was revoked in January 1992, and Ct. ordered original 4-year suspended sentence to be served concurrently to 15-year sentence for second burglary. D argued that Ct. had no discretionary authority to impose consecutive sentences because only one offense was before the Ct., and that mandatory consecutive sentences were also precluded because at time he committed first offense, he was not on probation for second offense. Ct. agreed with first proposition but noted that Ind. Code 35-50-1-2(b) requires consecutive sentences for commission of second crime while on probation for first, "regardless of the order in which the crimes are tried and sentences are imposed." Even though sentence on second offense was imposed before probation was revoked on first offense, Ct. was still required to make sentence upon revocation consecutive to sentence on second burglary.

RELATED CASES: Shafer, App., 856 N.E.2d 752 (Tr. Ct. did not abuse discretion in ordering sentence consecutive to sentence to be handed down in another court later the same day); Carrion, App., 619 N.E.2d 972 (Sentences to penal institutions in different jurisdictions are cumulative & not concurrent, & it was not error to order D's sentence to be served consecutively to life sentences in other jurisdiction, Reaves, 586 N.E.2d 847).

TITLE: Haskett v. State

INDEX NO.: E.5.g.

CITE: (1st Dist. 8/13/84), Ind. App., 467 N.E.2d 32

SUBJECT: Consecutive sentences - improper grounds for

HOLDING: Tr. Ct. properly enhanced D's Class C robbery & attempted robbery convictions by 3 years & properly ordered two 8-year sentences served consecutively. Here, D contends Tr. Ct. meted out maximum sentence because he successfully eluded habitual & additional serious charges were dismissed prior to trial. Ct. acknowledges such reasoning would be improper & could be grounds for reversing enhanced sentence & imposing presumptive sentence. See Gambill, 436 N.E.2d 301 (enhanced sentence reversed & presumptive imposed where record revealed enhanced sentence was imposed to compensate for what Tr. Ct. believed was erroneous verdict (voluntary manslaughter) following D's murder trial). Held, no error.

RELATED CASES: Burch, App., 487 N.E.2d 176 (Crim L 1210(4); Tr. Ct. erred in ordering sentences served consecutively simply because both crimes involved use of deadly weapon, where that was part of crime charged & Tr. Ct. cited no other reasons; held, remanded for findings or sentencing to concurrent terms).

TITLE: Henderson v. State

INDEX NO.: E.5.g.

CITE: (9/30/2015), 44 N.E.3d 811 (Ind. Ct. App. 2015)

SUBJECT: Maximum, consecutive sentences for misdemeanors upheld but remanded to determine D's ability to pay \$10,000 fine

HOLDING: Tr. Ct. did not abuse its discretion in ordering D to serve consecutive terms of 365 days executed for each misdemeanor offense of criminal mischief and invasion of privacy, even though the two convictions arose from the same facts and circumstances. No statutory, constitutional, or common law contains a restriction on imposing consecutive sentences for misdemeanor offenses. Dunn v. State, 900 N.E.2d 1291 (Ind. Ct. App. 2009). Here, a no-contact order prevented D from having any contact with his ex-wife, except for communication about their two children. On day of incident, ex-wife dropped the children off with D for a scheduled visit but returned after her daughter texted saying their father was yelling at them. D yelled at ex-wife while she was trying to leave his driveway, grabbed her car window and punched a dent into her front fender.

In imposing aggravated, consecutive sentences, Tr. Ct. properly considered D's extensive criminal history and fact that he was on probation for a similar offense committed against his ex-wife. However, Tr. Ct. erred when it ordered D to pay a \$10,000 fine without determining his ability to pay as required by Ind. Code § 35-38-1-18. Held, judgment affirmed.

TITLE: Isom v. State

INDEX NO.: E.5.g.

CITE: (5/20/2015), 31 N.E.3d 469 (Ind. 2015)

SUBJECT: No statutory authority to order consecutive death sentences

HOLDING: The Tr. Ct. exceeded its statutory authority by ordering the D's three death sentences to be served consecutively. D was convicted of murdering his wife and two step-children. The State sought the death penalty, alleging the multiple murder aggravator. The jury recommended death for each victim, and the Tr. Ct. imposed it, ordering the sentences to be served consecutively. The Tr. Ct. explained that "each victim is entitled to their own sentence." Ind. Code § 35-50-1-2(c) provides that "the court shall determine whether terms of imprisonment shall be served concurrently or consecutively." (emphasis in original). "A 'term of imprisonment' is a penalty under which the convict is sent to incarceration for some period...and then released after the period has passed. Execution is a penalty of a radically different sort...State v. Price, 715 N.E.2d 331, 332 (Ind. 1999). Therefore, a death sentence is not a "term of imprisonment" under Ind. Code § 35-50-1-2. The Tr. Ct. exceeded its statutory authority by ordering the D's death sentences to be served consecutively.

TITLE: Johnican v. State
INDEX NO.: E.5.g.
CITE: (1st Dist., 3-3-04), Ind. App., 804 N.E.2d 211
SUBJECT: Consecutive sentence - single episode of criminal conduct
HOLDING: Disagreeing with majority opinion in Ratliff, App., 741 N.E.2d 424, *trans. denied*, Ct. held that where a D possesses contraband on his person as he simultaneously commits other criminal offenses, offenses should be deemed part of a single episode of criminal conduct for purposes of Ind. Code 35-50-1-2(c). Statute limits consecutive terms of imprisonment arising out of episode of criminal conduct to presumptive sentence for felony which is one class of felony higher than most serious of felonies for which person has been convicted.

In this case, jury convicted D of possession of cocaine, a Class B felony & two class D felonies for pointing a firearm & resisting law enforcement. *Citing Ratliff*, D argued that his Class B felony possession of cocaine offense represented one episode of criminal conduct, while his Class D felony convictions represented a separate episode of criminal conduct, thus limiting maximum possible sentence to years. Ct. disagreed, concluding that D's possession of cocaine was directly & inextricably connected to the other offenses, as it occurred at same time & place as other offenses & would have never been discovered had D not fled from & pointed his gun at police officers. Because D's offenses constituted single episode of criminal conduct, Tr. Ct. was permitted to impose consecutive sentences totaling thirty years, which is presumptive sentence for Class A felony. Held, remanded for resentencing on other grounds.

RELATED CASES: Akers, 963 N.E.2d 615 (Ind. Ct. App. 2012) (unlike in Johnican, where offenses resulted largely due to D's possession of cocaine, here there is no nexus between D's acts of battery and resisting arrest and his possession of paraphernalia); Deshazier, App., 877 N.E.2d 200 (D's possession of handgun & marijuana were not "closely related in time, place & circumstance" to his acts of resisting arrest for purposes of Ind. Code 35-50-1-2(b)); Cole, App., 850 N.E.2d 417 (thoroughly reviewing caselaw & recognizing split, Ct. agrees with cases holding simultaneous possession with with tank of ammonia in it could not exceed four years); Massey, App., 816 N.E.2d 979 (because D was a serious violent felon in possession of a handgun & simultaneously was in possession of cocaine, convictions in this case arose from a single episode of criminal conduct).

TITLE: Kendrick v. State

INDEX NO.: E.5.g.

CITE: (11/7/88), Ind., 529 N.E.2d 1311

SUBJECT: Consecutive sentences - absent plea agreement, must be contemporaneous

HOLDING: Tr. Ct. did not err in denying D's PCR petition to set aside guilty plea. D pled guilty to charge in Marion County Superior Ct., Div. One. At time of plea, other charges were pending against D in another division. Judge in Div. One accepted plea & did not advise D of possibility of consecutive sentences. D then pled guilty to other pending charges, & pursuant to plea agreement, received 2 sentences running consecutive to one another & to sentence received in Div. One. D sought to withdraw guilty plea in Div. One because of lack of advisement re consecutive sentences. Tr.Ct.'s, in absence of express statutory authority, cannot impose consecutive sentences. Baromich, 249 N.E.2d 30. By statute, Tr. Cts. have general discretionary authority to order consecutive sentences whenever justified by sufficient, articulated reason. Ind. Code 35-50-1-2(a); Shippen, 477 N.E.2d 903. Language employed by legislature is restrictive. General authority is limited to those occasions when Ct. is meting out 2 or more terms of imprisonment, contemporaneously. Absent plea agreement, Ct. which imposed sentence on other pending charges had no discretion to order them to run consecutive to sentence from Div. One. Thus, there was no possibility of consecutive sentences of which Div. One needed to advise D. Held, PCR denial affirmed. Pivarnik, J., CONCURS IN RESULT.

Note: effective 7-1-94, Ind. Code 35-50-1-2 has been amended to allow consecutive sentences, even when Tr. Ct. is not contemporaneously imposing two or more sentences.

RELATED CASES: Totten, App., 760 N.E.2d 1074 (D suffered no prejudice where counsel failed to properly advise him of potential sentence because combined sentence for all three convictions was less than maximum possible sentence for any one of them); Elswick, App., 706 N.E.2d 592; Buell, 668 N.E.2d 251 (Tr. Ct. has discretionary power to order consecutive sentences for closely related offenses, tried in same Ct., even where sentences are not imposed contemporaneously); Seay, 550 N.E.2d 1284 (order running sentence consecutive to sentence in prior cause in another Ct. vacated).

TITLE: Lamirand v. State

INDEX NO.: E.5.g.

CITE: (5th Dist., 09-19-94), Ind. App., 640 N.E.2d 79

SUBJECT: Consecutive sentences prohibited during modification of prior sentence

HOLDING: Where Tr. Ct. modifies sentence on one conviction at same time it enters judgment on second sentence, it is improper to order sentences served consecutively under Ind. Code 35-50-1-2(a). While D was serving sentence for first conviction, he admitted commission of earlier offense. He was subsequently charged with that offense & pled guilty. At sentencing hearing on second conviction, Tr. Ct. modified terms of first conviction so that probationary period wouldn't fall between two sentences, & ordered second sentence to be served consecutively to modified first sentence. Thereafter D filed pro se motion to correct erroneous sentence, arguing that Tr. Ct. lacked authority to order consecutive sentences because he was not contemporaneously imposing two sentences, & Ct. agreed. Mandatory sentencing provisions of Ind. Code 35-50-1-2(b) were not involved. Case law clearly indicates that discretionary authority for consecutive sentences is limited to occasions when Ct. is contemporaneously imposing two or more sentences. (**Note**, statute has been amended to allow consecutive sentences, effective 07-01-94) Ct. found that when Tr. Ct. modifies sentence it is altering already existing sentence, rather than imposing sentence within meaning of law of consecutive sentencing. Tr. Cts. may not avoid limitation on discretionary authority merely by modifying sentence imposed previously in separate action. Held, reversed & remanded for resentencing, Chezem, J., dissenting.

TITLE: Little v. State
INDEX NO.: E.5.g.
CITE: (3/25/85), Ind., 475 N.E.2d 677
SUBJECT: Consecutive sentences - Tr. Ct. not limited to statutory factors
HOLDING: Tr. Ct. did not err in basing consecutive sentence on fact D committed 2 unrelated crimes, committed against 2 victims, 17 days apart. Tr. Ct. has discretion to impose consecutive sentences for multiple offenses, provided that it states sufficient reasons for doing so. Ind. Code 35-38-1-7(b) lists aggravating & mitigating circumstances which Tr. Ct. may consider, but list does not limit matters Tr. Ct. may consider in determining sentence. Allen, 453 N.E.2d 1011; Bish, 421 N.E.2d 608. Tr. Ct. here based consecutive sentences on fact that D committed 2 separate crimes. Fact that D had harmed 2 separate victims is sufficient to support imposition of consecutive sentences. Held, sentences affirmed. DeBruler & Prentice, JJ., DISSENT, arguing that statement of reasons was not sufficiently specific.

TITLE: Lumbley v. State

INDEX NO.: E.5.g.

CITE: (4/6/2017), 74 N.E.3d 234 (Ind. Ct. App. 2017)

SUBJECT: Sentence enhancements for use of a firearm can be run consecutively

HOLDING: Tr. Ct. did not abuse its discretion by enhancing Defendant's two separate criminal confinement convictions (of two separate victims on separate days) under Indiana's firearm enhancement statute and ordering that they be served consecutively. *Citing Breaston v. State*, 907 N.E.2d 992 (Ind. 2009), Defendant argued that sentencing enhancements for use of a firearm cannot be run consecutively, just as habitual offender enhancements cannot. But the firearm enhancements “do not have the special and distinct dimensions of habitual offender enhancements and are similar to the finding of aggravating circumstances for separate offenses.” Further, the addition of Ind. Code § 35-50-2-11(i) in 2015, which prevents the imposition of consecutive sentences when a single episode of conduct is present, provides further support for the conclusion that the Legislature intended for enhancements to support consecutive sentences. Held, judgment affirmed.

RELATED CASES: *Breaston*, 907 N.E.2d 992 (Ind. 2009) (sentence enhancements for use of a firearm can be run consecutively unless a single episode of criminal conduct is present); *Young*, 57 N.E.3d 857 (Ind. Ct. App. 2015) (because there is no statutory authorization for stacking general and specialized habitual offender enhancements, Ct. remanded with instructions to run the habitual and repeat sexual offender enhancements concurrently).

TITLE: Martin v. State

INDEX NO.: E.5.g.

CITE: (2d Dist., 1-18-95), Ind. App., 645 N.E.2d 1100

SUBJECT: Consecutive sentencing - D on bond

HOLDING: On rehearing, Ct. affirmed Tr. Ct.'s imposition of consecutive sentences for three battery convictions, holding that D was "on bond" for first battery offense at time he committed second & third batteries. After first charge, D was released on bond with no contact order. Subsequently parties entered into agreement to withhold prosecution if D participated in diversion program & had no contact with prosecuting witness. Agreement also provided that D's failure to comply with terms would cause State to withdraw from agreement & proceed with prosecution. Attachment of conditions rendered charges against D ongoing, as D remained subject to appearance bond.

Ct. held that under these circumstances, D is "on bond" within meaning of Ind. Code 35-50-1-2, until conditions of agreement are fully performed. Ct. rejected use of Ind. Code 27-10-2-10, which regulates questions about bond's form, but not vitality of bond. Held, State's petition for rehearing granted, Tr. Ct. affirmed, holding at 638 N.E.2d 1349 modified.

RELATED CASES: Christmas, App., 812 N.E.2d 174 (pretrial diversion agreement constitutes either being "released on own recognizance" or "on bond" within meaning of Ind. Code 35-50-1-2).

TITLE: Martin v. State

INDEX NO.: E.5.g.

CITE: (2nd Dist.; 7-22-99), Ind. App., 714 N.E.2d 1140

SUBJECT: Consecutive sentences - limitation on consecutive sentences ameliorative

HOLDING: Amendment to Ind. Code 35-50-1-2(c) limiting length of consecutive sentences is ameliorative amendment. Total of consecutive terms of imprisonment to which D is sentenced for felony convictions arising out of episode of criminal conduct shall not exceed presumptive sentence for felony which is one class of felony higher than most serious felonies for which person has been convicted. Ind. Code 35-50-1-2(c). When legislature enacts ameliorative amendment without including specific savings clause, ameliorative statute will apply to all individuals sentenced after statute's effective date. However, where Tr. Ct. on remand merely corrects D's sentence, statutory amendments effective after original sentence have no effect on new sentence imposed. See Riffe, App., 675 N.E.2d 710; Rowald, App., 629 N.E.2d 1285. Here, between D's original sentencing to Class D felony & Class C felony & his resentencing to two Class C felonies, legislature amended Ind. Code 35-50-1-2 to limit length of consecutive sentences. Because after reversal & remand D stood convicted of different crimes than before, resentencing was not merely correction of D's existing sentences but a true resentencing. Thus, amendment applied to D on resentencing, & Tr. Ct. erred when it sentenced D to aggregate sentence which exceeded presumptive for Class B felony. Held, judgment affirmed in part & reversed in part; Sullivan, J., concurring in order to reiterate his dissent in Riffe, *supra*.

RELATED CASES: Ford, App., 755 N.E.2d 1138 (despite ameliorative statute which imposed limitation on authority to impose consecutive sentences, trial Ct. did not err in sentencing D to forty years for murder to be served consecutively to his twenty-five-year conviction for attempted murder).

TITLE: Mask v. State

INDEX NO.: E.5.g.

CITE: (06-23-05), Ind., 829 N.E.2d 932

SUBJECT: Limitation on consecutive sentences - "term of imprisonment" includes suspended sentence

HOLDING: Ind. Code 35-50-1-2(c) limits total consecutive terms for non-violent felony convictions arising out of an episode of criminal conduct to the presumptive sentence for the next higher felony. Incarceration in context of this statute does not mean the period of executed time alone. Imposition of a suspended sentence leaves open the real possibility that an individual will be sent to incarceration for some period before being released from any penal obligation. Thus, Ct. held that any period of a suspended sentence must be included when calculating maximum aggregate sentence under Ind. Code 35-50-1-2(c). In so holding, Ct. noted rule of lenity, which requires that criminal statutes be strictly construed against the State. Ellis v. State, 736 N.E.2d 731 (Ind. 2000). In this case, "term of imprisonment" is left undefined by Legislature in Ind. Code 35-50-1-2 & Ct. held that the phrase should be read in order to include any period of incarceration a D is sentenced to, even if all or a portion of that period of time is suspended. Held, transfer granted, remanded with instructions.

TITLE: Meniffee v. State

INDEX NO.: E.5.g.

CITE: (2nd Dist., 10-19-92), Ind. App., 601 N.E.2d 359 & (4th Dist., 10-15-92), 600 N.E.2d 967

SUBJECT: Consecutive Sentences - Probation violation (PV) and multiple previous sentences

HOLDING: These 2 decisions represent 3 original appeals on same probation revocation. In August, 1989, D was sentenced to 6 years (1 executed, 5 years probation) for burglary. In July, 1990, he was sentenced to 8 years (4 executed, 4 years probation) for attempted robbery. In October, 1990, while on probation for both sentences, D pled guilty to 2 new offenses, criminal mischief and theft, and PV on both of the former convictions. At that time he was sentenced to 1« years on criminal mischief and theft and previous sentences on burglary (5 years) and attempted robbery (4 years) were ordered executed concurrently to each other, but consecutively to theft and criminal mischief. D was ordered to serve these sentences in community corrections. After D was expelled from correctional facility, Ct. granted petition to serve his remaining time on home detention and probation. While on home detention, another charge of PV was filed due to apparent domestic violence. Upon finding probation was violated, Ct. ordered all original sentences (6 years, 8 years, 1« years) to be executed consecutively. Ct. rejected D's argument that Tr. Ct.'s maximum sentencing should have been limited to 5 1/2 year sentence imposed in 1990 plea agreement theft, and criminal mischief charges. Tr. Ct.'s acceptance of that plea did not result in new judgment wiping out all previously suspended sentences, and it did not affect original suspended sentences, nor Tr. Ct.'s authority to order execution of these sentences at second PV hearing. Second Dist. addressed issue of consecutive nature of last PV sentence order, and found no error in imposing consecutive sentences. Opinion is confused by fact that not all of record was presented to both appellate Cts., but it appears that Ct. first determined that Ind. Code 35-50-1-2 required that 1«-year theft and criminal mischief sentence be served consecutive to sentences ordered executed in 1990 PV hearing because D was on probation at time new offenses were committed. Ct. then determined from record in Fourth Dist., that when each subsequent offense was committed, D was on probation for previous offense, and therefore consecutive sentences were also proper. Because each sentence was properly ordered consecutive to others, ordering full, consecutive execution upon last PV, was also proper. Held, Tr. Ct. affirmed.

TITLE: McGriff v. State

INDEX NO.: E.5.g.

CITE: (9/5/2014), 20 N.E.3d 156 (Ind. Ct. App. 2014)

SUBJECT: Consecutive sentences - no jurisdiction beyond county

HOLDING: Tr. Ct. did not abuse its discretion by ordering D's sentence consecutive to sentences in a different county. Whether to impose consecutive or concurrent sentences is within the Tr. Ct.'s sound discretion and is reviewed only for an abuse of discretion. A Circuit Court is a county Court only, whose jurisdiction is limited, generally, by the bounds of the county. It can issue no process, whether mesne or final, to any other county. Sherry v. Winston, 1 Ind. 96, 98-99 (1848).

Here, D committed burglaries in Grant, Wells and Blackford counties. Blackford Circuit Court sentenced D first and ordered the sentences to be served concurrent to the sentences in Wells County and Grant County. Grant Circuit Court sentenced D second, and ordered the sentence to be served concurrent to Blackford County. However, Wells Circuit Court sentenced D last and ordered that his sentence be served consecutive to the Blackford and Grant County sentences. The Blackford Circuit Court could not direct the Wells Circuit Court how to sentence D because a circuit court has no jurisdiction beyond the limits of the county in which it is seated. Thus, Tr. Ct. was within its authority to order the Wells County sentence consecutive, despite the conflicting orders of the other counties. Held, judgment affirmed.

TITLE: Miller v. State

INDEX NO.: E.5.g.

CITE: (12/17/19), Ind. Ct. App., 138 N.E.3d 314

SUBJECT: Consecutive sentence above the advisory sentence is permitted

HOLDING: Defendant was convicted of murder, robbery as a level 5 felony, and robbery as a level 3 robbery and the trial court sentenced him to consecutive sentences of fifty-five years for murder, five years for the level 5 robbery and twelve years for the level 3 robbery, for an aggregate sentence of 72 years. Defendant argued on appeal that the trial court was prohibited from imposing a sentence above the advisory for his attempted robbery as a level 5 felony by Ind. Code 35-50-2-1.3(c), which provides: "In imposing...consecutive sentences for felony convictions that are not crimes of violence...arising out of an episode of criminal conduct...a court is required to use the appropriate advisory sentence in imposing a consecutive sentence...." The Court of Appeals held that the language of Ind. Code 35-50-2-1.3 to which Defendant points appears to be rendered obsolete by the current wording of Ind. Code 35-50-1-2(c) and, to the extent that it was not, in light of Robertson v. State, 871 N.E.2d 280 (Ind. 2007), the phrase is a reference to Ind. Code 35-50-1-2 (c) and (d), and that those sections do not prohibit the trial court's sentence.

TITLE: Pearson v. State

INDEX NO.: E.5.g.

CITE: (1st Dist. 9/28/89), Ind. App., 543 N.E.2d 1141

SUBJECT: Consecutive sentences - specific findings required

HOLDING: Tr. Ct. erred in imposing consecutive sentences without statement indicating reasons for doing so. Generally, Tr. Ct. has wide discretion in determining whether sentences for multiple offenses will be served consecutively. See Ind. Code 35-50-1-2. If consecutive sentences are imposed, Tr. Ct. must include statement indicating reasons for doing so. Spinks, 437 N.E.2d 963; Page, 424 N.E.2d 1021. Statement must contain 3 elements: (1) identification of all significant mitigating & aggravating circumstances found; (2) specific facts leading Tr. Ct. to find each circumstance; & (3) articulated balancing of mitigators & aggravators. Dumbsky, 508 N.E.2d 1274; Hammons, 493 N.E.2d 1250. Here, Tr. Ct. failed to make any statement whatsoever. State argues that D waived error, *citing* Beasley 445 N.E.2d 1372. In Beasley, Tr. Ct. generally referred to D's lengthy criminal record without stating any particulars supporting imposition of consecutive sentences. Ind. S. Ct. ruled that because record revealed sufficient facts to support enhancement based on criminal record, error was not fundamental. Where Tr. Ct. states reasons for sentencing without sufficient specificity, reviewing Ct. may review record to determine whether sufficient facts exists to support sentence. Beasley, *supra*; Adkins, 532 N.E.2d 6. However, where Tr. Ct. provides no statement of reasons at all, reviewing Ct. must remand with instructions either to enter specific & individualized findings to support consecutive sentences, or to order sentences to run concurrently. Held, reversed & remanded.

RELATED CASES: Miller, App., 637 N.E.2d 1359 (failure to include statement whether consecutive sentence mandatory or discretionary harmless because record showed it was mandatory; Hurst, App., 464 N.E.2d 19 (consecutive sentences reversed where Tr. Ct. specially found that no aggravators existed to enhance sentence).

TITLE: Perry v. State

INDEX NO.: E.5.g.

CITE: (5th Dist., 02-18-10), 921 N.E.2d 525 (Ind. Ct. App. 2010)

SUBJECT: No authority to order sentence to run concurrent with sentence being served in another state

HOLDING: Tr. Ct. did not err by ordering D to serve his aggregate ten-year sentence consecutive to previously imposed Michigan sentence on unrelated charges. See Carrion v. State, 619 N.E.2d 972, 973 (Ind. Ct. App. 1993); Reaves v. State, 586 N.E.2d 847, 851-52 (Ind. 1992). Sentences to penal institutions of different jurisdictions are cumulative, not concurrent. Id. at 974. Absent statutory authority, there is no right to concurrent sentences for different crimes. Id. at 973. Held, judgment affirmed.

TITLE: Purdy v. State

INDEX NO.: E.5.g.

CITE: (2nd Dist., 4-27-00), 727 N.E.2d 1091 (Ind. Ct. App. 2000)

SUBJECT: Limitation on consecutive sentences - misdemeanors

HOLDING: Consecutive sentencing restriction of Ind. Code 35-50-1-2, which limits total consecutive terms for non-violent felony convictions arising out of episode of criminal conduct to presumptive sentence for next higher felony, applied to D's misdemeanor sentences for resisting law enforcement & battery. D received total sentence of five years for his convictions for Class D felony intimidation, Class A misdemeanor resisting law enforcement & Class A misdemeanor battery. Ind. Code 35-30-1-2 is ameliorative statute because it imposes previously nonexistent limitation upon Tr. Ct.'s discretion to impose consecutive sentences. Tedlock, App., 702 N.E.2d 273. Statute on its face appears to apply to felony convictions & is ambiguous with respect to misdemeanor sentences. If statute is ambiguous, Ct. seeks to ascertain & give effect to legislature's intent. Here, D received longer consecutive sentence for one felony & two misdemeanor convictions than he could have received for three felony convictions. Ct. concluded that legislature could not have intended this result & rejected State's interpretation of ameliorative statute so as to increase length of D's sentence by virtue of his convictions of misdemeanors rather than felonies. Because D's convictions were not crimes of violence as defined by Ind. Code 35-50-1-2(a) and were result of single episode as defined by Ind. Code 35-50-1-2(b), consecutive terms of his sentences should not have exceeded four years, which is presumptive sentence for Class C felony. Held, reversed and remanded with instructions to resentence D so that his total sentence is limited to four years.

RELATED CASES: Daugherty, 52 N.E.3d 885 (Ind. Ct. App. 2016) (Appellate counsel ineffective for not challenging aggregate consecutive sentences of 33 years; even though events occurred at two locations, D's crimes were committed within a single episode because neither episode could be explained without referring to the other where officers stopped D for OWI, discovered illegal weapons, and when having brought him to hospital for treatment of his injuries, D threatened their lives); Lewis, 31 N.E.3d 539 (Ind. Ct. App. 2015) (limitation on consecutive sentences for crimes committed within an episode of criminal conduct did not apply where only one of D's two battery convictions was a felony); Akers, 963 N.E.2d 615 (Ind. Ct. App. 2012) (D's actions do not constitute a single episode of criminal conduct, so he does not have standing to challenge statute because it would not apply to him even if it applied generally to Ds convicted of only misdemeanors); Dunn, 900 N.E.2d 1291 (Ind. Ct. App. 2009) (where D is sentenced to only misdemeanors and not misdemeanors and felonies, the statutory limitation on consecutive sentences does not apply; D's three-year sentence for three misdemeanor's was proper); Deshazier, App., 877 N.E.2d 200 (reaffirming Purdy and declining State's request to revisit issue).

TITLE: Reed v. State

INDEX NO.: E.5.g.

CITE: (11-14-06), Ind., 856 N.E.2d 1189

SUBJECT: IAC- failure to raise issue of first impression on appeal was ineffective; improper consecutive sentences based on single episode of criminal conduct

HOLDING: Failure to raise on appeal the aggregate length of consecutive sentences for two counts of attempted murder constituted ineffective assistance of appellate counsel. To evaluate the performance prong when counsel allegedly waived issues upon appeal, the Cts. apply the following test: (1) whether the unraised issues are significant & obvious from the face of the record; & (2) whether the unraised issues are clearly stronger than the raised issues. Here, D was sentenced to consecutive sentences for two attempted murder convictions for shooting at two different officers during a chase. At the time of D's appeal, the issue of whether attempted murder was a violent offense, thereby excluding it from the limitations on consecutive sentences set forth in Ind. Code 35-40-1-2(c), had not been decided. However, this did not excuse the failure to raise the issue. The issue would have been a clear winner. Failure to raise an issue of first impression where a plain reading of a statute demonstrates that D is entitled to immediate relief is sufficient to demonstrate that this unraised issue was significant & obvious from the face of the record. Further, this issue was clearly stronger than the issues raised on appeal. D was prejudiced by appellate counsel's failure to raise the consecutive sentencing issue because the issue would have resulted in relief. At the time the attempted murders were committed, the statute limited the Tr. Ct.'s authority to impose consecutive sentences if the convictions were not for crimes of violence & arose out of an episode of criminal conduct. Ind. Code 35-50-1-2(c). Although the ability to recount each charge without referring to the other can provide additional guidance on the question of whether a D's conduct constitutes an episode of criminal conduct, it is not a critical ingredient in resolving the question. Rather, the Cts. must look to the timing of the offenses. Here, there was time lapse of approximately five seconds between the first & last shots fired that served the basis of the two attempted murder convictions. Thus, this was one criminal episode. Held, transfer granted, judgment reversed & remanded to post-conviction Ct. with instructions to order new sentencing consistent with opinion; Ct. App.' opinion at 825 N.E.2d 911 (Ind. Ct. App. 2005) *overruled*.

RELATED CASES: Gallien, 19 N.E.3d 303 (Ind. Ct. App. 2014) (D received ineffective assistance of appellate counsel for failing to raise "significant and obvious" argument regarding the consecutive sentencing limitation of Ind. Code 35-50-1-2 as applied to his two burglary convictions); Harris, 861 N.E.2d 1182 (just because the act involves two separate victims does not mean the acts cannot be part of same criminal episode; two acts of sexual misconduct which occurred five minutes apart on the same bed and based on the same reason - the girls' need for a place to stay for the night - are a connected series of offenses that are closely connected in time, place and circumstance).

TITLE: Robertson v. State

INDEX NO.: E.5.g.

CITE: (08-08-07), Ind., 871 N.E.2d 280

SUBJECT: Use of advisory sentence not required when imposing consecutive sentences

HOLDING: Under Ind. Code 35-50-2-1.3, a Tr. Ct. imposing a sentence to run consecutively to another sentence is not limited to the advisory sentence. Rather, the Tr. Ct. may impose any sentence within the applicable range. Ind. Code 35-50-2-1.3(b) provides that “a Ct. is not required to use an advisory sentence” except in the following three circumstances identified in subsection 1.3(c): (1) when imposing consecutive sentences for nonviolent felony convictions arising out of a single episode of criminal conduct in accordance with Ind. Code 35-50-1-2; (2) when imposing an additional fixed term to an habitual offender under Ind. Code 35-50-2-8; & (3) when imposing an additional fixed term to a repeat sexual offender under Ind. Code 35-50-2-14. In each of these circumstances, Tr. Ct. is required to use the appropriate advisory sentence in imposing a consecutive or an additional term.

Ind. Code 35-50-2-1.3(c) does not represent a general requirement that a consecutive sentence be for the advisory term. This subsection does no more than retain the fixed maximum sentences permissible under Ind. Code 35-50-1-2 (“episode” statute) & the repeat offender provisions. The 2007 amendment to Ind. Code 35-50-2-1.3 confirms that the 2005 amendment of the statute was not meant to impose additional restrictions on a Tr. Ct.’s ability to impose consecutive sentences. Held, transfer granted, Ct. App.’ Opinion at 860 N.E.2d 621 vacated, judgment affirmed.

Note: see also (pre-Robertson): White, App., 849 N.E.2d 735; Dixson, App., 865 N.E.2d 704; Barber, App., 863 N.E.2d 1199.

RELATED CASES: Quiroz, App., 885 N.E.2d 740 (the rule of lenity does not allow courts to ignore the Supreme Court’s precedent in Robertson and prohibit enhanced, consecutive sentences during the time there was a split in the Court of Appeals concerning this issue); Frey, App., 884 N.E.2d 901.

TITLE: Salone v. State

INDEX NO.: E.5.g.

CITE: (2nd Dist., 7-11-95), Ind. App., 652 N.E.2d 552

SUBJECT: Erroneous imposition of consecutive sentences

HOLDING: Tr. Ct. erred in imposing consecutive sentences for conviction of one count of aggravated battery, four counts of confinement, & four counts of criminal deviate conduct. 1994 amendment to consecutive sentencing statute provides that: “except for murder & felony convictions for which a person receives an enhanced penalty because the felony resulted in serious bodily injury...the total of the consecutive terms of imprisonment...for felony convictions arising out of an episode of criminal conduct shall not exceed the presumptive sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.”

Here, greatest offense committed was criminal deviate conduct as class A felony. Offense classification which is one class higher is murder, which has presumptive 50-year sentence. Tr. Ct. must separate convictions into 2 categories: 1) murder & crimes for which penalty is enhanced by virtue of infliction of serious bodily injury, & 2) all felony offenses not included in first category. Ct. concluded aggravated battery conviction fell into first category & could be served consecutive to total sentence imposed for crimes in second category. Although Tr. Ct. had discretion to impose consecutive sentences for 8 convictions in second category, total term of consecutive sentences could not exceed presumptive 50-year sentence for murder. Held, judgment affirmed in part, reversed in part, & remanded, Sullivan, J., concurring. **Note:** Ind. Code 35-50-1-2 was amended in 1995 to limit use of “next higher felony” cap on consecutive sentences.

RELATED CASES: Henson, App., 881 N.E.2d 36 (two burglaries were “closely related in time, place, and circumstance” and thus were a single episode of criminal conduct under Ind. Code 35-50-1-2©); Jennings, App., 687 N.E.2d 621 (consecutive sentence for crimes related to two successive burglaries of same building violated statute); Trej, App., 658 N.E.2d 131 (where D’s convictions for confinement & sexual misconduct with minor arose out of single episode of criminal conduct, Ind. Code 35-50-1-2 “next higher felony” cap applied).

TITLE: Scott v. State

INDEX NO.: E.5.g.

CITE: (3rd Dist. 04-13-94), Ind. App., 632 N.E.2d 761

SUBJECT: Consecutive Sentence D on probation

HOLDING: Tr. Ct. did not err in ordering D's six-year sentence for Battery to be consecutive to any violation of probation imposed from other cases. Presentence report revealed that probation violation proceedings were pending in two separate cases at time of sentencing. Ct. noted that while Ind. Code 35-50-1-2(a) affords discretion to impose consecutive or concurrent sentences, uncertainties have arisen concerning whether person convicted upon guilty plea should have plea set aside if sentencing Ct. did not explain potential for mandatory consecutive sentencing under Ind. Code 35-30-1-2(b) [where person has not been discharged from probation, parole, or imprisonment at time of commission of crime]. Ct. found that under Bartruff, 553 N.E.2d 485, Tr. Ct. erred by not specifying whether consecutive sentence was ordered pursuant to Ind. Code 35-50-1-2(b). However, Ct. held error harmless, presuming that Tr. Ct. applied subsection (b) in this case, apparently relying on what it perceived to be clear legislative mandate for execution of consecutive sentencing in these cases, Sullivan, J., dissenting, finding no basis for Tr. Ct. to impose consecutive sentences when at time of sentencing it is uncertain what action will be taken in any pending probation revocation proceeding, Arnold, App., 539 N.E.2d 969.

RELATED CASES: Garner, App., 646 N.E.2d 349 (Tr. Ct.'s order sentencing D consecutively to any sentence that D might receive on both a pending probation violation charge & on pending possession of cocaine charge was proper).

TITLE: Shropshire v. State

INDEX NO.: E.5.g.

CITE: (12/23/86), Ind., 501 N.E.2d 445

SUBJECT: Concurrent sentence – right to

HOLDING: Tr. Ct. did not err in requiring D to begin serving his state sentence after serving time in federal prison. Here, D escaped (basis of state conviction in this case). While at large, D committed bank robberies & was arrested by feds. Feds turned D over to IN for trial on escape. Following conviction, D was returned to feds to serve sentence. D contends his sentence should have started immediately upon conviction by IN Ct's. & that he should have been given credit on that sentence for entire time spent in federal custody. There is no right to serve concurrent sentences for different crimes absent a statute so providing; concurrent sentences may be ordered only when they are served in same institution. Smith, App., 330 N.E.2d 384. Held, no error.

RELATED CASES: Jiggets, 978 N.E.2d 29 (Ind. Ct. App. 2012) (Tr. Ct. properly ordered D's sentence for his probation violation to run consecutively to his federal sentence for bank robbery which occurred while he was serving probation; the statutory language makes no distinction between a federal and state conviction, and there is no logical reason to do so).

TITLE: Sinn v. State

INDEX NO.: E.5.g.

CITE: (1st Dist., 03-01-93), Ind. App., 609 N.E.2d 434

SUBJECT: Consecutive sentencing erroneous, so plea agreement vacated

HOLDING: Where consecutive sentencing was not mandatory under Ind. Code 35-50-1-2(b), it was error for Ct. to accept plea agreement & sentence D to sentence to run consecutively to that imposed at earlier time. Agreement called for 12 year sentence to be served consecutively to 15 year sentence imposed previously by another Ct., but consecutive sentence for instant offense was not statutorily mandated, & therefore Ct. could not impose it consecutively to previous sentence, Kendrick, 529 N.E.2d 1311. Ct. rejected State's argument that D should be bound by terms of plea agreement by contractual considerations, because contracts made in violation of statute are void & unenforceable, & Cts. cannot sanction illegal sentences simply because they are product of agreement. Ct. additionally found it could not correct error by ordering sentences to be concurrent, as it had done in Watkins, App., 588 N.E.2d 1342, because in Watkins sentence was not result of plea agreement. Instead, Ct. found that plea must be vacated due to illegal provision, & that D could be reprosecuted on instant charge. Held, judgment reversed.

Note: It appears from footnote that D may have been eligible for habitual offender determination, & Ct. noted that on remand he could face such enhancement, because illegal sentence must be corrected even if correction results in longer period of incarceration.

Note: Ind. Code 35-50-1-2 has been amended to allow consecutive sentences, effective 7/1/94.

RELATED CASES: Lee, 816 N.E.2d 35 (D was not entitled to have his illegal sentence severed from plea agreement & ordered to run concurrently with unrelated conviction. D may not enter a plea agreement calling for an illegal sentence, benefit from that sentence, & then later complain that it was an illegal sentence; see full review at C.3); Smith, App., 717 N.E.2d 239 (Tr. Ct. erred in denying D's motion to withdraw his guilty plea prior to sentencing, where plea agreement imposed illegal sentence & was therefore facially invalid).

TITLE: Slone v. State

INDEX NO.: E.5.g.

CITE: (6/13/2014), 11 N.E.3d 969 (Ind. Ct. App. 2014)

SUBJECT: Consecutive sentences - episode of criminal conduct; "single scheme or plan" analysis inapplicable

HOLDING: D's three burglaries, committed in December 2012, April 2013, and May 2013 in DeKalb County, were not all part of a single "episode of criminal conduct." Thus, Ind. Code § 35-5-1-2(c)(2), limiting the maximum consecutive sentence for multiple crimes to the advisory sentence for a felony one class higher, did not apply. State sought to join two of the burglaries for trial purposes pursuant to Ind. Code § 35-34-1-9(a), arguing that burglaries displayed a common modus operandi. However, burglaries were not simultaneous or continuous and State never argued they arose from a single episode of criminal conduct. Tr. Ct. did not err in ordering consecutive sentences totaling 24 years on all three class C felony convictions. Held, judgment affirmed.

RELATED CASES: Grimes, 84 N.E.3d 635 (Ind. Ct. App. 2017) (D's 18 convictions for incest were not part of single episode, so Tr. Ct. did not err in imposing 18 consecutive sentences; see full review, this section).

TITLE: Smith v. State
INDEX NO.: E.5.g.
CITE: (6-21-02), Ind., 770 N.E.2d 290
SUBJECT: Consecutive sentences - not part of one criminal episode
HOLDING: Consecutive sentencing restriction of Ind. Code 35-50-1-2, which limits total consecutive terms for non-violent felony convictions arising out of episode of criminal conduct to presumptive sentence for next higher felony, did not apply to conduct with which D was charged. Ind. Code 35-50-1-2(b) defines "episode of criminal conduct" as offenses or connected series of offenses that are closely related in time, place, & circumstances. Here, D pled guilty to six counts of theft & six counts of forgery for stealing checkbook & depositing six forged checks in same account at six branches of same bank within hours after stealing checkbook. D argued that his conduct constituted a single episode & that under statute maximum sentence he could have received was ten years. He further argued that, had counsel or Tr. Ct. advised him about single episode statute's limit, he would not have entered into plea agreement that permitted Tr. Ct. to impose sentence of up to twenty years.

Where complete account of crime can be given without referring to other offense, offenses are not a single "episode of criminal conduct." Tedlock v State, 656 N.E.2d 273 (Ind. Ct. App. 1995). Considering timing of D's deposits in this case, Ct. concluded that they were not simultaneous nor were they contemporaneous with one another. D went from one bank branch to another branch, with about a half hour between visits, depositing checks for differing amounts of money. Ct. could recount each of forgeries without referring to other forgeries, as each occurred at separate time, separate place, & for separate amount of money from other. Thus, although theft of checkbook constituted a single larceny, D's six counts of forgery did not constitute single episode of criminal conduct. Held, transfer granted, Ct. App.' opinion at 748 N.E.2d 895 vacated, post-conviction Ct. affirmed in part & reversed in part, five erroneous theft convictions vacated based on single larceny rule.

RELATED CASES: Grimes, 84 N.E.3d 635 (Ind. Ct. App. 2017) (D's 18 convictions for incest were not part of single episode, so Tr. Ct. did not err in imposing 18 consecutive sentences; see full review, this section), Gootee, 942 N.E. 2d 111 (Ind. Ct. App. 2011) (imposition of consecutive sentences upon resentencing did not violate Ind. Code 35-50-1-2(c), because D's theft and subsequent use of victim's debit card were separate incidents and did not constitute a single episode of criminal conduct; each forgery-fraud can be recounted without referring to any of the other forgeries/frauds); Garner, App., 646 N.E.2d 349 (Tr. Ct.'s order sentencing D consecutively to any sentence that D might receive on both a pending probation violation charge & on pending possession of cocaine charge was proper).

TITLE: St. John v. State

INDEX NO.: E.5.g.

CITE: (4th Dist. 10/20/88), Ind. App., 529 N.E.2d 371

SUBJECT: Consecutive sentences not required where prior conviction later set aside

HOLDING: PCR Ct. did not err in denying D's petition challenging guilty plea. D pled guilty to burglary, Class B, in 1978 & was placed on probation. While on probation in 1980, D committed second burglary, & following jury trial & conviction received 8-year sentence. In 1983, D's 1978 guilty plea was vacated in PCR proceedings. Pursuant to plea agreement in 1983, D re-pled to 1978 burglary as lesser, Class C felony, in exchange for 2-year sentence concurrent with 8-year term. D later filed pro se PCR petition challenging 1983 guilty plea, which was denied. On appeal, D argues that concurrent sentence received pursuant to plea agreement was contrary to Ind. Code 35-50-1-2(b). D argues that because sentence is erroneous & may be corrected at any time to run consecutive to 8-year term, he should be allowed to withdraw guilty plea. Ind. Code 35-50-1-2(b) requires sentence for prior crime to run consecutive to sentence for prior crime. However, when D's 1978 conviction was set aside in 1983, it was rendered void. See Brown, App., 458 N.E.2d 245. When conviction supporting habitual offense enhancement is set aside, enhancement must also be set aside because underlying conviction is void. Likewise, although D was on probation for 1978 offense when he committed 1980 burglary, 1978 conviction was later rendered void & requirement of consecutive sentences does not apply. Held, PCR denial affirmed.

TITLE: Starks v. State

INDEX NO.: E.5.g.

CITE: (5/24/88), Ind., 523 N.E.2d 735

SUBJECT: Consecutive sentences - habitual offender (HO) enhancements

HOLDING: Multiple HO enhanced sentences cannot be ordered to run consecutively. Here, D was convicted of 18 counts of theft. Two HO determinations were made, attaching to 2 of the underlying theft convictions, with sentences to run consecutively. D argues Tr. Ct. was not authorized to order 2 HO sentences to run consecutively at single trial. Tr. Ct. may enhance sentence because of aggravating circumstances & enhance again due to HO status. Woodson, 466 N.E.2d 432. Tr. Ct. may also order 2 enhanced sentences to run concurrently. Smith, 474 N.E.2d 71. Sentence enhanced by aggravators & sentence enhanced by HO finding may run consecutively. Jackson, 483 N.E.2d 1374. In Kelly, 452 N.E.2d 907, Ind. S. Ct. upheld 2 concurrent HO sentences imposed at one trial. In Calloway, 500 N.E.2d 1196, Ind. S. Ct. refused to invalidate guilty plea due to failure to advise that 2 potential HO sentences could not be run consecutively, *citing Kelly* for proposition that no rule prevented such consecutive sentences. Ct. now says Kelly does not stretch so far. Basis for consecutive sentences is that each criminal act deserves separate punishment. Basis for statutory HO enhancement is prior convictions & dangerousness they imply; key is D's status, not individual offenses. Purpose & process of HO statute has special & distinct dimensions. Absent statutory authority to "tack" HO sentences, none exists. Sentences must be served concurrently. Givan, J., DISSENTS, joined by Pivarnik, J.

RELATED CASES: Aslinger, 2 N.E.3d 84 (Ind. Ct. App. 2014) (Tr. Ct. incorrectly ordered HSO enhancements in separate but closely-related proceedings to run consecutively); Farris, 907 N.E.2d 1057 (Ind. Ct. App. 2009) (Tr. Ct. cannot order HO enhancements consecutive when the underlying charges could have been joined for trial, regardless of the State's intent for pursuing the related charges in two different trials); Breaston, 907 N.E.2d 985 (Ind. 2009) (even when underlying sentences are required to run consecutively under Ind. Code 35-5-1-2(d) (requiring consecutive sentences when a person commits a second crime after being arrested for but before, being discharged from a first crime), a Tr. Ct. cannot order HO enhancements attached to the first and second crimes consecutively); Smith, App., 774 N.E.2d 1021 (Tr. Ct. improperly sentenced D to serve consecutive habitual offender enhancements, even though sentencing did not take place in single proceeding); Ingram, App., 761 N.E.2d 883 (although D's consecutive HO sentences did not rise from single criminal trial, they did arise from single sentencing proceeding & therefore, Tr. Ct. erred when it ordered HO sentences to run consecutively); McCotry, App., 722 N.E.2d 1265 (Tr. Ct. exceeded its authority by sentencing D to consecutive HO enhancements); Seay, 550 N.E.2d 1285 (Starks extends to situations where state could join charges for related offenses under IC 35-34-1-9, but elects to pursue them in successive actions); Weaver, App., 676 N.E.2d 22 (erroneous multiple HO enhancement).

TITLE: Sweatt v. State

INDEX NO.: E.5.g.

CITE: (05-22-08), Ind., 887 N.E.2d 81

SUBJECT: Consecutive sentences - enhanced sentences based on same prior conviction cannot run consecutively

HOLDING: Tr. Ct. erred by running a possession of a firearm by a SVF and a burglary conviction to which a habitual offender (HO) enhancement was attached consecutively. It is proper to use one felony both to prove the D is a SVF and an HO, if the sentence for a felony conviction other than possession of a firearm by a SVF is the sentence that is enhanced under the general HO statute. Anderson v. State, 774 N.E.2d 906, 914 (Ind. Ct. App. 2002). Here, D's conviction of possession of a firearm by a SVF and his status as an HO, both based on the same 1994 rape conviction, do not by themselves create a double enhancement problem because the HO is attached to D's burglary conviction. However, running the burglary conviction consecutively to the SVF conviction has the same effect as if the enhancements both applied to the same count. This result is different only in form from the multiple enhancements found improper in Conrad v. State, 747 N.E.2d 575 (Ind. Ct. App. 2001) (improper double enhancement to enhance SVF with HO using same prior conviction to prove SVF and HO). On the other hand, if Tr. Ct. orders the sentences to run concurrently, the enhancements, though duplicative in name, operate just once to increase D's term of imprisonment. Held, transfer granted, Court of Appeals' disposition of other allegations of error summarily affirmed, and case remanded for Tr. Ct. to consider whether to alter D's sentence to remedy this defect; Boehm and Dickson, JJ., dissenting on basis that two convictions enhanced for the same prior crimes can be served consecutively.

RELATED CASES: Pedraza, 887 N.E.2d 77

TITLE: Tedlock v. State
INDEX NO.: E.5.g.
CITE: (1st Dist., 9-25-95), Ind. App., 656 N.E.2d 273
SUBJECT: Consecutive sentences upheld where not part of one criminal episode
HOLDING: Where D's four security fraud convictions did not constitute one criminal episode, consecutive sentencing to aggregate term of 16 years did not violate Ind. Code § 35-50-1-2. Statute limits total consecutive terms for felony convictions arising out of episode of criminal conduct to presumptive sentence for felony which is one class of felony higher than most serious of felonies. 1995 amendment to Ind. Code § 35-50-1-2 *clarified* 1994 version of statute by adding definition of term "episode," which means "offenses or a connected series of offenses that are closely related in time, place, & circumstance." Here, D's four convictions arose out of crimes he committed against different victims at different times spanning approximately 2 years. Fraudulent sales were not connected, as complete account of each of D's four offenses can be related without referring to details of another. Fact that D sold same type of security to each of his victims in order to finance his real estate scheme does not make all or any of the four transactions one criminal episode. Held, no error.

RELATED CASES: Edwards, 147 N.E.3d 1019 (Ind. Ct. App. 2020) (multiple counts of possession of child pornography constituted a single episode of criminal conduct); Eckelbarger, 46 N.E.3d 1267 (Ind. Ct. App. 2015) (two counts of delivering methamphetamine seven days apart and one count of manufacturing were distinct in nature and not part of a continuous transaction, thus D's crimes were not part of a single episode of criminal conduct); Reeves, 953 N.E.2d 665 (Ind. Ct. App. 2011) (each of 9 counts of securities fraud involved a different bond that was not issued with any of the other bonds, different sets of transactions, and different groups of victims); Williams, App., 889 N.E.2d 1274 (although confinement and battery of two victims took place on Purdue campus on same night, they took place on opposite ends of campus and were separated by ninety minutes; thus, crimes were not a "single episode of criminal conduct" under statute); Monyhan, App., 780 N.E.2d 1187 (attempted battery arose from throwing punches at two officers, one battery from spitting on officer's shirt, second for spitting blood in another officer's eye, & final battery for kicking another officer; therefore, D's sentence was not subject to consecutive sentence limitations of Ind. Code § 35-50-1-2(c) because accounting of each charge could be made without referring to details of other charges); Smith, 770 N.E.2d 290 (D's 6 counts of forgery did not constitute single episode of criminal conduct where D's deposits were not simultaneous or contemporaneous with one another); Catt, App., 749 N.E.2d 633 (D's conduct of stamping clerk's certification on pleading while representing estate & using money from estate for other purposes did not constitute "single episode of criminal conduct;" thus, consecutive sentences for multiple counts of forgery & theft did not violate Ind. Code § 35-50-1-2); O'Connell, 742 N.E.2d 943 (attempted murder of several people & murder of another on different days over span of two weeks did not constitute single criminal episode; fact that Co-D was not entitled to severance is irrelevant to consecutive sentencing statute); Ratliff, App., 741 N.E.2d 424 (D's actions did not constitute single episode even though all three of his crimes were discovered at same time & were part of larger/comprehensive series of acts); Mendoza, App., 737 N.E.2d 784 (three sales of marijuana over several weeks were not part of same criminal episode); Hightower, App., 735 N.E.2d 1209 (where four separate check writing offenses were committed on same institution over three months, offenses were not part of same criminal episode); Logan, App., 693 N.E.2d 1331 (cashing of five fraudulent checks over five days did not form single criminal episode); Newman, App., 690 N.E.2d 735 (D's crimes of burglary, resisting law enforcement & escape were part of 3 distinct criminal episodes because each may be

described without referring to specific details of other; thus imposition of consecutive sentences was proper); Pritscher, App., 675 N.E.2d 727 (ameliorative version of statute could not be retroactively applied to D); Riffe, App., 675 N.E.2d 710 (Tr. Ct. did not err in applying sentencing statute applicable at time of original sentence rather than version in place at time amended sentence was ordered; statute does not apply retroactively); Lockhart, App., 671 N.E.2d 893 (Tr. Ct. erroneously reduced D's sentence under statute, where D committed four distinct acts of molestations against victim at different times); Reynolds, App., 657 N.E.2d 438 (D's three class B felony burglary convictions did not constitute single criminal episode).

TITLE: Thompson v. State
INDEX NO.: E.5.g.
CITE: (4th Dist., 05-23-94), Ind. App., 634 N.E.2d 775
SUBJECT: Consecutive sentence inappropriate
HOLDING: Where Ct. was not mandated to impose consecutive sentences under Ind. Code 35-50-1-2(B), sentence imposed in one county could not be made consecutive to sentences imposed in other counties, regardless of fact plea agreement leading to sentence called for consecutive sentences. When imposing sentence under Ind. Code 35-50-1-2(a), Ct. may exercise discretion to make sentences consecutive only when imposing multiple sentences contemporaneously, Kendrick, 529 N.E.2d 1312. Ct. rejected State's argument that it had entered into plea agreement in lieu of prosecuting D for additional charges, & therefore D had gotten benefit of his bargain & could not now complain. Consecutive sentence order was illegal, regardless of agreement, & could not stand, Sinn, App., 609 N.E.2d 434. Therefore Tr. Ct. erred in denying D's motion to correct erroneous sentence. Ct. ordered sentence & conviction vacated, rather than altering consecutiveness of sentence, & noted that D could be reprosecuted on that county's charge. **Note:** Ind. Code 35-50-1-2 has been amended to allow consecutive sentences, effective 7/1/94.

TITLE: Thompson v. State

INDEX NO.: E.5.g.

CITE: (2/13/2014), 5 N.E.3d 383 (Ind. Ct. App. 2013)

SUBJECT: Operating motor vehicle causing SBI is serious violent felony

HOLDING: D's consecutive sentences for D felony OMV > .08 BAC Causing SBI (OMV/SBI) do not violate prohibition in IC 35-50-1-2(c) that consecutive sentences for an episode of criminal conduct cannot exceed the advisory sentence for the next higher felony, because OMV/SBI is a crime of violence.

D's BAC was 0.25 when she rear-ended a car, rendering the driver of the other car unconscious and comatose for 14 days. D pled guilty to D felony OMV/SBI, and at open sentencing, Tr. Ct. imposed a seven-year sentence, three more years than the four-year advisory sentence for C felonies.

OMV/SBI is a "crime of violence," even though Ind. Code 35-5-1-2(a)(15), mentions only OWI causing SBI (OWI/SBI) as a crime of violence. Nonetheless, OMV/SBI is a crime of violence because Ind. Code 35-5-1-2(a)(15) refers to offenses under Ind. Code 9-30-5-4, which includes OMV/SBI, as crimes of violence. Held, judgment affirmed.

TITLE: White v. State

INDEX NO.: E.5.g.

CITE: (4th Dist., 05-26-06), Ind. App., 847 N.E.2d 1043

SUBJECT: Erroneous imposition of consecutive sentences - mitigators outweighed aggravators

HOLDING: In robbery & confinement prosecution, Tr. Ct. erred in ordering some of D's sentences to be served consecutively when the Ct. implicitly found the mitigating circumstances outweighed the aggravating circumstances. D challenged his sixty-six-year cumulative sentence for fifteen Class B felonies. After giving D less than the presumptive sentence for each count, Tr. Ct. ordered some of the sentences served consecutively. In Marcum v. State, 725 N.E.2d 852 (Ind. 2000), Ct. held that a Tr. Ct. may not order a D to serve consecutive sentences when finding the aggravators & mitigators are in equipoise, such that a D is entitled to presumptive sentences. Here, Tr. Ct. did not explicitly find the mitigators outweighed the aggravators when it sentenced D to reduced sentences. Nevertheless, Ct. recognized clear directive from Marcum & reversed & remanded for resentencing. Tr. Ct. did not explain why balancing of aggravators & mitigators justified imposition of consecutive minimal sentences. Ct. noted the sentence imposed on remand could be the same sentence if the Tr. Ct. supports its sentence with appropriate findings. Held, judgment reversed & remanded.

RELATED CASES: Rhoiney, 940 N.E. 2d 841 (Ind. Ct. App., 2010) (appellate counsel should have recognized Tr. Ct.'s imposition of consecutive sentences in the absence of any available aggravators as a significant and obvious issue; her failure to raise this issue cannot be explained by any reasonable strategy); Harris, Jr., 897 N.E.2d 927 (in sentencing D to consecutive 50-year terms for two counts of Class A felony child molesting, Tr. Ct. erred in failing to explain why the aggravating circumstances warranted consecutive sentences as opposed to enhanced concurrent sentences); Frentz, App., 875 N.E.2d 453 (disagreeing with Feeney, 874 N.E.2d 382 (App., 2007), Ct. held that even when Tr. Ct. finds the aggravators & mitigators are balanced, Ct. can impose consecutive sentences based on an aggravator); Lopez, App., 869 N.E.2d 1254 (because Tr. Ct. based its imposition of consecutive sentences upon free-standing aggravator that D killed two children, its initial finding of balance does not serve to invalidate consecutive nature of sentences); Gleaves, App., 859 N.E.2d 766 (one additional "multiple victim" aggravator tipped the balance such that the aggravators outweighed the mitigators & also justified imposition of consecutive sentences); Townsend, App., 860 N.E.2d 1268 (where Tr. Ct. specifically found no aggravator or mitigators, Tr. Ct. could still impose consecutive sentences based on the harm to each victim of attempted murder and murder).

TITLE: Wilson v. State

INDEX NO.: E.5.g.

CITE: (4/1/2014), 5 N.E.3d 759 (Ind. 2014)

SUBJECT: Illegal partially consecutive sentence

HOLDING: Tr. Ct.s have discretion to determine, subject to certain qualifications, whether sentences are served consecutively or concurrently; but nothing in statutory sentencing scheme grants a Tr. Ct. authority to impose partially consecutive, hybrid, or blended sentences for multiple convictions. Courts are limited to imposing sentences that are authorized by statute, rather than only being limited to sentences that are not prohibited by statute.

Here, in 1996, Tr. Ct. split D's 20-year sentence for Class B felony robbery into a partially consecutive sentence, with the remaining five years to be served concurrently with his 45-year sentence for Class A felony rape and criminal deviate conduct convictions. Plain language of Ind. Code § 35-50-1-2(c) contemplates only consecutive or concurrent terms, not a hybrid of both, for a sentence on one count. D's partially consecutive sentence was erroneous on its face, and Tr. Ct. erred in denying his motion to correct erroneous sentence. Held, transfer granted, Court of Appeals' opinion at 988 N.E.2d 1221 vacated, remanded for resentencing not to exceed current 50-year term.

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.i. Disparity in sentencing

TITLE: Alvies v. State

INDEX NO.: E.5.i.

CITE: (6/7/85), Ind., 478 N.E.2d 678

SUBJECT: Disparity in sentencing - due process challenge

HOLDING: Ct. finds D's argument that he was denied due process of law when Tr. Ct. imposed much more severe sentence (35 years) in his case than in totally unrelated case of F.J. (3 years) is without merit because D & F.J. were not similarly situated. D was convicted of Class A robbery after inflicting serious bodily injury on 76 year-old woman when taking her purse. D was 21 years old & was on probation for essentially same offense at the time. F.J. was 16, convicted of Class C robbery & had no prior record. Held, no error.

TITLE: Hill v. State

INDEX NO: E.5.i.

CITE: (11/17/86), Ind., 499 N.E.2d 1103

SUBJECT: Disparity in sentencing - harsher sentence after jury trial

HOLDING: Due process was not violated where D, who went to trial, was sentenced to 50 years for burglary & co-D, who pled guilty was sentenced to 20 years. Here, D contends disparity in sentences demonstrates his sentence was based in part on decision to exercise right to jury trial rather than plead guilty, *citing* NC v. Pearce, (1969), 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656. U.S. S.Ct. in Bordenkircher v. Hayes, (1978), 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed. 604 found no constitutional infirmity where prosecutor filed habitual offender charge after D refused plea bargain. See also Walker, App., 454 N.E.2d 425 (Ct. rejects D's contention that fine 10 times greater than non-jury cases with similar facts constituted punishment for exercise of jury trial). Ct. finds D provides inadequate indicia that his exercise of his jury trial right contributed to severity of sentence. Held, sentence revised for other reasons.

TITLE: Phillips v. State

INDEX NO.: E.5.i.

CITE: (7/7/82), Ind., 436 N.E.2d 1123

SUBJECT: Disparity in sentencing - principal/accessory; co-Ds

HOLDING: Disparity between D's sentence as accessory & sentence received by principal does not require reversal. Here, Tr. judge enhanced D's sentence because of prior criminal activity, her encouragement of principal to commit crime & her prior batteries on victim. Consistency between verdicts of an accessory & a principal charged with the same offense is required (Rufer, 413 N.E.2d 880; Schmidt, 300 N.E.2d 86; Combs, 295 N.E.2d 366); consistency in sentencing is not (Rufer; Wright, 363 N.E.2d 1221). Different sentencing considerations may exist between accessory/principal. Held, no error.

RELATED CASES: Young, 482 N.E.2d 246 (fact co-D received 10 years while D received 20 for same crime is "totally irrelevant"); McDonald, 439 N.E.2d 588 (Ct. perceives no disparity between D, who was found guilty of arson & sentenced to 20 years upon finding of aggravating circumstances, & co-D, who pled guilty to criminal mischief & was given one year suspended sentence).

E. SENTENCING

E.5. Sentencing decision/discretion of court

E.5.j. Presumptive sentences

E.5.j.1. Murder (Ind. Code 35-50-2-3)

TITLE: Smith v. State
INDEX NO.: E.5.j.1.
CITE: (12-30-96), Ind., 675 N.E.2d 693
SUBJECT: Murder - conflicting statutes regarding presumptive sentence
HOLDING: Tr. Ct. erred in using 50-year presumptive sentence for murder, where Legislature expressed two different sentencing intentions by enacting two conflicting versions of same statute. Ind. Code 35-50-2-3, which instructs Ct. on how to sentence D convicted of murder, was amended twice in 1994 legislative session. First Amend. changed presumptive sentence from 40 to 50 years & reduced possible enhancement time from 20 to 10 years. Subsequent amendment excluded mentally retarded individuals from sentence of death or life imprisonment but did not incorporate changes of first amendment. After some confusion as to proper version to apply, Tr. Ct. applied first version, sentencing D to 50 years executed & 10 on probation. Where two inconsistent sentencing statutes are passed in same legislative session & cannot be harmonized, Tr. Ct. should apply later version. Milk Control Board v. Pursifull, 219 Ind. 49, 36 N.E.2d 850 (1941). Ambiguous penal statute must be strictly construed against State. Spangler v. State, 607 N.E.2d 720 (Ind. 1993). Ct. found that Tr. Ct. improperly sentenced D under first version of statute because second version was enacted subsequently & use of 40-year presumptive sentence was more favorable to D. Held, conviction affirmed, case remanded for new sentencing statement.

RELATED CASES: Mauricio, 941 N.E. 2d 497 (Ind. 2011) (appellate counsel was ineffective for not arguing that D was sentenced under incorrect version of Ind. Code 35-50-2-3); Johnson, 702 N.E.2d 711 (any conflict between statutes re: minimum sentence for murder was of no legal consequence to D, who received presumptive term of imprisonment).

E. SENTENCING

E.6. Miscellaneous sentencing treatment/alternatives

E.6.a. Drug/alcohol abuser treatment (Ind. Code 16-13-61)

TITLE: Barlow v. State

INDEX NO.: E.6.a.

CITE: (2d Dist. 8/15/88), Ind. App., 526 N.E.2d 1212

SUBJECT: Drug/alcohol abuser treatment - not appealable order

HOLDING: Deferment of criminal proceeding pursuant to Ind. Code 16-13-6.1-15.1(b) is neither final judgment nor proper subject for interlocutory appeal. After bench trial, D was found guilty of DUI & driving with .10 or more BAC, with the latter merging into the former. Tr. Ct. offered D option of withholding judgment for one year, conditioned upon D's successful completion of alcohol counseling & not committing additional alcohol related offenses during that period. If D met conditions during year, charges would be dismissed, pursuant to Ind. Code 16-13-6.1-15.1. D accepted this offer. D then filed Motion to Correct Errors (MCE). State filed Motion to Dismiss Appeal, alleging that Tr. Ct. has entered no appealable order. C.R. 16 provides that D has 60 days from date of sentencing to file MCE. Here, Tr. Ct. deferred entry of judgment. If D fails to meet conditions of deferment, Tr. Ct. will enter judgment of conviction & sentence D. Then D would have right to appeal. At this point, however, since there has been no conviction or sentence, D may not appeal. Held, appeal dismissed. Sullivan, J., DISSENTS.

TITLE: Bess v. State

INDEX NO.: E.6.a.

CITE: (5th Dist., 11-9-95), Ind. App., 657 N.E.2d 185

SUBJECT: Denial of substance abuse treatment - no error

HOLDING: D's due process rights were not violated when his request for substance abuse treatment was denied as result of, in part, Tr. Ct.'s reliance upon particular examiner's report. In report, examiner noted D's chemical dependency but recommended against treatment program. Division of Mental Health (DMH) agreed & did not accept D into treatment program. At sentencing hearing, D introduced evidence that victim of D's theft worked for same establishment as examiner & argued that examiner might have been improperly influenced by victim in making his report. In rejecting D's argument, Ct. concluded: 1) treatment in lieu of imprisonment statutes, Ind. Code 12-23-8, place total discretion with DMH in determining eligibility for their treatment program; 2) notwithstanding DMH's decision, Tr. Ct. has "rather generous" discretion to determine whether drug abuser is likely to be rehabilitated through DMH or probation treatment program, although Tr. Ct. may not unilaterally force DMH to accept D for treatment; 3) D failed to properly challenge report or its evaluator; & 4) other reasons set out by Tr. Ct., along with independent reports not subject to influence from victim, supported finding that D was poor candidate for treatment. Held, conviction affirmed.

Note: To properly challenge partiality of evaluator, D must file motion to suppress report, making out prima facie case of bias. Evidentiary hearing follows filing of motion, after which Tr. Ct. may order Division to assign new evaluator from different agency to perform another evaluation of D.

RELATED CASES: Dyer, App., 714 N.E.2d 229 (because D did not disclose to prosecutor or Tr. Ct. facts leading to her ineligibility that were later revealed by presentence investigation, she could not complain that State somehow reneged on its agreement not to oppose her request for treatment).

TITLE: Gilbert v. State

INDEX NO.: E.6.a.

CITE: (2d Dist. 12/26/90), Ind. App., 574 N.E.2d 289

SUBJECT: Deferred judgment - drug or alcohol treatment; time limitations

HOLDING: Tr. Ct. did not err in failing to dismiss state's petition for judgment filed nearly 22 months after judgment was withheld pursuant to Ind. Code 16-13-6.1-15.1. Statute provides that Tr. Ct. may conditionally defer proceedings for up to 1 year, & Tr. Ct. set matter for hearing just inside 1-year period to review D's progress. At that hearing, director of alcohol abuse program appeared & requested continuance so that D could complete program. Director later filed petition to execute sentence because D had not completed program & after hearing, Tr. Ct. & entered judgment & sentence. On appeal, D argues that because statute authorizes Tr. Ct. to withhold judgment for only 1 year, motion to execute sentence was untimely & should have been dismissed. D asserts that after 1 year, Tr. Ct. lost jurisdiction to resume pleadings & D should have been discharged. Statute provides that proceedings may be deferred for up to 1 year, but does not require that proceedings, once resumed, must be completed within that 1-year period. Intent of statute is to provide Tr. Ct. discretion to allow Ds to obtain rehabilitative treatment. Continuance for benefit of D to enable him/her to complete treatment program furthers legislature's intent. It is apparent from record here that proceedings were resumed within 1 year, & that continuance was granted at that point without objection from D. Tr. Ct. did not err in refusing to dismiss petition to execute sentence. Held, judgment affirmed. Shields, P.J., CONCURS IN RESULT, noting that D has same duty to object to continuance outside 1 year as one seeking discharge under C.R.4.

TITLE: Gosha v. State

INDEX NO.: E.6.a.

CITE: (05-28-10), Ind. Ct. App., 931 N.E.2d 432

SUBJECT: Due process rights apply to termination of Drug Court Program

HOLDING: D was denied the right to due process when his participation in Drug Court Program was terminated without the court first affording him notice of a hearing and the right to present evidence and cross-examine witnesses at that hearing. Same due process requirements afforded Ds in probation revocation proceedings, e.g., written notice of allegations against them and opportunity to confront and cross examine, inure also to benefit of persons facing termination of participation in Drug Court Programs. Hopper v. State, 546 N.E.2d 106 (Ind. Ct. App. 1989). Under Ind. Code 12-23-14.5-15(d), a participant in a Drug Court Program can be terminated if the Drug Court determines, after a hearing, that the person violated a condition established by the Drug Court or that the period of time that the conditions established by the Drug Court were in effect expired before the person successfully completed each condition established by the Drug Court. Thus, following Hopper, D had a protected liberty interest such that he must be accorded procedural due process before the court may terminate his participation in the Drug Court Program and reinstate his original sentence. Held, reversed and remanded for an evidentiary hearing in Tr. Ct., not Drug Court, with written notice to D of claimed violations, disclosure of evidence against him, an opportunity to be heard and to present evidence, and the right to confront and cross-examine witnesses.

TITLE: Hopper v. State

INDEX NO.: E.6.a.

CITE: (1st Dist. 11/14/89), Ind. App., 546 N.E.2d 106

SUBJECT: Treatment in lieu of prosecution - due process required for termination

HOLDING: Before treatment program pursuant to Ind. Code 16-13-6.1-16 may be terminated, D must be afforded procedural due process similar to probation or parole revocation procedures. Under Ind. Code 16-13-6.1-16, D may request treatment in lieu of prosecution or imprisonment, & if treatment period is successfully completed, D is entitled to discharge of criminal proceedings. Ind. Code 16-13-6.1-17(a). Where statute creates right which may be forfeited only upon misconduct of individual, procedural due process must be afforded to prevent arbitrary determination that misconduct has occurred. [Citations omitted.] Although statute here does not specify that treatment may be terminated only upon misconduct, it does require determination by department of mental health that D cannot be further treated. Ct. App. finds that D's status is akin to probationer or parolee & determines that same minimal requirements must be met as for revocation of probation or parole. D must have written notice of claimed violations, disclosure of evidence, opportunity to be heard, right to confront & CX witnesses, neutral & detached hearing body, & written statement describing evidence relied upon for action taken. Purpose is to ensure that decision rests upon some reasonable basis. Further, state must bear burden of proving its allegations. See Ind. Code 35-28-2-3(d); Ind. Code 11-13-2-3-10. It appears from record that D was in fact afforded these procedural protections. Held, affirmed. Sullivan, J., DISSENTS, arguing that D erroneously bore burden of proving successful completion by preponderance of evidence, & Ct. of Appeals cannot know what Tr. Ct. might have decided under proper standard.

RELATED CASES: Schenke, 136 N.E.3d 255 (Ind. Ct. App. 2019) (there is no Due Process right to a hearing when the State chooses to revoke a pre-trial diversion agreement); Gosha, 931 N.E.2d 432 (Ind. Ct. App. 2010) (same due process requirements afforded Ds in probation revocation proceedings apply to termination of participation in Drug Court Programs).

TITLE: Meadows v. State
INDEX NO.: E.6.a.
CITE: (1/29/2014), 2 N.E.3d 788 (Ind. Ct. App. 2014)
SUBJECT: Pretrial diversion drug program - no credit time
HOLDING: Tr. Ct. did not abuse its discretion by denying D's request for credit time for the time he spent on electronic monitoring during a drug court program. Sentencing decisions not mandated by statute are within the discretion of the Tr. Ct. and will be reversed only upon a showing of abuse of that discretion.

Here, D entered a plea agreement in which Tr. Ct. deferred entry of judgments of conviction upon Defendant's plea and, with his consent, would place him in the county drug court program. If he successfully completed the drug court program, the charges to which he had pleaded guilty would be dismissed. During his time in the program, D spent time on electronic monitoring. When his placement in the program was revoked, he requested credit time for the electronic monitoring. But there is no statute which requires such credit time. Ind. Code 35-38-2.5-5 requires credit time for home detention as a condition of probation, and Ind. Code 35-38-2.6-6 requires credit time for placement in a community corrections program. But, here, D was neither on probation nor serving a sentence. Thus, both statutes are inapplicable. To allow credit time to a person who fails to comply with deferral conditions diminishes the value of such programs in that the incentive to comply is undermined by the reward of failure. D was not entitled to credit time. Held, judgment affirmed.

TITLE: State v. Nix

INDEX NO.: E.6.a.

CITE: (5th Dist., 09-7-05), Ind. App., 833 N.E.2d 541

SUBJECT: State must object to treatment in lieu of prosecution; C.R. 4 (C) time attributed to D

HOLDING: Ct. found that dismissal of OWI & other charges was proper pursuant to treatment in lieu of prosecution statute, Ind. Code 12-23-6-1, as State failed to object to D's motion requesting such treatment. Ct. agreed with State that for Ind. Crim. Rule 4(C) & speedy trial purposes, time elapsing because of such request is attributable to the D & this request would extend the 4 (C) timeline by 140 days. Ind. Code 12-23-7-2(4) also states a request for treatment constitutes a formal speedy trial waiver. Further, if an individual is accepted for treatment during pendency of a felony charge, a Ct. may only defer the trial or withhold the judgment with the consent of the prosecutor. Ind. Code 12-23-7-8 (Ct.'s emphasis). However, where State fails to lodge an objection to participation in treatment in lieu of prosecution, waiver occurs. State v. Barlow, 390 N.E.2d 1046 (Ind. Ct. App.1979). Here, D completed treatment prior to State seeking a trial date. As D successfully completed treatment, Tr. Ct. did not err in granting his request to dismiss the case. Held, judgment affirmed.

E. SENTENCING

E.6. Miscellaneous sentencing treatment/alternatives

E.6.a.1. For felony (Ind. Code 12-23-6,7,8 et seq)

TITLE: Hammond v. State

INDEX NO.: E.6.a.1.

CITE: (5th Dist. 06/30/92), App., 594 N.E.2d 509

SUBJECT: Treatment in lieu of prosecution - waiver of jury

HOLDING: It was not error for Tr. Ct. to deny D's request for jury trial after denying his petition for substance abuse treatment in lieu of prosecution, because both statute & D's petition specifically acknowledged that by making request, D waived right to jury trial, & Ct. also advised him of this waiver. Request for treatment in lieu of prosecution pursuant to Ind. Code 16-13-6.1-16 included language that "[t]he D, by making this request ... waives his right to trial by a jury & consents to trial by the Ct." Department of Mental Health (DMH) determined that D was unlikely to be rehabilitated & refused to accept him. Ct. then denied petition, & D was tried to Ct. after his request for jury trial was denied. Ct. App. rejected argument that because waiver of right to jury trial was made for sole purpose of getting treatment, it was rendered void when DMH refused to accept him. Right to jury trial is fundamental, but it can also be waived if waiver is knowing, voluntary, & intelligent. Once jury has been waived, withdrawal of waiver is in discretion of Tr. Ct. Admittance into treatment program as alternative to prosecution is not automatic for all who make request, & to get opportunity to seek treatment, Ind. Code 16-13-6.1-17(a)(5) requires that D waive right to jury trial. In addition to language in D's request, Tr. Ct. advised D of rights he was waiving by making request & asked D if he knew that even if DMH wouldn't take him, he'd still given up those rights? D responded, "I don't know, but I need help." Ct. then asked D, "[y]ou still want to, even knowing that, do you still want help?," & D replied "Yes." Ct. App. found this evidence made D's waiver of right to jury trial clear, & that he understood what he was waiving.

TITLE: Mogle v. State

INDEX NO.: E.6.a.1.

CITE: (4th Dist. 12/6/84), Ind. App., 471 N.E.2d 1146

SUBJECT: Alcohol treatment - felony; in lieu of prosecution/imprisonment

HOLDING: Tr. Ct. did not err in refusing D's request for treatment in lieu of imprisonment. Ind.

Code 16-13-6.1-16 & 18. Such denial is reversible only for abuse of discretion. See, e.g., Sleck, App., 369 N.E.2d 963. Here, Tr. Ct. denied D's request because he was ineligible for probation under Ind. Code 35-50-2-2(a)(3) because of a prior felony. See Ind. Code 16-13-6.1-18(b). Ineligibility for probation precludes sentencing alternatives. See Williams, App., 427 N.E.2d 708. Ct. rejects D's argument that offenses listed in Ind. Code 16-13-6.1-16 are exclusive list of offenses barring alcohol treatment. List governs who may initially request treatment, not who may be denied treatment. Held, no error.

RELATED CASES: Fullen, App., 505 N.E.2d 493 (Crim L 982.4(2); Tr. Ct. did not err in rejecting D's request for treatment as D was ineligible for probation, *citing Mogle*; even if eligible, Tr. Ct. did not abuse discretion by denying request in light of D's 21 prior alcohol-related arrests, past failed therapy attempts & fact D was out on bond on identical charges when he was arrested for present DWI charge); Pier, App., 446 N.E.2d 985 (case concerns validity of waiver of jury trial by D later found ineligible for treatment; card at D.9.b); Thurman, 320 N.E.2d 795 (petition for treatment as alcohol or drug abuser may be filed after sentencing as long as Ct. has authority under Ind. Code 35-38-1-17 to modify sentence).

TITLE: Yoder v. State

INDEX NO.: E.6.a.1.

CITE: (2d Dist. 07/10/91), Ind. App., 574 N.E.2d 929

SUBJECT: Treatment in lieu of prosecution/incarceration - eligibility of D convicted of child molesting

HOLDING: Tr. Ct. did not abuse discretion in denying D's motion for treatment in lieu of prosecution/imprisonment, because child molesting is considered forcible felony. Ind. Code 16-13-6.1-16 provides that drug abuser or alcoholic may request treatment instead of prosecution/imprisonment, unless offense is forcible felony, & sections 17 & 18 of same statute provide for continuation of prosecution for treatment, & treatment after conviction, respectively. Ct. of appeals finds that evaluation for treatment is not mandatory since amendment of statute. Scholl, App., 404 N.E.2d 1154. Furthermore, use of force is implied in child molest offenses because victim is unable to consent, making D's crime forcible felony. Therefore Tr. Ct. properly exercised discretion in refusing D's request for treatment in lieu of prosecution/imprisonment. Held, judgment affirmed.

TITLE: Weatherley v. State

INDEX NO.: E.6.a.1.

CITE: (4th Dist. 06/17/92), App., 593 N.E.2d 1239

SUBJECT: Treatment in lieu of incarceration - discretion of Department of Mental Health (DMH)

HOLDING: It was not denial of due process to allow DMH absolute discretion in refusing to accept D for chemical dependency treatment in lieu of incarceration under Ind. Code 16-13-6.1. After exam, DMH said that it believed treatment would be unsuccessful & refused to consent to D's participation in its program. Tr. Ct. then held that DMH had total discretion to determine acceptance into program, & sentenced D to 8 years. D argued that it was denial of due process not to allow him to challenge DMS's conclusions in Ct. After looking at similar Illinois statute which had been upheld, Ct. of Appeals found that Ind. legislature, through provisions of Ind. Code 16-13-6.1, recognized possible relationship between addiction & crime, & placed duty on DMH to establish & operate treatment & rehabilitation programs. Eligible drug abuser or alcoholic may not be admitted to program without DMH's consent, & Tr. Ct. cannot place D under DMH supervision unless it accepts him for treatment. Ct. concluded that in placing total discretion in DMH, legislature recognized its special evaluation & treatment capabilities, & importance of placing only those who will benefit from program. Participation in program is only opportunity, not constitutional right, & issue of judicial review of refusal to consent is issue for legislature.

E. SENTENCING

E.6. Miscellaneous sentencing treatment/alternatives

E.6.b. Forensic diversion

TITLE: Lomont v. State

INDEX NO.: E.6.b.

CITE: (3rd Dist., 08-23-06), Ind. App., 852 N.E.2d 1002

SUBJECT: Lack of forensic diversion program - no error

HOLDING: Lack of a forensic diversion program in Steuben County when five other counties & cities have such a program did not deny D equal protection of the law under 14th Amendment to U.S.

Constitution or violate D's rights guaranteed by Privileges & Immunities Clause of Ind. Constitution. The forensic diversion program reflects a public policy determination by legislature that when persons with a mental illness or addictive disorder are charged with or convicted of certain offenses & their criminal history is limited in certain ways, the criminal justice system should provide treatment for their illness or disorder as the preferred means of correction. Ruble v. State, App., 849 N.E.2d 165. D argued that by failing to require all counties to establish drug cts., the forensic diversion statute has created two classifications: counties with forensic diversion programs & counties without. Following State v. Little, 66 P.3d 1099 (Wash. Ct. App. 2003), Ct. held that statute did not create separate classifications of offenders, noting that no Ds charged in Steuben County or Dekalb County had access to a forensic diversion program. D was treated no differently than other similarly situated Ds in those counties.

Committing a crime contemplated by forensic diversion program statute in a smaller county or one with limited financial resources as compared to committing such a crime in a large or resource-rich county is not a classification for equal protection purposes. Further, forensic diversion statute specifically states that program's implementation is not mandatory & merely prescribes the minimal requirements for the program should a county choose to establish one. Ind. Code 11-12-3.7-7. There is no law mandating forensic diversion programs in all counties, especially when there is limited funding available.

Accordingly, D failed to carry his burden of establishing an equal protection violation. Moreover, lack of program in Steuben County did not violate principle that all criminal Ds are to be treated fairly & equally under Article 1, Section 23 of Indiana Constitution. Held, judgment affirmed.

RELATED CASES: Morales, 991 N.E.2d 619 (Ind. Ct. App. 2013) *aff'd* on *reh'g* 4 N.E.3d 668 (if a county decides to implement a forensic diversion program, that county also has the discretion to decide its program's scope).

TITLE: Members v. State

INDEX NO.: E.6.b.

CITE: (4th Dist., 12-05-06), Ind. App., 857 N.E.2d 1019

SUBJECT: Post-conviction forensic diversion program- must show current mental illness or addiction

HOLDING: Tr. Ct. did not abuse its discretion by denying D's request for placement in a post-conviction forensic diversion program (FDP). The ruling on a request to be placed in a FDP, even a post-conviction request, is essentially a sentencing decision, & thus, the determination is within the discretion of the Tr. Ct. An inmate seeking post-conviction placement in FDP must meet the following criteria: (1) the person has a mental illness or an addictive disorder; (2) the person has been convicted of an offense that is: (A) not a violent offense; & (B) not a drug dealing offense; & (3) the person does not have a conviction for a violent offense in the previous ten (10) years. Ind. Code 11-12-3.7-1.

Here, D was convicted of multiple crimes, including a 1995 Class B felony arson, which is a violent offense under the FDP statute. In 2005, D filed a request for placement in FDP, & in support of the request, called the psychiatrist who found D not competent to stand trial in December of 1994. Although, in 1994, the psychiatrist diagnosed D with cocaine dependence, polysubstance dependence, cocaine delusional disorder, schizophrenia, paranoid personality disorder, & antisocial personality disorder, there was no testimony that the psychiatrist had re-evaluated D. Rather, the psychiatrist testified that it was very unlikely that significant progress would have been made with respect to the mental illness since this diagnosis. Because D offered no evidence of his current mental state, even assuming that D is otherwise qualified for FDP placement, a dubious proposition at best, Tr. Ct. did not abuse its discretion in denying D's request. Held, judgment affirmed.

TITLE: Morales v. State

INDEX NO.: E.6.b.

CITE: (7/25/2013), 991 N.E.2d 619 (Ind. Ct. App. 2013)

SUBJECT: Denial of placement in forensic diversion program affirmed

HOLDING: Tr. Ct. did not abuse its discretion in denying D's motion for placement into Vanderburg County Forensic Diversion Program, because Program would not accept any sex offenders. In his petition for judicial review of Program's acceptance criteria, D argued that because Ind. Code 11-12-3.7-12 already excludes certain violent offenders from placement into post-conviction forensic diversion programs, and not all sex offenders are included in that list, the Program exceeded its statutory authority by establishing acceptance criteria that were more exclusive than those in the statute.

Court held that there was no final administrative decision for Tr. Ct. to review because D never applied for acceptance into the Program and was thus never rejected from consideration by the Program. Even if the Program had explicitly rejected D, its decision would not have been arbitrary or capricious because D's Class B felony sexual misconduct with minor convictions rendered him ineligible under Ind. Code 11-12-3.7-6. Even assuming D had been eligible under the statute, Indiana counties have the ability to determine the scope of their forensic diversion programs. Held, judgment affirmed.

RELATED CASES: Morales, (Ind. Ct. App. 2013) (on rehearing, Ct. *clarified* that D did not apply directly to the Program; It appears D really wanted a declaratory judgment that the Program's criteria excluded too many offenders, but he did not pursue procedures to seek a declaratory judgment).

TITLE: Perry v. State

INDEX NO: E.6.b.

CITE: (7/22/2014), 13 N.E.3d 909 (Ind. Ct. App. 2014)

SUBJECT: Deferral drug court program - court's discretion to deny or grant credit time for electronic monitoring

HOLDING: Tr. Ct. did not abuse its discretion by denying D credit time for the time he spent on electronic monitoring as a drug court participant. Credit time statutes that apply to persons convicted or sentenced are inapplicable to someone who is participating in a drug court deferral program, and thus, Tr. Ct. has the discretion to award or deny credit time spent on electronic monitoring as part of the program. Meadows v. State, 2 N.E.3d 788 (Ind. Ct. App. 2014); but see House v. State, 901 N.E.2d 598 (Ind. Ct. App. 2009). Here, as part of a plea agreement, D's judgment and conviction were deferred if he successfully completed a drug court program. Over the course of one year, D was sanctioned by the drug court three times for violating his participation agreement. When D was convicted of additional crimes, his participation in the drug court program was revoked. The Tr. Ct. denied his request for credit time for 127 days he spent on electronic monitoring in the program. There are many positive results for a D who successfully completes a drug court program, but there are also negative consequences for failing. Not receiving credit time for time spent on electronic monitoring while participating in a drug court program is potentially one of those negative consequences. Following Meadows, Court held that Tr. Ct. gave D multiple chances before finally terminating him from the program and did not abuse its discretion in denying the request for credit time. Held, judgment affirmed.

TITLE: Ruble v. State

INDEX NO.: E.6.b.

CITE: (01-03-07), Ind., 859 N.E.2d 338

SUBJECT: Forensic Diversion statute - trial Ct.'s discretion

HOLDING: Ind. Code 11-12-3.7-12(b) provides that: "If a person has been convicted of an offense that may be suspended, the Ct. shall suspend all or a portion of the person's sentence" & make successful completion of Forensic Diversion a condition of probation. Similarly, it provides that when the person has been "convicted of an offense that is nonsuspendible, the Ct. shall order the execution of the nonsuspendible sentence & stay execution of all or part." Ind. Code 11-12-3.7-12(c). General Assembly did not intend mandatory suspension & referral of all persons meeting the minimum criteria in Ind. Code 11-12-3.7-12. Because idea of Forensic Diversion is to create additional treatment-based alternatives to incarceration, the legislature understandably elected to exempt sentences ordering such diversion from Ind. Code 35-50-2-2(b), which mandates nonsuspendible sentences for certain crimes. Forensic Diversion provisions in Title 11 & Title 35 complement each other only if they are understood as meaning that when a trial Ct. approves placement of an offender on Forensic Diversion, it shall suspend at least part of the sentence to probation & make successful completion of Forensic Diversion a condition of probation. Here, D pled guilty to operating a vehicle after a lifetime suspension. Trial Ct. had the authority to determine, based on an evaluation of D's suitability for diversion, as well as nature of offense & offender, whether to order D placed on Forensic Diversion. Held, transfer granted, Ct. App.' opinion at 849 N.E.2d 165 vacated, judgment of trial Ct. affirmed.

TITLE: Withers v. State

INDEX NO: E.6.b.

CITE: (8/26/2014), 15 N.E.3d 660 (Ind. Ct. App. 2014)

SUBJECT: Judicial notice of attendance reports

HOLDING: In a proceeding to terminate placement in a drug court program, Tr. Ct. was authorized to take judicial notice of the attendance reports pursuant to Indiana Evid. Rule 201(b)(5). The attendance records indicated that D missed four mental health therapy sessions required for participation in the drug program. Rule 201(b)(5) provides that a court may judicially notice a law, including "records of a court of this state." The attendance records were records of the Drug Court, prepared under its supervision and as part of its treatment program for D. Although Tr. Ct. properly took judicial notice of the records, this does not mean that the facts within them were conclusive; the parties were free to contest the facts. Though attendance records may not have been electronically signed by social workers, they constitute reliable hearsay evidence for purposes of hearing on termination of participation in Drug Court program. Tr. Ct.'s decision to terminate D's participation in the Drug Court program and reinstating her sentence pursuant to plea agreement did not violate due process. Held, judgment affirmed.

E. SENTENCING

E.6. Miscellaneous sentencing treatment/alternatives

E.6.c. Costs

TITLE: Amick v. State

INDEX NO.: E.6.c.

CITE: (6-7/19), Ind. Ct. App., 126 N.E.3d 909

SUBJECT: Erroneous imposition of sliding scale fee schedule

HOLDING: Trial court may place a person on home detention as part of a community corrections program and require the payment of a home detention fee, which must be set by the court. Here, at sentencing trial court ordered Defendant to be evaluated by community corrections for sliding scale fees for the cost of home detention. Community Corrections assessed Defendant \$3,680 for home detention fees and costs but never petitioned the court for its approval to assess those fees. The Court of Appeals stated Ind. Code § 35-38-2.5-6(7) clearly indicates that the court is to determine home detention fees, not community corrections. Held, judgment reversed and remanded to trial court for an opportunity to clarify its intent regarding fees.

TITLE: Baker v. State
INDEX NO.: E.6.c.
CITE: (5-16-02), Ind. App., 768 N.E.2d 477
SUBJECT: Public defender fee - inappropriate
HOLDING: Tr. Ct. erred in ordering D to pay \$250 for public defender costs as part of plea agreement pursuant to Ind. Code 33-9-11.5-6. Because there was no showing that Tr. Ct. determined that D had ability to pay for representation, order was not valid under statute. Further, statute appears to place fee for public defender representation in category of "costs" separate & distinct from other "Ct. costs." Here, plea agreement listed "Ct. costs" as those that should be paid by D & Tr. Ct. made separate entries for various costs & for public defender fee. Therefore, public defender fee was not intended to be part of "Ct. costs" covered by plea agreement. Held, judgment reversed in part, affirmed on other grounds.

TITLE: Brantley v. State

INDEX NO.: E.6.c.

CITE: (5th Dist., 6-11-02), Ind. App., 769 N.E.2d 676

SUBJECT: Denial of motion to refund fees & costs - no error

HOLDING: After Ct. App. vacated D's conviction, Tr. Ct. did not abuse its discretion when it denied D's motion to refund fees & costs totaling \$2,415, which she had paid to community corrections center. D argued that she should not be required to pay fees for community corrections services when her conviction & sentence have been vacated. However, D benefitted from fees she paid to community corrections center by receiving supervisory services. Presumably, she received or could have received some rehabilitative benefit from these services. Her placement in community corrections program was a privilege, not a right. Cox v. State, 706 N.E.2d 547 (Ind. 1999). Additionally, D avoided incarceration with her placement & chose not to pursue a stay of her sentence pending appeal. On the other hand, community corrections program expended time & resources to provide these supervisory services to D. To refund these fees to D would be inequitable to community corrections program, as it would not be compensated for benefits derived by D from program's service. Held, judgment affirmed.

TITLE: Burnett v. State
INDEX NO.: E.6.c.
CITE: (4/19/2017), 74 N.E.3d 1221 (Ind. Ct. App. 2017)
SUBJECT: Probation fees improperly imposed by probation department - inadequate indigency hearing

HOLDING: When a defendant is convicted of a misdemeanor, the Tr. Ct., not the probation department, has discretion to impose certain probation fees. Ind. Code § 35-38-2-1(e). If the probation department later wants to alter the fees imposed by Tr. Ct., it must petition the Tr. Ct. to increase the probation fees and demonstrate that there was a change in financial ability of the probationer while on probation. Ind. Code § 35-38-2-1.7(b). Here, Tr. Ct. stated Defendant had “various probation fees that are required,” but erred by not itself assessing the fees. Tr. Ct. also erred by failing to conduct an adequate indigency hearing before imposing fees pursuant to Ind. Code § 33-37-2-3. Tr. Ct. asked only one question about Defendant's financial situation, i.e., confirming she makes “less than \$20,000 per year.” Court noted that a later indigency hearing (deemed acceptable in other cases) would not suffice here. “Any disparate treatment based on a defendant’s financial situation whether it be by conferring a benefit, modifying a sentence, or something else triggers the requirement to have an indigency hearing at the time the fees are imposed to determine the defendant’s ability to pay.” Held, fees vacated and remanded for further proceedings to determine ability to pay fees.

RELATED CASES: Ross, 150 N.E.3d 233 (Ind. Ct. App. 2020) (erroneous imposition of probation fees based upon post-sentencing probation department memo without notice to probationer or inquiry into ability to pay); Polk, 88 N.E.3d 226 (Ind. Ct. App. 2017) (noting that the indigency hearing would have to be held before Tr. Ct. could revoke probation on the basis of a failure to pay fees), Outlaw, 929 N.E.2d 196 (Ind. 2010) (Ct. reversed Class A misdemeanor operating while intoxicated conviction where there was no evidence in record that D drove in a manner that endangered a person when she started driving after accident); Staten, 946 N.E.2d 80 (Ind. Ct. App. 2011) (conviction affirmed where evidence showed D could have endangered someone, even though he was driving on a deserted access road in a small town in middle of night; Crone, J., dissenting, believes statute requires State to show actual endangerment); Temperly, 933 N.E.2d 558 (Ind. Ct. App. 2010) (although D’s BAC was .244, he was involved in an accident in which he was not the cause; because no evidence other than D’s intoxication was presented to suggest that he operated his vehicle in a manner that endangered himself or another person, there was insufficient evidence to support D’s conviction for OWI as a Class A misdemeanor).

TITLE: Coleman v. State

INDEX NO.: E.6.c.

CITE: (9/21/2016), 61 N.E.3d 390 (Ind. Ct. App. 2016)

SUBJECT: Erroneous imposition of public defender and probation fees

HOLDING: Tr. Ct. abused its discretion in imposing a supplemental public defender fee, probation fees, and a drug and alcohol treatment fee totalling more than \$600, after stating at D's sentencing hearing that he would be found indigent as to fines and costs. After Tr. Ct. found D to be indigent, it appointed an attorney at public expense to represent D with no reimbursement requirement. When D asked, Tr. Ct. said he would have to pay for ordered alcohol and drug treatment class, but it never inquired about D's financial situation at the time. Sentencing order did not list any fees or costs and showed total monetary obligation as \$0. Probation order showed alcohol and drug treatment program but did not show amount owed for probation user fees. One day after sentencing, D was charged \$640 in total court fees (\$50 supplemental public defender fee, \$250 alcohol and drug service program user fee, \$50 adult probation administrative fee, and \$290 adult probation user fee). Imposition of the latter three fees appears to be an error by the probation department, as record did not support that Tr. Ct. even imposed these fees on D in either its sentencing order or its order of probation. Held, judgment vacated and remanded to hold an indigency hearing. If the hearing shows that D is able to pay the probation fees, then order should reflect that D owes \$150 for the alcohol and drug services, corresponding with his Class B misdemeanor conviction. The \$250 fee would only be imposed for a Class A misdemeanor.

RELATED CASES: Whitaker, 87 N.E.3d 1139 (Ind. Ct. App. 2017) (Ind. Ct. App. 2017) (Tr. Ct. abused its discretion when it did not order probation fees but allowed probation department to do so), De La Cruz, 80 N.E.3d 210 (Ind. Ct. App. 2017) (Tr. Ct. abused its discretion in directing probation department to assess probation fees).

TITLE: Creekmore v. State

INDEX NO.: E.6.c.

CITE: (3rd Dist., 12-13-06), Ind. App., 858 N.E.2d 230

SUBJECT: Imposition of cost & fees may be authorized by Indiana Home Rule Statute & local ordinance

HOLDING: On rehearing, Ct. App. *clarified* that imposition of a fee for collection of a dishonored check is not impermissible. Petition for rehearing in the Ct. App. must rely on the same theory as that advanced in the original brief. Here, the State argues, for the first time in its Petition for Rehearing, that the imposition of a prosecutor's fee for the money spent processing a bad check was statutorily authorized under Ind. Code 35-1-3-2, which states that "the policy of the State is to grant units all the powers that they need for the effective operation of government as to local affairs." The County was a "unit" under Ind. Code 35-1-2-23, & was authorized to collect a fee for processing dishonored checks pursuant to Kosciusko County, Ind., General Ordinance No. 95-4. Because State did not assert this theory in its original brief, the Petition for Rehearing is *denied*. However, Ct. *clarified* that although a prosecutor's collection fee is not authorized pursuant to Ind. Code 33-37-4-1, such a fee may be imposed where it is otherwise authorized by, e.g., the Indiana Home Rule statute or a valid county ordinance. Held, Petition for Rehearing from opinion at 853 N.E.2d 523 (Ind. Ct. App. 2006) *denied*.

TITLE: De La Cruz v. State
INDEX NO.: E.6.c.
CITE: (6/23/2017), 80 N.E.3d 210 (Ind. Ct. App. 2017)
SUBJECT: Tr. Ct., not probation department, assesses probation fees
HOLDING: Tr. Ct. abused its discretion in directing the probation department to assess probation fees. Defendant was convicted of C misdemeanor OWI.

Sentencing decisions include decisions to impose fees and costs. Coleman v. State, 61 N.E.3d 390, 392 (Ind. Ct. App. 2016). Ind. Code 35-38-2-1(b) provides that, if a person is convicted of a misdemeanor, “the court may order the person to pay the user’s fee prescribed under subsection (e)” following an indigency hearing. Coleman, 61 N.E.3d at 393. Subsection (f) states that “the probation department . . . shall collect” those fees. And Indiana Code Section 35-38-2-1.7(b) states that “[a] probation department may petition a court” to “impose” or “increase” a person’s probation fees. These statutes give “the Tr. Ct., not the probation department, . . . the discretion to impose probation fees.” Burnett v. State, No. 49A02-1610-CR-2402, 74 N.E.3d 1221, 2017 WL 1399845, at *4 (Ind. Ct. App. April 19, 2017). Held, judgment reversed.

RELATED CASES: Ross, 150 N.E.3d 233 (Ind. Ct. App. 2020) (erroneous imposition of probation fees based upon post-sentencing probation department memo without notice to probationer or inquiry into ability to pay); Coleman, 61 N.E.3d 390 (Ind. Ct. App. 2015) (trial court abused its discretion in directing probation department to assess probation fees).

TITLE: Everroad v. State

INDEX NO.: E.6.c.

CITE: (1st Dist.; 6-22-00), 730 N.E.2d 222 (Ind. App.)

SUBJECT: Costs; Fines - indigency hearing required

HOLDING: Tr. Ct. erred in denying D's motion to correct erroneous sentence which was based on Ct.'s failure to hold indigency hearing before ordering D to pay fines & costs. Ind. Code 35-58-1- 18(a) imposes affirmative duty on Tr. Ct. to hold indigency hearing when imposing fine on D. Ind. Code 33-19-2-3 imposes affirmative duty on Tr. Ct. to conduct indigency hearing when imposing costs on D. Although finding of indigency for purposes of appointing defense counsel is not conclusive in regard to D's ability to pay fine, it can make Tr. Ct. aware of D's indigency. Here, Tr. Ct. ordered D to pay \$100 initial fee & \$15 monthly fee to probation department; \$125 in Ct. costs to clerk; \$1,470 to Bartholomew County Sheriff's Department as reimbursement for pre- trial detention; \$10,000 joint & several fine for each conviction; & \$300 drug abuse, prosecution, interdiction & correction fee. However, D had no opportunity to demonstrate to Tr. Ct. his ability (or inability) to pay fines & costs. Thus, Tr. Ct. remanded for indigency hearing.

Note: This case provides lengthy discussion on case law dealing with imposition of fines & costs on indigent Ds.

RELATED CASES: Neal, 131 N.E.3d 654 (Ind. Ct. App. 2019) (Tr. Ct. must conduct a hearing to determine D's ability to pay public defender fees and medical expenses; must reduce the medical expenses incurred by any amount of co-payment made by inmate and insurance or Medicaid reimbursement expected; and, must state a statutory basis for requiring D to pay a public defender fee); Godby, 976 N.E.2d 1235 (Ind. Ct. App. 2012) (because court costs in a criminal action "are not part of the sentence" under Ind. Code 33-37-2-2, D's belated attempt to correct error through a motion to correct erroneous sentence is not proper; see full review at E.13.b); Taylor, App., 786 N.E.2d 285 (Court's duty to examine D's ability to pay is not triggered unless court imposes fee greater than \$200; Tr. Ct. properly imposed \$200 drug abuse, prosecution, & correction fee without considering D's ability to pay); Clenna, App., 782 N.E.2d 1029 (when imposing fines & costs on D, Tr. Ct. did not abuse discretion in failing to hold separate indigency hearing or include language in sentencing order prohibiting imprisonment for failure to pay fines or costs); Dunkley, App., 787 N.E.2d 962; Wooden, App., 757 N.E.2d 212 (it was not error to impose costs/fees without separate indigency hearing because Tr. Ct.'s statements & actions at sentencing hearing indicated intention to find D indigent & because sentencing statement included non-imprisonment language); Whedon, 765 N.E.2d 1276 (Ct. *overruled* cases declaring that sentencing orders must include prohibition against imprisonment for failure to pay fines or costs; D's financial resources should be determined at conclusion of his incarceration, not at time of sentencing); Like, App., 760 N.E.2d 1118 imposition of \$1,000 drug abuse, prosecution, interdiction & correction fee was inappropriate because Ind. Code 33-19-6-9 requires that court consider person's ability to pay in determining whether to assess fee & D had been declared indigent).

TITLE: Goffinet v. State

INDEX NO.: E.6.c.

CITE: (10-8-02), Ind. App., 775 N.E.2d 1227

SUBJECT: Retention of costs & fees from cash bond remittance

HOLDING: Tr. Ct. abused its discretion by retaining from bond remittance Ct. costs, administrative fee, appeal costs, & drug fee. D's father paid entire \$20,000 bond in cash, which Ct. remitted with clerk retaining \$5,679 for various costs & fees. Ind. Code 35-33-8-3.2 does not authorize Tr. Ct. to order any money retained from bond remittance for any purpose unless bond was 10% cash or securities deposit. Since D's father paid entire amount in cash, Tr. Ct. abused its discretion in retaining costs & fees. On remand, Tr. Ct. can either hold indigency hearing before imposing Ct. costs on D or amend its sentencing statement to include required non-imprisonment language. Ct. may not impose any administrative fee because entire bond was paid in cash. Finally, Ct. must determine D's ability to pay before ordering drug fee, which may not exceed \$1,000 pursuant to Ind. Code 33-19-6-9. Held, affirmed in part, vacated in part, & remanded with instructions.

RELATED CASES: Dillman, 16 N.E.3d 445 (Ind. Ct. App. 2014) (Although the Tr. Ct. erred in releasing D's cash bond to pay costs and fees, this not constitute an illegal sentence and fundamental error that would allow the Court to review D's appeal on the merits despite his failure to timely appeal the Tr. Ct.'s order; see full review at E.13.b); Dillman, 2 N.E.3d 774 (Ind. Ct. App. 2014) (because D's \$250 bond was a cash bond posted under Ind. Code 35-33-8-3.2(a)(1) rather than a 10% cash or security deposit, Tr. Ct. was not authorized to retain the bond for any purpose); Wright, 949 N.E.2d 411 (Ind. Ct. App. 2011) (pursuant to Ind. Code 35-33-8-3.2(a)(2), Tr. Ct. has authority to retain cash bail bond for fines, costs and fees where D executes cash bail-bond agreement authorizing retention of all or part of bond in the event D fails to appear or is convicted; indigency hearing not required; see full review, this section); Blixt, App., 872 N.E.2d 149 (effective 7/1/06, Ind. Code 35-33-8-3.2(a) authorizes retention of cash bond if agreed to, & prior to that date, failure to object to agreement to retain cash bond constitutes waiver of issue on appeal); Traylor, App., 817 N.E.2d 611 (D posted entire amount of bail in cash & is therefore entitled to remittance of \$30,000 cash bond).

TITLE: Gooch v. State
INDEX NO.: E.6.c.
CITE: (2nd Dist., 9-17-97), Ind. App., 685 N.E.2d 152
SUBJECT: Erroneous assessment of jury fees
HOLDING: There is no statutory authority in Ind. for assessment of costs relating to jury service against convicted D. Ind. Code 35-19-5-1 provides that convicted Ds must pay criminal costs fee of \$120 & may be required to pay one or more of number of other fees. However, statute does not give Tr. Ct. authority to assess jury fees. Absent specific authorization by legislature, Tr. Ct. had no power to assess jury costs against D. Held, judgment affirmed in part & reversed in part.

TITLE: Hall v. State

INDEX NO.: E.6.c.

CITE: (2nd Dist., 04-26-05), Ind. App., 826 N.E.2d 99

SUBJECT: Erroneous imposition of appellate attorney fees & costs

HOLDING: Tr. Ct. abused its discretion when it appointed appellate counsel for D, but ordered him to pay one-half of his appellate attorney fees & all of costs of preparing transcript at a rate of \$100 per month pursuant to Ind. Code 33-40-3-6. Statute gives Tr. Cts. discretion to impose representation costs & attorney fees against Ds upon a finding of ability to pay. Ind. Code 33-40-3-7 provides that if a D is receiving publicly paid representation, the Ct. shall consider the following factors to determine whether he is able to pay costs of representation; 1) person's independently held assets & assets available to spouse of person or person's parent if person is unemancipated; 2) the person's income; 3) person's liabilities; & 4) extent of burden that payment of costs assessed under Ind. Code 33-40-3-6 would impose on person & dependents of the person.

If a D legitimately lacks financial resources to employ an attorney, without imposing substantial hardship on himself or his family, Ct. must appoint counsel to defend him. Moore v. State, 273 Ind. 3, 401 N.E.2d 676 (1980). Here, after D was incarcerated, his income decreased by nearly \$1000 per month. Moreover, his income of \$9312 per year is well below \$12,830, the poverty guideline for a family unit of two. A significant percentage of D's income is needed for his modest mortgage payment & there is no equity in residence. Finally, from record it does not appear that D & his wife have any substantial assets. From these facts, Ct. concluded that D is indigent & Tr. Ct. abused its discretion when it found that he is partially able to pay costs associated with prosecuting his appeal. Because he is indigent, Tr. Ct. was required to provide D with pauper appellate counsel & a free transcript. Graves v. State, 503 N.E.2d 1258 (Ind. Ct. App. 1987); Ind. Code 33-40-8-5. Held, judgment affirmed in part, reversed in part & remanded.

RELATED CASES: LaMonte, App., 839 N.E.2d 172 (Tr. Ct. erroneously ordered D to pay \$400 toward his appeal costs; determination of indigency must be based on a "thorough" rather than "superficial" examination of income & ownership of property).

TITLE: Hayden v. State
INDEX NO.: E.6.c.
CITE: (7-16-02), Ind. App., 771 N.E.2d 100
SUBJECT: Document storage & automated record keeping costs - no ex post facto violation
HOLDING: Tr. Ct. did not err in assessing Ct. fees set forth in Ind. Code 33-19-6-18.1 & Ind. Code 33-19-6-19. D was ordered to pay \$129 in Ct. costs which included two dollar document storage fee & two dollar automated record keeping fee under aforementioned statutes, which became effective July 1, 2001. D had pled guilty to acts which had allegedly occurred in May 2000, well before statute became effective. D argued that assessment of fees was violation of ex post facto provisions of state & federal constitutions. Determination turns on whether statutes are procedural or substantive in nature. Procedural, adjective, or remedial law is that portion of law which prescribes method of enforcing right or obtaining redress for invasion of right. Substantive law is that portion of law which creates, defines, & regulates rights. State v. Fletcher, 717 P.2d 866 (Ariz. 1986). Statutes at issue here do not make any substantive changes to criminal law, do not add elements to any offense or alter sentencing statutes, & are not intended to increase criminal punishment. Therefore, statutes serve procedural function by providing funding for document storage & automated record keeping in all types of cases. Held, no violation of ex post facto principles, judgment affirmed.

TITLE: Holder v. State

INDEX NO.: E.6.c.

CITE: (2/11/2019), 119 N.E.3d 621 (Ind. Ct. App. 2019)

SUBJECT: Erroneous order of public defender fee without indigency hearing

HOLDING: Tr. Ct. abused its discretion by imposing a \$100 public defender fee when D was only charged with misdemeanors and imposing probation fees without conducting an indigency hearing. Ind. Code § 33-37-2-3(a) plainly requires Tr. Ct. to determine indigency "when the court imposes costs." There is no indication that the fees totaling at least \$395 were suspended or that an indigency hearing would take place when the costs became due at a later date. Given the plain language of Ind. Code § 33-37-2-3(g), the highest fee Tr. Ct. could impose was \$50. Tr. Ct. did not intend to impose public defender fee pursuant to Ind. Code § 33-37-2-3(g), which would have allowed imposition of a higher fee. Held, imposition of \$100 public defender fee reversed and remanded for further proceedings.

TITLE: Lagos v. United States
INDEX NO.: E.6.c.
CITE: (5/29/2018), 138 S. Ct. 1684 (U.S. 2018)
SUBJECT: Federal Mandatory Restitution Act does not require reimbursement of victim's expenses incurred through its own investigation and related civil proceedings
HOLDING: The Mandatory Victims Restitution Act of 1996 ("the Act") requires convicted Ds to reimburse victims only for the expenses incurred by participating in the government's investigation and prosecution of the case, not the expenses the victim incurred from private investigations or participation in related civil or bankruptcy proceedings.

D was convicted of using a company he controlled to defraud General Electric Capital Corporation ("GE") of tens of millions of dollars. After the scheme came to light and D's company went bankrupt, GE conducted a private investigation of D's fraud and participated as a party in the D's company's bankruptcy proceedings. Between the private investigation and the bankruptcy proceedings, GE spent nearly \$5 million in legal, accounting, and consulting fees. After D pled guilty to federal wire fraud charges, the District Court ordered him to pay restitution for those fees, and the Fifth Circuit affirmed.

The Act requires Ds convicted of certain federal offenses, including wire fraud, to "reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U. S. C. §3663A(b)(4).

The most reasonable interpretation of the Act is that the words "investigation" and "proceedings" are limited to government investigations and criminal proceedings and do not include private investigations and civil or bankruptcy proceedings. Therefore, the District Court erred by ordering D to pay restitution to GE for the \$5 million it spent on its own private investigation. Held, cert. granted, opinion at 864 F.3d 320 reversed, and remanded. Breyer, J., for the unanimous Court.

TITLE: Langdon v. State
INDEX NO.: E.6.c.
CITE: (3/10/2017), 71 N.E.3d 1162 (Ind. Ct. App. 2017)
SUBJECT: Erroneous imposition of second supplemental public defender fee
HOLDING: Trial court abused its discretion in assessing a second \$50 supplemental public defender fee at sentencing hearing after having already imposed a \$50 public defender fee at Defendant's initial hearing. Trial court lacked statutory authority to impose the second fee pursuant to Ind. Code § 33-35-7-6 (authorizing public defender fee at initial hearing); Ind. Code § 33-40-3-6 (authorizing reasonable attorney fees upon finding defendant has the ability to pay); and Ind. Code § 33-37-2-3 (authorizing part of attorney fees if trial court determines defendant is not indigent). Trial court determined that Defendant was indigent and did not find that he had the ability to pay costs of representation. Held, judgment reversed and remanded.

TITLE: McRoy v. State

INDEX NO.: E.6.c.

CITE: (1st Dist., 8-29-03), Ind.App, 794 N.E.2d 539

SUBJECT: Fines & costs - indigency; Tr. Ct. may not stay execution

HOLDING: Regardless of D's indigency status, Tr. Ct. is not precluded from imposing fine & costs upon D. Tr. Ct. may find that a D does not have financial ability to hire an attorney yet is able to pay fines or Ct. costs. Whedon v. State, 765 N.E.2d 1276 (Ind. 2002). However, Tr. Ct. had no authority in this case to suspend payment & conduct hearing seven months after D had completed maximum sentence for offense. A Tr. Ct.'s authority over a D exists only as long as Ct. has authority to act. Beck v. State, 790 N.E.2d 520 (Ind. Ct. App. 2003). Held, Tr. Ct.'s imposition of fine & costs affirmed, order setting further proceedings vacated.

RELATED CASES: McRoy, App., 798 N.E.2d 521 (on rehearing, Ct. noted that Ind. Code 35-38-1-18(b) & Ind. Code 33-19-2-3(b)(1) provide for a civil remedy to collect unpaid fines & costs should an indigent or non-indigent D fail to do so.; notwithstanding Ind. Code 35-38-1-18, Tr. Ct. has no statutory authority to conduct an additional indigency hearing & subject a D to additional imprisonment for failure to pay fines & costs once D has already served maximum term, as was case here).

TITLE: Neeley v. State

INDEX NO: E.6.c.

CITE: (01/26/2022), 182 N.E.3d 234 (Ind. Ct. App. 2022)

SUBJECT: Erroneous assessment of child abuse prevention fee and failure to remit remaining amount of bail deposit after subtracting costs and fees

HOLDING: Defendant was originally charged with neglect of a dependent as a level 6 felony. Bond was set at \$4,000.00 and she paid ten percent cash deposit of \$400.00. The bond agreement stated that fees and costs would be deducted from her deposit. Defendant failed to appear, and a warrant was issued for her arrest with bond set at \$5000.00. Defendant was arrested and posted a ten percent deposit of \$500.00. Defendant pleaded guilty to newly added charge of failure to comply with compulsory school attendance as a class B misdemeanor and neglect of a dependent charge was dismissed. Court costs and fees were assessed including a \$100.00 "child abuse prevention" fee. The CCS indicated Defendant's total costs were \$660.00 and that her balance was \$0.00. The Court of Appeals held that because Defendant pleaded guilty to failure to comply with compulsory school attendance, the child abuse prevent fee was not authorized by statute. (IC 33-37-5-12(1)(P)). Therefore, the total fees should have been \$560.00 and Defendant was entitled to remittance of \$340.00, the difference of the \$560.00 fees subtracted from the \$900.00 she had posted as a cash bond deposit.

TITLE: Owens v. State

INDEX NO: E.6.c.

CITE: (04-25-11), 947 N.E.2d 482 (Ind. Ct. App. 2011)

SUBJECT: Public Defender reimbursement - ability to pay determination

HOLDING: Tr. Ct. did not abuse its discretion when it failed to hold a hearing to determine D's ability to reimburse the Public Defender Fund at the time of initial sentencing. Pursuant to Ind. Code 33-37-2-3(b), Tr. Ct. was not required to hold a hearing until D has completed the executed portion of his sentence. Moreover, a D's financial resources are more appropriately determined not at the time of initial sentencing but at the conclusion of incarceration. Kimbrough v. State, 911 N.E.2d 621 (Ind. Ct. App. 2009); Whedon v. State, 765 N.E.2d 1276 (Ind. 2002). The matter of D's indigency is not yet ripe for appellate review, because he has yet to complete his executed sentence. Thus, at time of initial sentencing, Tr. Ct. was under no obligation to make an ability to pay determination. Held, judgment affirmed.

RELATED CASES: Eliseo, 14 N.E.3d 778 (Ind. Ct. App. 2014) (no abuse of discretion in failing to hold hearing on D's ability to pay fees and costs because Tr. Ct. didn't order D to pay until after incarceration).

TITLE: Obregon v. State

INDEX NO.: E.6.c.

CITE: (3rd Dist., 12-22-98), Ind. App., 703 N.E.2d 695

SUBJECT: Imposition of public defender fee - conflicting statutes

HOLDING: Tr. Ct. did not err in imposing public defender fee in excess of amount specifically stated in Ind. Code 35-33-7-6(c). Statute provides for \$100 fee for felony when Tr. Ct. finds that D is able to pay part of representation by assigned counsel. However, Ind. Code 35-33-8-3.2 states without ambiguity that publicly paid costs of representation may be deducted from D's cash bond prior to remittance. Facts of this case fit squarely within latter statute, notwithstanding \$100 fee provided by Ind. Code 35-33-7-6. Held, judgment affirmed; Garrard, J., concurring in result.

RELATED CASES: Eliseo, 14 N.E.3d 778 (Ind. Ct. App. 2014) (while Ind. Code 35-33-7-6 caps supplemental PD fee at \$100, both Ind. Code 33-40-3-6 and Ind. Code 33-37-2-3 give Tr. Ct.s discretion in setting the fee); Stanley, App., 755 N.E.2d 708 (Tr. Ct. abused discretion in ordering D to reimburse county where record contained no findings regarding actual cost of defense services rendered & no findings or calculations regarding how trial Ct. arrived at conclusion that D could reimburse county \$6,000, given fact that his average weekly salary was \$300-\$400); Turner, App., 755 N.E.2d 194 (where D posted no bond & was incarcerated following his arrest through conclusion of his trial, Tr. Ct. exceeded its statutory authority when it assessed D a reimbursement fee of more than \$100).

TITLE: Sears v. State

INDEX NO.: E.6.c.

CITE: (8/26/2022), Ind. Ct. App., 194 N.E.3d 1173

SUBJECT: Trial court lacked statutory authority to impose drug interdiction fee and countermeasure fees

HOLDING: In sentencing Defendant for theft, trial court erred when it ordered him to pay a \$200 drug interdiction fee and a \$200 countermeasure fee, as neither fee was authorized by statute. State conceded the fees were erroneously imposed. Ind. Code 33-37-4-1(a) directs the clerk to collect court costs from each convicted defendant in a criminal case. In addition to costs, Ind. Code 33-37-4-1(b) directs the clerk to collect additional fees if they are required under Ind. Code chapter 33-37-5. This includes a drug abuse, prosecution, interdiction, and correction fee pursuant to Ind. Code 33-37-5-9, which applies to offenses related to controlled substances. It does not include offenses against property.

In addition, Ind. Code 33-37-5-10 authorizes a \$200 countermeasures fee in each action in which a person is found to have committed an offense or infraction under Indiana Code chapter 9-30-5 and the person's driving privileges are suspended as a result of the finding. The statute also authorizes imposition of the countermeasures fee if a person is charged with an offense under Indiana Code chapter 9-30-5, agrees to plead guilty to an offense not listed in that chapter of the Indiana Code, and agrees to pay the countermeasures fee as part of the plea agreement. Indiana Code chapter 9-30-5 concerns offenses involving operating a vehicle while intoxicated. As Defendant was not charged with or convicted of an offense listed in IC 9-30-5, the trial court likewise erred in imposing a countermeasures fee. Held, judgment reversed and remanded with instructions to vacate imposition of the fees

TITLE: Sutton v. State

INDEX NO.: E.6.c.

CITE: (2nd Dist.; 7-13-99), Ind. App., 714 N.E.2d 694

SUBJECT: Costs - improper order of Domestic Violence Fee

HOLDING: Tr. Ct. erred in ordering D to pay fifty dollar domestic violence fee as part of his sentence. Ct. is required to order person who has committed offense of battery on his or her spouse or former spouse to pay domestic violence prevention & treatment fee of fifty dollars to clerk. See Ind. Code 33-19-6-13. In construing statute, words & phrases must be given their plain, ordinary & usual meaning, unless contrary purpose is clearly shown by statute itself. Spouse means "[o]ne's husband or wife." BLACK'S LAW DICTIONARY 1402 (6th Ed. 1990). Here, Ct. ordered D, who was convicted of battery on his live-in girlfriend, to pay domestic violence fee. Although victim lived with D & was mother of their child, she was not legally married to D & was not his spouse within meaning of Ind. Code 33-19-6-13. Thus, consistent with legislature's clear expression of intent not to lend spousal rights & benefits to those not legally married, Ct. cannot expand definition of "spouse" in Ind. Code 33-19-6-13 to include victim in this case. Held, judgment affirmed in part & reversed in part; Brooks, J., concurring on basis that legislature should take action to correct oversight which excludes adults who live together from paying domestic violence fees.

TITLE: Vaughn v. State

INDEX NO.: E.6.c.

CITE: (2/15/2013), 982 N.E.2d 1071 (Ind. Ct. App. 2013)

SUBJECT: Unauthorized order of community service in lieu of costs and fines

HOLDING: Tr. Ct. abused its discretion when it ordered indigent D to serve forty hours of community service in lieu of fines and costs. Plea agreement gave Tr. Ct. discretion regarding fines and costs. Although Tr. Ct. did not order that D would be imprisoned if she failed to complete community service, it expressly refused to eliminate the possibility of a sanction of some kind.

Court of Appeals held that although imposition of community service in lieu of costs and fines did not violate plea agreement, it was not statutorily authorized. Statutes regarding imposition of fines and costs do not address the procedure a Tr. Ct. should follow if the convicted person is indigent, and none of them mention or permit a Tr. Ct. to impose community service in lieu of costs or fines. See Ind. Code. 33-37-4-1; Ind. Code. 33-37-2-3; Ind. Code. 35-50-3-2. None of the several statutes cited by State that allow imposition of community service are relevant here. Held, judgment reversed and remanded to address imposition of costs and fees, noting that an indigent D may not be imprisoned for failure to pay fines and costs. See Whedon v. State, 765 N.E.2d 1276 (Ind. 2002). Baker, J., dissenting, notes that Tr. Ct. may impose any reasonable condition it deems appropriate when it exercises its discretion to suspend fines and costs. Campbell v. State, 551 N.E.2d 1164 (Ind. Ct. App. 1990).

TITLE: Vestal v. State

INDEX NO.: E.6.c.

CITE: (4th Dist., 3-7-01), Ind. App., 745 N.E.2d 249, sum. *aff'd*, 773 N.E.2d 805 (Ind. 2002)

SUBJECT: Reimbursement of extradition costs

HOLDING: Tr. Ct. did not err in ordering D to pay \$1,472 to Clay County for extradition expenses. Relying on Indiana's restitution statute, Ind. Code 35-50-5-3, D argued that because Clay County was in no way injured by his burglary or theft, it was not a victim of crime & he cannot be ordered to pay restitution for his extradition. Ct. noted that it would agree with D if order to pay county for his extradition costs were indeed a restitution cost. However, Tr. Ct. ordered D to reimburse county for costs of his extradition, not to pay restitution. Ind. Code 35-33-14-1 states that county extradition fund exists in each county. Purpose of this fund is to offset costs of extraditing criminal Ds. Ct. presumed Clay County Extradition Fund was used to offset costs of extraditing D to Indiana. Thus, order from Tr. Ct. to pay back money to this fund is considered reimbursement of costs & not restitution. Held, affirmed in part & remanded with instructions to hold indigency hearing to address whether D has ability to pay costs of his public defender & his extradition.

RELATED CASES: Zanders, App., 800 N.E.2d 942 (Tr. Ct. erred in retaining a portion of D's bond deposit for extradition expenses as costs after charges against him were dismissed).

TITLE: Whedon v. State
INDEX NO.: E.6.c.
CITE: (4-16-02), Ind., 765 N.E.2d 1276
SUBJECT: Costs - no imprisonment for indigent D's failure to pay; sentencing orders
HOLDING: When fines or costs are imposed upon an indigent D, such a person may not be imprisoned for failure to pay fines or costs. Although Indiana cases do not provide a conclusive resolution regarding whether rule requiring express prohibition of imprisonment for fines applies equally to costs, legislature requires indigency hearings both as to imposition of fines, Ind. Code 35-38-1-18(a), & costs, Ind. Code 33-19-2-3(a).

Ct. also *overruled* cases declaring that sentencing orders must include prohibition against imprisonment for failure to pay fines or costs. Remanding a sentence to insist that a prohibition upon imprisonment for failure to pay fines or costs be included in every order sentencing an indigent D does not substantially serve Ds or the just & efficient administration of justice. A D's financial resources are more appropriately determined not at time of initial sentencing but at conclusion of incarceration, thus allowing consideration of whether D may have accumulated assets through inheritance or otherwise. Held, judgment affirmed.

RELATED CASES: Banks, 847 N.E.2d 1050 (Ind. Ct. App. 2006) (I. C. 33-37-2-3 does not permit imposition of costs when a convicted person is indigent); Berry, 950 N.E.2d 798 (Ind. Ct. App. 2011) (Whedon does not require that all fees, costs, and fines be assessed after D is released from prison); Owens, 947 N.E.2d 482 (Ind. Ct. App. 2011) (Tr. Ct. did not err in imposing court costs without specifying in its sentencing order that D would not be imprisoned for nonpayment thereof); Purifoy, App., 821 N.E.2d 409 (Tr. Ct. did not err in delaying a final determination of D's indigency until completion of his term of probation); Clenna, App., 782 N.E.2d 1029 (if D is found to be indigent as to attorney fees, then he is also as matter of law indigent as to any fines & costs that are assessed); McRoy, 794 N.E.2d 539 (Ind. Ct. App. 2003), *clarified on reh'g*, 798 N.E.2d 521 (Ind. Ct. App. 2003) (appointment of counsel affords only a presumption of indigency at time of sentencing).

E. SENTENCING

E.6. Miscellaneous sentencing treatment/alternatives

E.6.d. Fines (see, also E.11.e)

TITLE: Bitner v. State

INDEX NO.: E.6.d.

CITE: (2d Dist. 11/16/89), Ind. App., 546 N.E.2d 117

SUBJECT: Fines & costs - indigency hearing required

HOLDING: Tr. Ct. erred in imposing fines & costs on D without first determining whether he was indigent. Indigency determination for purpose of appointing counsel is not conclusive as to D's ability to pay fine or cost. Marshall, App., 505 N.E.2d 853; Meeker, App., 395 N.E.2d 301. Ind. Code 33-19-2- 3(a) provides that Tr. Ct. shall conduct indigency hearing when imposing costs, & Ind. Code 35-38-1- 18(a) requires indigency hearing before fines are imposed. In Meeker, *supra*, Ct. of Appeals found that statutes imposed affirmative duty on Tr. Ct. to conduct indigency hearing, so that it was error to impose fines & costs upon D without conducting such hearing. Ind. S. Ct. in White head 511 N.E.2d 284 held that when fine is imposed on indigent D, Tr. Ct. must expressly state that D shall not be imprisoned for failure to pay it. Ct. of Appeals holding in Marshall, *supra*, that no appealable issue is presented until effort is made to enforce fine was therefore impliedly *overruled* in Whitehead. Here, record of D's sentencing does not provide sufficient evidence for Ct. of Appeals to review D's indigency. Tr. Ct. merely inquired whether D had money or means to employ counsel for appeal, to which D responded the he did not. Consequently, Ct. of Appeals here remands to Tr. Ct. for indigency hearing.

RELATED CASES: Collins, App., 676 N.E.2d 741 (order requiring D to pay \$700,000 in resitution did not constitute excessive fine & vindictive justice under Art. I, Sec. 16 & 18 of Ind. Constitution); Polen, App., 578 N.E.2d 755 (information in presentence report about D's financial status, coupled with evidence presented in Ct. concerning her employment history & financial status, was sufficient to satisfy requirement for inquiry into D's ability to pay before imposing restitution).

TITLE: Like v. State

INDEX NO.: E.6.d.

CITE: (1-16-02), Ind. App., 760 N.E.2d 1188, *reh'g granted*, 766 N.E.2d 416

SUBJECT: Maximum fine unreasonable

HOLDING: When sentencing D who was convicted of dealing in controlled substance, Tr. Ct. abused its discretion in ordering D to pay maximum fine of \$10,000. Imposition of maximum fine of \$10,000 for class B felony was clearly, plainly, & obviously unreasonable in this case because D had no other adult convictions & had sold only .32 grams of methamphetamine. Thus, Ct. remanded with instructions to impose a fine, if any, that is commensurate with nature of offense & D's character. Held, judgment affirmed in part, vacated in part, & remanded in part.

RELATED CASES: Johnson, App., 845 N.E.2d 147 (\$5000 fine for Class A felony child molesting conviction was not inappropriate, despite fact that D is indigent & will not be released from jail until he is past retirement age); Cooper, App., 831 N.E.2d 1247 (\$2500 fine in battery case was inappropriate; there was no evidence D could ever be able to pay fine, she lost her job because of conviction & could not make her house or car payments); Like, App., 766 N.E.2d 416 (on rehearing, ct. remanded with instructions to impose criminal costs fee in amount of \$120.000 pursuant to Ind. Code 33-19-5-1(a)).

TITLE: McRoy v. State

INDEX NO.: E.6.d.

CITE: (1st Dist., 8-29-03), Ind.App, 794 N.E.2d 539

SUBJECT: Fines & costs - indigency; Tr. Ct. may not stay execution

HOLDING: Regardless of D's indigency status, Tr. Ct. is not precluded from imposing fine & costs upon D. Tr. Ct. may find that a D does not have financial ability to hire an attorney yet is able to pay fines or Ct. costs. Whedon v. State, 765 N.E.2d 1276 (Ind. 2002). However, Tr. Ct. had no authority in this case to suspend payment & conduct hearing seven months after D had completed maximum sentence for offense. A Tr. Ct.'s authority over a D exists only as long as Ct. has authority to act. Beck v. State, 790 N.E.2d 520 (Ind. Ct. App. 2003). Held, Tr. Ct.'s imposition of fine & costs affirmed, order setting further proceedings vacated.

RELATED CASES: McRoy, App., 798 N.E.2d 521 (on rehearing, Ct. noted that Ind. Code 35-38-1-18(b) & Ind. Code 33-19-2-3(b)(1) provide for a civil remedy to collect unpaid fines & costs should an indigent or non-indigent D fail to do so.; notwithstanding Ind. Code 35-38-1-18, Tr. Ct. has no statutory authority to conduct an additional indigency hearing & subject a D to additional imprisonment for failure to pay fines & costs once D has already served maximum term, as was case here).

E. SENTENCING

E.6. Miscellaneous sentencing treatment/alternatives

E.6.d.1. In general (indigency hearing and default, Ind. Code 35-38-1-18)

TITLE: Langdon v. State

INDEX NO.: E.6.d.1.

CITE: (3/10/2017), 71 N.E.3d 1162 (Ind. Ct. App. 2017)

SUBJECT: Erroneous imposition of second supplemental public defender fee

HOLDING: Trial court abused its discretion in assessing a second \$50 supplemental public defender fee at sentencing hearing after having already imposed a \$50 public defender fee at Defendant's initial hearing. Trial court lacked statutory authority to impose the second fee pursuant to Ind. Code § 33-35-7-6 (authorizing public defender fee at initial hearing); Ind. Code § 33-40-3-6 (authorizing reasonable attorney fees upon finding defendant has the ability to pay); and Ind. Code § 33-37-2-3 (authorizing part of attorney fees if trial court determines defendant is not indigent). Trial court determined that Defendant was indigent and did not find that he had the ability to pay costs of representation. Held, judgment reversed and remanded.

TITLE: Marshall v. State
INDEX NO.: E.6.d.1.
CITE: (1st Dist. 4/6/87), Ind. App., 505 N.E.2d 853
SUBJECT: Fines - determination of indigency
HOLDING: Ind. Code 35-38-1-18 does not prohibit Tr. Ct. from imposing fine upon indigent person. Here, D contends fine was improper because Tr. Ct. did not conduct indigency hearing as required by statute. After Tr. Ct. imposed fine and advised D of right to appeal, hearing was held to determine if D had assets to employ appellate counsel. D stated he was employed, but had no money, real estate, bank account, nor other property of any value. Tr. Ct. appointed appellate counsel. Finding of indigency for purpose of appointing defense counsel is not conclusive in regard to D's ability to pay fine. Meeker, App., 395 N.E.2d 301. Order in which sentencing & indigency hearing occur is not critical nor reversible so long as indigency hearing (which is mandatory) is conducted. Meeker. Incarceration is prohibited where indigent D cannot pay fine. Borum, App., 434 N.E.2d 581. [See also E.11.e.] Ct. is of opinion that fine cannot be enforced against D. However, D has no appealable issue because no effort has been made to enforce fine. Held, conviction affirmed.

RELATED CASES: Meunier-Short, 52 N.E.3d 927 (Ind. Ct. App. 2016) (timing of indigency hearing on D's ability to pay probation fees and costs isn't important as long as the hearing is held).

TITLE: Mathis v. State

INDEX NO.: E.6.d.1.

CITE: (10-30-02), Ind. App., 776 N.E.2d 1283

SUBJECT: Excessive public defender fees - no finding of D's ability to pay

HOLDING: Tr. Ct. erred in ordering D to pay more than \$100 in public defender fees pursuant to Ind. Code 35-33-7-6(c), which caps costs for felony at \$100. D was ordered to pay \$200 in public defender fees as result of murder & carrying handgun without license convictions. Only authority allowing D to pay more than prescribed \$100 is when Ds post cash bond pursuant to Ind. Code 35-33-8-3.2, which was not case here. D may also be ordered to pay more under Ind. Code 33-19-11.5-6, which gives Tr. Ct. general authority to impose fee over \$100, but can only be applied where Ct. makes finding of ability to pay & Ind. Code 33-19-2-3 applies only where D is not indigent. Because D was indigent & no finding had been made regarding his ability to pay, Tr. Ct. only had authority to impose public defender fees in amount of \$100. Held, remanded with instructions to reduce fee.

RELATED CASES: Langdon, 71 N.E.3d 1162 (Ind. Ct. App. 2017) (Tr. Ct. lacked statutory authority to assess a second \$50 supplemental public defender fee at sentencing hearing after having already imposed the fee at D's initial hearing); Holder, 119 N.E.3d 621 (Ind. Ct. App. 2019); Berry, 950 N.E.2d 798 (Ind. Ct. App. 2011) (Tr. Ct. must determine D's ability to pay public defender fee and must specify from which part of Indiana Code imposed costs and fees derive); Jones, 938 N.E.2d 1248 (Ind. Ct. App. 2010) (Tr. Ct. abused its discretion in ordering D to pay jury fee of \$1,322, pauper counsel fee of \$4,527 and docket fee of \$164; Ind. Code 33-37-5-19 allows clerk to collect jury fee of only \$2.00, and Tr. Ct. failed to hold hearing to determine if D was no longer indigent and thus could be ordered to pay pauper counsel fee and docket fee); Banks, App., 847 N.E.2d 1050 (noting the confusing nature of conflicting statutes on imposing public defender fees & suggesting that a thorough legislative consideration would be helpful); Davis, App., 843 N.E.2d 65 (Tr. Ct. erred in prospectively ordering D to reimburse public defender fund in amount of \$16,350 for trial & appeal; Tr. Ct. has authority to order a presently indigent D to pay restitution based on possible future earnings or other speculative prospective wealth); May, App., 810 N.E.2d 741 (Tr. Ct. erred in ordering D to pay \$750 into the supplemental public defender service fund without determining D's ability to pay pursuant to Ind. Code 35-33-7-6 & 33-9-11.5.6, or conducting a hearing to determine his ability to pay a portion of fees pursuant to Ind. Code 33-19-2-3).

TITLE: Ridley v. State
INDEX NO.: E.6.d.1.
CITE: (12-11-97), Ind., 690 N.E.2d 177
SUBJECT: Erroneous imposition of fines or costs - sentencing order
HOLDING: When Tr. Ct. imposes fines or costs pursuant to Ind. Code 35-38-1-18(a) on indigent D, Ct. must expressly state that D shall not be imprisoned for failing to pay. Whitehead, 511 N.E.2d 284; Lock, 567 N.E.2d 1155. Although Tr. Ct. in this case did not explicitly find D indigent, Ct. appointed pauper appellate counsel which showed Ct.'s awareness of D's indigence. Held, convictions affirmed; remanded with instructions to include language in sentencing order indicating that D shall not be imprisoned for failure to pay fines or costs assessed by Ct.

RELATED CASES: Whedon, 765 N.E.2d 1276 (Ct. *overruled* cases declaring that sentencing orders must include prohibition against imprisonment for failure to pay fines or costs; D's financial resources should be determined at conclusion of his incarceration, not at time of sentencing); Everroad, App., 730 N.E.2d 222 (if Tr. Ct. fails to determine indigency before ordering fines, case must be remanded for such hearing); Robles, App., 705 N.E.2d 183 (because trial judge did not find D indigent at time of sentencing with respect to his inability to pay costs in future, judge was not required to specifically indicate in sentencing order that D could not be imprisoned for failing to pay Ct. costs); Cranor, App., 699 N.E.2d 284 (imposition of \$1000 fine was erroneous because it failed to reflect D's indigency).

TITLE: Vaughn v. State

INDEX NO.: E.6.d.1.

CITE: (2/15/2013), 982 N.E.2d 1071 (Ind. Ct. App. 2013)

SUBJECT: Unauthorized order of community service in lieu of costs and fines

HOLDING: Tr. Ct. abused its discretion when it ordered indigent D to serve forty hours of community service in lieu of fines and costs. Plea agreement gave Tr. Ct. discretion regarding fines and costs. Although Tr. Ct. did not order that D would be imprisoned if she failed to complete community service, it expressly refused to eliminate the possibility of a sanction of some kind.

Court of Appeals held that although imposition of community service in lieu of costs and fines did not violate plea agreement, it was not statutorily authorized. Statutes regarding imposition of fines and costs do not address the procedure a Tr. Ct. should follow if the convicted person is indigent, and none of them mention or permit a Tr. Ct. to impose community service in lieu of costs or fines. See Ind. Code. 33-37-4-1; Ind. Code. 33-37-2-3; Ind. Code. 35-50-3-2. None of the several statutes cited by State that allow imposition of community service are relevant here. Held, judgment reversed and remanded to address imposition of costs and fees, noting that an indigent D may not be imprisoned for failure to pay fines and costs. See Whedon v. State, 765 N.E.2d 1276 (Ind. 2002). Baker, J., dissenting, notes that Tr. Ct. may impose any reasonable condition it deems appropriate when it exercises its discretion to suspend fines and costs. Campbell v. State, 551 N.E.2d 1164 (Ind. Ct. App. 1990).

TITLE: Whedon v. State
INDEX NO.: E.6.d.1.
CITE: (4-16-02), Ind., 765 N.E.2d 1276
SUBJECT: Fines - no imprisonment for indigent D's failure to pay; sentencing orders
HOLDING: When fines or costs are imposed upon an indigent D, such a person may not be imprisoned for failure to pay fines or costs. Although Indiana cases do not provide a conclusive resolution regarding whether rule requiring express prohibition of imprisonment for fines applies equally to costs, legislature requires indigency hearings both as to imposition of fines, Ind. Code 35-38-1-18(a), & costs, Ind. Code 33-19-2-3(a).

Ct. also *overruled* cases declaring that sentencing orders must include prohibition against imprisonment for failure to pay fines or costs. Remanding a sentence to insist that a prohibition upon imprisonment for failure to pay fines or costs be included in every order sentencing an indigent D does not substantially serve Ds or the just & efficient administration of justice. A D's financial resources are more appropriately determined not at time of initial sentencing but at conclusion of incarceration, thus allowing consideration of whether D may have accumulated assets through inheritance or otherwise. Held, judgment affirmed.

RELATED CASES: Banks, 847 N.E.2d 1050 (Ind. Ct. App. 2006) (I. C. 33-37-2-3 does not permit imposition of costs when a convicted person is indigent); Berry, 950 N.E.2d 798 (Ind. Ct. App. 2011) (Whedon does not require that all fees, costs, and fines be assessed after D is released from prison); Owens, 947 N.E.2d 482 (Ind. Ct. App. 2011) (Tr. Ct. did not err in imposing court costs without specifying in its sentencing order that D would not be imprisoned for nonpayment thereof); Bex, 952 N.E.2d 347 (Ind. Ct. App. 2011); Kimbrough, 911 N.E.2d 621 (Ind. Ct. App. 2009) (because Tr. Ct. did not order D to reimburse Public Defender fund or pay fine and costs until he completes executed portion of his sentence, it was not necessary to hold hearing to determine his current ability to pay); Purifoy, App., 821 N.E.2d 409 (Tr. Ct. did not err in delaying a final determination of D's indigency until completion of his term of probation); Clenna, App., 782 N.E.2d 1029 (if D is found to be indigent as to attorney fees, then he is also as matter of law indigent as to any fines & costs that are assessed); McRoy, 794 N.E.2d 539 (Ind. Ct. App. 2003), *clarified on reh'g*, 798 N.E.2d 521 (Ind. Ct. App. 2003) (appointment of counsel affords only a presumption of indigency at time of sentencing); Dunkley, App., 775 N.E.2d 1121 (Tr. Ct. erred when it ordered D to pay cost & fine as part of sentence without holding indigency hearing or expressly stating in its sentencing order that D shall not be imprisoned for inability to pay imposed cost & fine).

E. SENTENCING

E.6. Miscellaneous sentencing treatment/alternatives

E.6.h. Restitution/contribution to third party (condition of probation, Ind. Code 35-38-2-2(a)(5); in general, Ind. Code 35-50-5-3)

TITLE: Akehurst v. State
INDEX NO.: E.6.h.
CITE: (12/7/2018), 115 N.E.3d 515 (Ind. Ct. App. 2018)
SUBJECT: Restitution does not include lost wages arising from sentencing hearings
HOLDING: Trial court abused its discretion in including in its restitution order lost wages the victim incurred on the day of sentencing. Ind. Code § 35-50-5-3(a)(4) limits restitution to those earnings lost “before the date of sentencing.” Victim's lost wages for the time she took off work to attend and testify at the sentencing hearing occurred concurrent with the sentencing date and not before. However, Tr. Ct. properly ordered D to pay the difference between what the victim’s insurance paid for damage to her vehicle and what she owed on her car loan. Held, judgment affirmed in part and reversed in part and remanded.

TITLE: Archer v. State
INDEX NO.: E.6.h.
CITE: (9/6/2017), 81 N.E.3d 212 (Ind. 2017)
SUBJECT: Sufficient evidence supports restitution order
HOLDING: Restitution is based on damage "incurred as a result of the crime." Ind. Code § 35-50-5-3(a)(1). In this case, D pled guilty to stealing a vehicle and was ordered to pay \$5,240 in restitution for spray-paint damage done to the vehicle during the five hours it was stolen. On appeal, D argued that the State did not present evidence that she caused the spray-paint damage to the vehicle. D was driving the vehicle when it was recovered and it had fresh paint all over its front and sides as well as covering the vehicle's VIN. Although no one testified that D was the one who spray-painted the vehicle, it was reasonable to infer that D was responsible for the damage done to it while it was in her control.

Court also held that because the restitution order was part of D's probation, the Tr. Ct. was required to inquire into her ability to pay. The Tr. Ct.'s inquiry here was adequate. Distinguishing Bell v. State, 59 N.E.3d 959 (Ind. 2016), Court held that because D agreed to pay restitution and she testified she is able to work and hopes to secure employment in the future, Tr. Ct. did not abuse its discretion in finding she had the ability to pay \$25 per month restitution. Held, transfer granted, Court of Appeals' opinion at 71 N.E.3d 834 vacated, judgment affirmed.

TITLE: Baker v. State

INDEX NO.: E.6.h.

CITE: (1/25/2017), 70 N.E.3d 388 (Ind. Ct. App. 2017)

SUBJECT: Restitution determined by actual value of loss, not replacement cost

HOLDING: Restitution for a totaled car is determined by the value of the car, not the difference between the cost of a new car and the insurance proceeds paid to the victim. While intoxicated, Defendant crashed into Nancy Apollos' 1996 Buick Park Avenue, totaling the car. He pled guilty to OWI Endangering a Person. At the restitution hearing, Apollos testified that she recently bought a 2002 Buick Century, which cost her \$3,800.00, and that the insurance company paid her \$1,718.00 for the loss of the Park Avenue. Therefore, she argued, and the trial court agreed, that Defendant should pay \$2,082 in restitution, the difference between the cost of the new car and the payout from the insurance company. In so ordering, the trial court abused its discretion because restitution is based on the "actual cost of repair (or replacement if repair is inappropriate)." Ind. Code § 35-50-5-3(a)(1). A victim is entitled only to the actual replacement cost, *i.e.* value, of the destroyed item. S.G. v. State, 956 N.E.2d 668 (Ind. Ct. App. 2011), *trans. denied*. Held, judgment reversed.

TITLE: Balls v. State

INDEX NO.: E.6.h.

CITE: (4th Dist.; 3-15-00), Ind. App., 725 N.E.2d 450

SUBJECT: Restitution - based on value rather than actual loss sustained by victim

HOLDING: Tr. Ct. properly ordered D to pay \$8,000 restitution for stealing \$8,000 of food stamps although cost of replacement of food stamps would be substantially less than \$8,000. Ct. shall base its restitution order upon consideration of property damages of victim incurred as result of crime, based on actual cost of repair (or replacement if repair is inappropriate). Ind. Code 35-50-5-3(a)(1). Here, D claimed that restitution order should be limited to actual loss sustained by government agency printing food stamps, not face amount of stolen food stamps. However, Ct. analogized food stamps to bearer paper which is negotiable by holder of instrument for amount upon face of instrument. Because amount written upon face of negotiable bearer instrument is competent evidence to its value, food stamps stolen were worth \$8,000. It would not comport with logic, reason, or common sense to say that restitution is confined to minimal cost of printing new food stamps. Held, judgment affirmed.

TITLE: Bearden v. Georgia

INDEX NO.: E.6.h.

CITE: 461 U.S. 660 (1983) 05/24/1983

SUBJECT: Sentencing -- revocation of probation & imprisonment for failure to pay restitution & fine

HOLDING: D was convicted of burglary & theft by receiving stolen property. He was sentenced to probation on condition that he pay \$500.00 fine & \$250.00 in restitution with \$100.00 payable that day, \$100.00 next day, & \$550.00 balance within four months. D borrowed money & paid first \$200.00, but about month later he was laid off from his job, & despite repeated efforts, was unable to find other work. Shortly before \$550.00 balance became due, he notified probation office that his payment was going to be late. Thereafter, State filed petition to revoke petitioner's probation because he had not paid balance & Tr. Ct., after hearing, revoked probation, entered conviction, & sentenced D to prison. Record of hearing disclosed that D had been unable to find employment & had no assets or income. Ct. held that sentencing Ct. cannot properly revoke D's probation for failure to pay fine & make restitution, absent evidence & finding that he was somehow responsible for failure or that alternative forms of punishment were inadequate to meet State's interest in punishment & deterrence. Here, Tr. Ct. erred in automatically revoking D's probation & turning fine into prison sentence without making such determination. On remand, if Tr. Ct. determines that D did not make sufficient bona fide efforts to pay his fine or determines that alternative punishment is not adequate to meet State's interests in punishment & deterrence, imprisonment would be permissible sentence. Unless such determinations are made, however, fundamental fairness requires that D remain on probation. Held, judgment reversed & case remanded for further proceedings; White, J. concurring.

RELATED CASES: Szpunar, 914 N.E.2d 773 (Ind. Ct. App. 2009) (State failed to present sufficient evidence that D willfully failed to pay restitution although he had only paid \$464 towards his \$1,387,550 restitution order).

TITLE: Bell v. State
INDEX NO.: E.6.h.
CITE: (9/29/2016), 59 N.E.3d 959 (Ind. 2016)
SUBJECT: Sentencing- restitution as condition of probation requires inquiry into D's ability to pay
HOLDING: Under Ind. Code § 35-38-2-2.3(a)(6), a Tr. Ct. may order restitution as a condition of probation, even if the defendant has been found indigent for other purposes. However, the Tr. Ct. must fully assess a defendant's ability to pay when ordering restitution to prevent indigent defendants from being imprisoned for probation violation due to failure to pay restitution. Here, D presented evidence supporting her claimed inability to pay \$932 in restitution for her criminal mischief conviction, but State did not rebut her testimony and Tr. Ct. made no further inquiry. Thus, Tr. Ct. abused its discretion in ordering restitution and its order must be vacated. Where (unlike here) there is no record as to whether a defendant had the inability to pay, remand for a new restitution order is still an appropriate remedy. Held, transfer granted, Court of Appeals' memorandum opinion vacated, restitution order vacated. Slaughter, J., joined by Massa, J., concurring in part and dissenting in part, would remand to allow Tr. Ct. to enter fully lawful sentence. "We do not know what sentence the Tr. Ct. would have imposed had it concluded Bell could not afford restitution."

Note: Following Rich v. State, 890 N.E.2d 44, 48 (Ind. Ct. App. 2008), Court also found no waiver despite D's failure to object at time the restitution order was entered. "[A] restitution order is part of the sentence, and it is the duty of the appellate courts to bring illegal sentences into compliance."

TITLE: Blixt v. State

INDEX NO.: E.6.h.

CITE: (1st Dist., 08-21-07), Ind. App., 872 N.E.2d 149

SUBJECT: Bond- release agreement can allow withholding of restitution from cash bond

HOLDING: Effective July 1, 2006, after D's offense, the Indiana Legislature authorized Tr. Ct. to require a D posting a cash bond to execute an agreement allowing retention of all or a part of the cash to pay restitution. See Ind. Code 35-33-8-3.2(a). Here, although the statutory provision granting authority for the procedure used was not in effect on the date of D's offense, D agreed that Tr. Ct. could apply his cash bond to a restitution order when he signed a Notice stating "I understand that upon conviction cost for counsel, Ct. costs, restitution, & any other fees may be deducted. Any remaining balance will be returned to me at the below address." Because D did not challenge the Notice, but rather accepted the benefits of the bond agreement, he cannot challenge the Notice on appeal. Held, judgment affirmed.

RELATED CASES: Wright, 949 N.E.2d 411 (Ind. Ct. App. 2011) (pursuant to Ind. Code 35-33-8-3.2(a)(2), Tr. Ct. has authority to retain cash bail bond for fines, costs and fees where D executes cash bail-bond agreement authorizing retention of all or part of bond in the event D fails to appear or is convicted; indigency hearing not required; see full review at B.2.b).

TITLE: Bulthuis v. State

INDEX NO: E.6.h.

CITE: (9/23/2014), 17 N.E.3d 378 (Ind. Ct. App. 2014)

SUBJECT: Restitution for meth lab cleanup expenses

HOLDING: In dealing in methamphetamine prosecution, Tr. Ct. did not err in ordering D to pay \$2,443 incurred by the State in removing items found in garage that had been used to manufacture meth. Under Ind. Code § 35-48-4-17(a), Tr. Ct. is required to order D to pay restitution to cover costs of any environmental cleanup incurred by State as a result of D's manufacture of methamphetamine. Held, judgment affirmed.

RELATED CASES: Fisher, 52 N.E.3d 871 (Ind. Ct. App. 2016) (even though plea agreement did not mention restitution, trial court properly ordered D to pay restitution costs for meth lab cleanup, pursuant to Ind. Code 35-48-4-17, because the plea agreement must be construed as having been made in contemplation of applicable law. See Id.).

TITLE: Cherry v. State
INDEX NO.: E.6.h.
CITE: (4th Dist., 7-10-02), Ind. App., 772 N.E.2d 433
SUBJECT: Restitution - prejudgment interest
HOLDING: Because Indiana's criminal restitution statute does not specifically authorize Tr. Ct. to include pre-sentence interest in a restitution order, Tr. Ct. may not do so. Neither does Ind. Code 35-50-5-3 authorize as restitution the \$500 "fee" for insufficient-funds checks written by D to victim or the \$8,338 credit to D for services rendered to D on an unrelated matter. There is no statutory basis for inclusion of insufficient-funds fee in restitution calculations, & credit plainly has nothing to do with D's thefts. Thus, Tr. Ct. abused its discretion by including these amounts in its restitution calculations. Held, sentence affirmed & order of restitution in amount of \$211,050 vacated. Pursuant to Appellate Rule 66(C)(10), Ct. entered restitution order for \$124,291.

TITLE: Clausen v. State

INDEX NO.: E.6.h.

CITE: (3rd Dist., 04-12-93), Ind. App., 612 N.E.2d 147

SUBJECT: Restitution order improper

HOLDING: Where Tr. Ct. failed to adequately determine amount of restitution, D's ability to pay it, & manner of performance, remand for hearing on these issues was proper. After conviction for child molesting, D was ordered to pay costs of counseling for victim for 5 year period, beginning on her return from drug & alcohol treatment center. Although such restitution may be properly ordered as condition of probation, Ind. Code 35-38-2-2.3(a)(5) requires that Ct. fix amount of restitution, manner of performance and that amount not exceed what D can pay.

Tr. Ct. considered D's employment history, latest salary, assets & liabilities, & general financial situation, but there was no inquiry into cost or length of victim's counseling. Ct. found that without this information, Tr. Ct. could not fix amount of restitution or determine D's ability to pay it. Additionally, Ct. found Tr. Ct. did not fix manner of performance or determine how D would make payments while in jail. Because Tr. Ct. did not comply with statute, cause was remanded for rehearing on these issues. Decision of Ct. App. affirmed on transfer at 622 N.E.2d 925. See card at O.4.d.8 on other issue.

RELATED CASES: M.L., App., 838 N.E.2d 525 (juvenile Ct. must inquire into a juvenile's ability to pay before the Ct. can order restitution as a condition of probation; see full review, this section); Jaramillo, App., 803 N.E.2d 243, *sum. aff'd* 823 N.E.2d 1187 (Ct. remanded with instructions to set manner of performance regarding payment of several restitution orders after considering D's ability to pay); Garrett, App., 680 N.E.2d 1 (probation restitution order requiring D to make good faith effort to pay restitution "as determined by probation department" was unreasonably vague); McGuire, App., 625 N.E.2d 1281 (Tr. Ct. erred in ordering restitution in amount to be determined by probation department, & in allowing probation to determine method of payment. Ind. Code 35-38-2-2.3(a)(5) requires that Tr. Ct. determine amount of restitution & manner of performance. Although Tr. Ct. placed upper limit on amount of restitution, it did not comply with statute, so cause was remanded for hearing on restitution).

TITLE: Creager v. State

INDEX NO.: E.6.h.

CITE: (2nd Dist., 10-17-00), Ind. App., 737 N.E.2d 771

SUBJECT: Restitution - loss of future child support

HOLDING: Tr. Ct. erred in ordering \$100,000 in restitution for loss of child support past date of D's sentencing. Children of homicide victim are clearly "victims" entitled to restitution under Ind. Code 35-50-5-3. Correspondingly, child support qualifies as "lost earnings" for child victim within meaning of Ind. Code 35-50-5-3(a) because death of adult victim results in cessation of child support payments. However, Tr. Ct. exceeded its authority when it ordered D to make restitution for future loss of child support based upon future time span of eleven years. I.C 35-50-3(a)(3) limits restitution to earnings lost before date of sentencing. Held, restitution order reversed & remanded with instructions to recalculate amount of restitution for time period from date of adult victim's death to date of D's sentencing.

TITLE: Disney v. State

INDEX NO.: E.6.h.

CITE: (1st Dist. 10/28/82), Ind. App., 441 N.E.2d 489

SUBJECT: Sentencing - restitution

HOLDING: Ct. may require restitution/reparation as condition of probation (Ind. Code 35-7-2-1(a)(5)) if such requirement is stated on the record at sentencing (Ind. Code 35-7-1-1) & included in written statement of conditions of probation given to D at sentencing (Ind. Code 35-7-2-1). Ind. Code 11-13-1-3, which requires probation officers to give probationer written statement of conditions & instruct probationer regarding conditions, does not relieve Tr. Ct. of responsibility to specify terms of probation & to provide D with a written statement of such conditions at, & as a part of, the sentencing hearing. Here, Tr. Ct. imposed restitution as a condition of probation after sentencing hearing. Held, error; cause remanded with order to strike restitution as condition of probation.

RELATED CASES: Winter, App., 587/691 (where in original sentencing proceeding, imposition of restitution as condition of probation was erroneous because restitution amount was not sufficiently supported by evidence in record, remand for new restitution determination is not barred by concerns of double jeopardy. Because Ind. Code 35-38-2-2(a)(5) & 35-50-5-3 do not impose burden upon State, & Tr. Ct. is vested with discretion to impose restitution & determine its terms, principles of double jeopardy do not preclude redetermination of restitution.); Kingston, App., 479 N.E.2d 1356 (Crim L 982.5(2), 1208.4 (2); where D struck traffic light pole, fled scene & in fleeing struck 2 parked cars, restitution order to both highway department & car owners was proper condition of probation for crime of leaving scene of accident).

TITLE: Dolan v. United States
INDEX NO.: E.6.h.
CITE: (06-14-10), U.S., 130 S. Ct. 2533
SUBJECT: Court permits restitution order even though the statutory 90-day period had expired
HOLDING: The provision of the Mandatory Victims Restitution Act of 1996 providing that a court “shall order” certain Ds to make restitution to victims during a time “not to exceed 90 days after sentencing” is a time-related directive that does not deprive a judge of the power to take the action to which the deadline applies if the deadline is missed.

Here, Tr. Ct. had advised D prior to the deadline that restitution would be ordered but the amount had yet to be determined. Court looked at the language and the purposes of the MVRA and noted that the law specified no consequence for missing the 90-day post-sentencing deadline. The law had less to do with the certainty of the D’s sentence and was aimed more to benefit the victim of the crime. Thus, in some circumstances, a sentencing court that has missed the 90-day deadline for entering an order of restitution under the MVRA may nevertheless order restitution.

D had pointed out to the Court that the delay could postpone for more than 90 days his appeal of his sentence, and the court intimated (but did not hold) that the sentence would not have been final with the amount of restitution left open. Held, Tenth Circuit Court of Appeals’ opinion at 571 F.3d 1022 affirmed. Roberts, C.J., joined by Stevens, Scalia and Kennedy, JJ., DISSENTING, would hold that restitution must be ordered at the time of sentencing, if at all, and viewed the law as a limited exception to the general rule that a sentence may not be modified once it is imposed. Here, the trial judge did not act in accordance with the clear statutory text and the general rule prohibiting untimely modification should have been applied.

TITLE: Dupin v. State
INDEX NO.: E.6.h.
CITE: (4th Dist. 6/13/88), Ind. App., 524 N.E.2d 329
SUBJECT: Probation conditions - restitution/insurance settlement
HOLDING: Settlement payments to victims from D's insurance company cannot be set off against D's restitution obligations to same victims. Primary goal of restitution is to vindicate society's rights, not to compensate D's victim. Miller, 502 N.E.2d 92. Restitution is part of criminal sentence, like fine or other penalty. Id. Thus, civil settlement is no substitute for restitution. [Citations from other jurisdictions omitted.] Conditions of probation are within discretion of Tr. Ct. Further, settlement agreements here contained specific language that settlement would have no application to any restitution obligation imposed upon D. Held, D not entitled to set-off for insurance settlements.

TITLE: Fisher v. State
INDEX NO.: E.6.h.
CITE: (3/31/2016), 52 N.E.3d 871 (Ind. Ct. App. 2016)
SUBJECT: Statute requires restitution even if plea agreement did not
HOLDING: Tr. Ct. did not abuse discretion in ordering D to pay restitution, even though the plea agreement did not call for it, because the plea agreement must be read as having been made in contemplation of Ind. Code 35-48-4-17, which requires restitution in cases where the State incurs costs to clean meth labs.

Police found a makeshift meth lab in D's vehicle. A State Police lab team incurred \$1,432.49 in costs to clean up the lab. D pled guilty to Class B felony attempted dealing in meth. The Tr. Ct. ordered D to pay the lab's cleanup costs.

While it is generally true a Tr. Ct. cannot order restitution if a plea agreement does not call for it – See Edsall v. State, 983 N.E.2d 200, 208-09 (Ind. Ct. App. 2013) - it is also true that Ind. Code § 35-48-4-17 requires a Tr. Ct. to order restitution for cleanup costs incurred by law enforcement in meth cases. A plea agreement, like all contracts, must be construed as having been made in contemplation of applicable law. E.g., Mouch v. Ind. Rolling Mill Co., 93 Ind. App. 540, 151 N.E. 137, 138-29 (1926) (holding that statutes that exist at the time a contract is made must be read into the contract unless expressly excluded by the contractual language). Here, D's plea agreement was entered into in 2015, more than a decade after the 2003 enactment of the statutory requirement to pay restitution for meth lab cleanups. See Ind. Code 35-48-4-17. Thus, the plea agreement implicitly incorporated this statutory restitution requirement. See Lee v. State, 816 N.E.2d 35, 38 (Ind. 2004). Therefore, the Tr. Ct. did not err by ordering restitution. Held, judgment affirmed.

TITLE: Garcia v. State

INDEX NO.: E.6.h.

CITE: (12/21/2015), 47 N.E.3d 1249 (Ind. Ct. App. 2015)

SUBJECT: Insufficient evidence to support restitution order

HOLDING: In forgery prosecution, Tr. Ct. abused its discretion in ordering \$3,600 in restitution to victim. A restitution order must be supported by sufficient evidence of actual loss sustained by the victim of a crime. Rich v. State, 890 N.E.2d 44 (Ind. Ct. App. 2008). Here, D sold fake Morgan dollar coins to victim, who gave D \$3,600 for 180 coins. D objected to the restitution order and victim did not appear at the sentencing hearing or submit an affidavit. The only support for the restitution order came from the probable cause affidavit, which is not a valid basis for upholding the order. The State offered no other proof of the amount of the victim's loss and no additional evidence or testimony concerning the \$3,600 estimate was presented. Held, sixty-six month sentenced affirmed, remanded with instructions to conduct a new hearing at which both the State and D may present additional evidence bearing on the restitution due to victim. Bradford, J., dissenting, believes probable cause affidavit can be relied on because evidence rules do not apply in sentencing hearings, and Ind. Code § 35-50-5-3 does not limit consideration of restitution to evidence admissible in a trial. Victim paid currency for fake coins, "an easily definable loss not subject to valuation attack." Dissent also believes making victim appear at sentencing or file an affidavit would be an "unnecessary and unwarranted re-victimization" of crime victims and an unacceptable burden on Indiana criminal justice system generally.

RELATED CASES: Lisk, 145 N.E.3d 838 (Ind. Ct. App. 2020) (distinguishing Garcia, Ct. upheld \$400 restitution order which was based probable cause affidavit in PSI report entered into evidence without objection & D did not contest amount).

TITLE: Gil v. State
INDEX NO.: E.6.h.
CITE: (6/5/2013), 988 N.E.2d 1231 (Ind. Ct. App. 2013)
SUBJECT: Advisable to apportion restitution liability among co-Ds
HOLDING: Indiana Constitution, Article 1, Section 16 provides that "[a]ll penalties shall be proportioned to the nature of the offense." Thus, sentencing courts should consider whether imposing joint and several liability for the full amount of restitution ordered is constitutionally proportionate to the nature of the offense committed by a D who has caused only a portion of the damages and in relation to the sentences entered against other co-Ds for the same course of conduct. It may be particularly advisable to apportion liability among Ds under some factual circumstances, such as when there are varying lengths and levels of involvement by the criminal participants. Held, judgment reversed and remanded on other grounds.

TITLE: Gipperich v. State

INDEX NO.: E.6.h.

CITE: (3rd Dist., 12-11-95), Ind. App., 658 N.E.2d 946

SUBJECT: Restitution - attachment of attorney trust accounts

HOLDING: Tr. Ct.'s order permitting attachment of money held in attorney trust account did not meet requirements of statute regarding fraudulent conveyances. Upon motion of State, hearing was held requesting determination of D's assets & ability to pay restitution. Evidence revealed that D gave money to counsel for prospective legal fees. State argued that D paid in advance for legal services not yet incurred to deny victims & State restitution to which he agreed. After hearing, Tr. Ct. directed attorneys to pay \$5,000 of money held in trust accounts to clerk of Ct. until further order. Case law, developed under now repealed statutory provisions, required indicia or "badges of fraud" as described in.

TITLE: Green v. State

INDEX NO.: E.6.h.

CITE: (2nd Dist., 7-15-04), Ind. App., 811 N.E.2d 874

SUBJECT: Erroneous restitution order - forensic sexual assault examination

HOLDING: In criminal confinement & criminal deviate conduct prosecution, Tr. Ct. erred when it ordered D to pay \$1,345 in restitution to Adams County Prosecuting Attorney's deferral fund. State sought to be reimbursed for cost of forensic sexual assault examination performed on D following his arrest. Distinguishing Hendrickson v. State, 690 N.E.2d 765 (Ind. Ct. App. 1998), & Ault v. State, 705 N.E.2d 1078 (Ind. Ct. App. 1999), Ct. held that Tr. Ct. was not authorized to order restitution for the cost of examination because State was not a "victim" under these circumstances. There was no evidence that State expended any funds on complaining witness's behalf. Further, cases did not hold that State is considered a "victim" under Ind. Code 35-50-5-3(a) any time it elects to spend money to obtain criminal evidence. If that were prevailing rule of law, then State would seek restitution for any & all of its discovery costs. Finally, even if State were properly considered a "victim" in this case, it is significant that D was only convicted of criminal confinement. Portions of restitution order covering crimes to which D did not plead guilty, of which he was not convicted, or did not agree to repay as restitution, are contrary to law. Polen v. State, 578 N.E.2d 755 (Ind. Ct. App. 1991). Held, judgment reversed & remanded with instructions to vacate restitution order.

RELATED CASES: Hill, 25 N.E.3d 1280 (Ind. Ct. App. 2015) (restitution order that included value of items allegedly stolen, for which D was never charged, was an abuse of discretion); Edsall, 983 N.E.2d 200 (Ind. Ct. App. 2013) (Tr. Ct. erred in ordering D to repay over \$19,000 that drug task force spent during course of its undercover investigation, because State was not a "victim" as contemplated by restitution statute); Lohmiller, App., 884 N.E.2d 903 (in forgery & practicing nursing without license prosecution, Tr. Ct. committed fundamental error in ordering D to pay \$25,000 in restitution to Carroll County for potential liability it could have incurred as result of non-existent lawsuits & to reimburse county for portion of D's salary; award had no evidentiary basis) (1992), Ind. App., 587 N.E.2d 182. Here, hearing did not meet requirements of statutory provisions because there was no determination of transferor's intent & date of transfers was not disclosed. Held, reversed & remanded for redetermination of fraudulent conveyance.

TITLE: Haltom v. State
INDEX NO.: E.6.h.
CITE: (08-16-05), Ind., 832 N.E.2d 969
SUBJECT: Restitution - civil settlements do not preclude restitution order in criminal cases
HOLDING: In ordering restitution in criminal case, Tr. Ct. is not bound by civil settlement agreement between D's insurance carrier & victim. Civil settlements have no bearing on criminal punishment. Crawford v. State, 770 N.E.2d 775 (Ind. 2002). While criminal Ct.'s are permitted to take note of such agreements in deciding whether to order restitution & in what amount, these agreements in no way preclude a criminal Ct. from ordering restitution when appropriate under Ind. Code 35-50-5-3.

Here, before D's conviction for operating while intoxicated causing serious bodily injury, accident victim signed a release of all claims & received a \$100,000 settlement from D's insurance carrier in her civil action. Notwithstanding settlement agreement, Tr. Ct. in criminal case had authority to award \$27,956.68 in restitution for victim's medical expenses & lost wages. A private contract to which neither the State nor the Ct. are parties cannot impinge upon authority of State to seek & Ct. to impose a criminal sanction. Held, transfer granted, Ct. App.' opinion at 822 N.E.2d 977 vacated, judgment affirmed; Dickson, J., concurring with separate opinion; Boehm, J., concurring in part & dissenting in part; Shepard, C.J., dissenting.

RELATED CASES: Kelley, 11 N.E.3d 973 (Ind. Ct. App. 2014) (Tr. Ct. did not abuse discretion by reducing D's restitution obligation by amount victim obtained in civil suit against D); McKenney, App., 848 N.E.2d 1127 (restitution for failure to pay child support is not prevented because order is outside statute of limitations to bring civil suit); Myers, App., 848 N.E.2d 1108 (restitution order must be offset by amount paid to victim through civil judgment in order to avoid double recovery).

TITLE: Henderson v. State
INDEX NO.: E.6.h.
CITE: (1st Dist.; 06-01-06), Ind. App., 848 N.E.2d 341
SUBJECT: Restitution -- insurance company's investigative expenses cannot be included in restitution order
HOLDING: Insurance company's investigative expenses are not compensable as restitution in an arson case. IC 35-50-5-3 lists the considerations upon which a restitution order can be based, including earnings lost by the victim as a result of the crime. Lost earnings is defined by Black's Law Dictionary as "[w]ages, salary, or other income that a person could have earned if he or she had not lost a job, suffered a disabling injury, or died."

Here, the D was convicted of arson of a trailer. The judge ordered D to pay \$20,000 restitution to Allstate, who insured the trailer & spent \$20,000 investigating the fire. The \$20,000 was money that Allstate expended, not money that it lost. There is no evidence that Allstate lost any revenue or other income as a result of the fire. Allstate is not entitled to restitution pursuant to criminal proceeding because the losses that it incurred do not fall into statutorily compensable category of restitution. Thus, Tr. Ct. erred in ordering D to pay restitution to Allstate as condition of probation. Held, judgment affirmed in part & reversed in part; Sullivan, J., concurring with separate opinion.

RELATED CASES: Morgan, 49 N.E.3d 1091 (Ind. Ct. App. 2016) (Tr. Ct. erroneously ordered restitution in excess of victim's loss and \$250.00 insurance deductible); Gonzalez, 3 N.E.3d 27 (Ind. Ct. App. 2014) (Tr. Ct. abused its discretion by ordering D to pay restitution to company that paid workers compensation claim to victim who was a correctional officer beaten by D in the course of his employment); Lang, 911 N.E.2d 131 (Ind. Ct. App. 2009) (expenses incurred by Conservancy District when investigating its financial records was not an appropriate basis for a criminal restitution award); Bockler, 908 N.E.2d 342 (Ind. Ct. App. 2009) (restitution to fire department that expended money to dive for D who swam away from police in order to avoid arrest could not include amortized depreciation of equipment used or general expense reimbursement).

TITLE: Hendrickson v. State

INDEX NO.: E.6.h.

CITE: (1st Dist., 1-30-98), Ind. App., 690 N.E.2d 765

SUBJECT: Restitution to drug task force - no error

HOLDING: Trial Ct. properly ordered D to pay restitution to drug task force for amount of money used to conduct drug purchases. D argued that because drug task force knowingly and voluntarily expended money in order to acquire evidence, it was not entitled to restitution. Ct. disagreed and held that state entity may be considered "victim" under restitution statute. Ind. Code 35-50-5-3(a)(1); Judge v. State, 659 N.E.2d 608 (Ind. Ct. App. 1995). Requiring D to pay drug task force for buy money expended during sting operation advances Indiana's public policy of ensuring that victims are reimbursed, and Ds are prevented from being unjustly enriched by their criminal acts. Held, no error.

RELATED CASES: Edsall, 983 N.E.2d 200 (Ind. Ct. App. 2013) (distinguishing Hendrickson, Ct. held that under facts of this case, State was not a "victim" under restitution statute, thus Tr. Ct. erred in ordering D to repay over \$19,000 that drug task force spent during course of its undercover investigation); Ault, App., 705 N.E.2d 1078 (no error in ordering resitution to State & to mother of injured infant in amount of \$450,000; Ind. Code 35-50-5-3(a)(2) does not require that victim directly receive payment covering cost of his care); Green, App., 811 N.E.2d 874 (distinguishing Hendrickson & Ault, Ct. held that Tr. Ct. erred in ordering restitution for cost of forensic sexual assault examination because State was not a "victim"; see full review, this section).

TITLE: Huddleston v. State

INDEX NO.: E.6.h.

CITE: (2-25-02), Ind. App., 764 N.E.2d 655

SUBJECT: Restitution - income lost by victim's parent

HOLDING: On rehearing, Ct. vacated its previous opinion reversing Tr. Ct.'s order for D to pay restitution based on finding that evidence was insufficient to show victim suffered injury, harm, or loss as direct & immediate result of D's acts. However, Appellee's Appendix was filed, but misplaced by Clerk's office. Appendix contained pre-sentence investigation report which included victim impact statement requesting restitution. That evidence, combined with letter from victim's employer indicating days of missed work without pay, was sufficient evidence to demonstrate that victim suffered injury, harm or loss. Held, rehearing granted, original opinion at 756 N.E.2d 1054 vacated, Tr. Ct.'s order of restitution affirmed.

RELATED CASES: Akins, 39 N.E.3d 410 (Ind. Ct. App. 2015) (insufficient evidence for restitution award for officer's injuries because State's evidence did not identify who caused officer's injuries); Morris, 985 N.E.2d 364 (Ind. Ct. App. 2013) (even though plea agreement did not mention restitution, Tr. Ct. had authority to order restitution because D's plea was an open plea, leaving sentence entirely to Tr. Ct.'s discretion; see full review, this section); Cooper, App., 831 N.E.2d 1247 (Tr. Ct. abused its discretion when it ordered D to pay restitution to battery victim's father & stepmother for their claimed lost wages).

TITLE: Iltzsch v. State

INDEX NO.: E.6.h.

CITE: (08-14-12), 972 N.E.2d 409 (Ind. Ct. App. 2012), *sum. aff'd*. 981 N.E.2d 55 (2013)

SUBJECT: Restitution - valuation based on speculation

HOLDING: In burglary prosecution, Tr. Ct. abused its discretion in ordering D to pay restitution in the amount of \$711.95. The restitution order was based solely on the "Victim Impact Statement" written by the officer who prepared D's Pre-Sentence Investigation Report. In the statement, the officer indicated that victim had informed her that nothing was taken during the burglary, but that D had destroyed his antique record collection, which was worth "approximately \$300.00" and that his television "had to be replaced and the loss was \$411.95." The only evidence supporting the restitution order was the probation officer's secondhand account of victim's bare, unsworn assertions that his property had been damaged and that his total loss was \$711.95, without any supporting documentation or testimony, and without any explanation of how the property was damaged or how victim arrived at these valuations. Court also found it troubling that D was not provided with the information that formed basis of restitution order until shortly before the sentencing hearing. Held, judgment reversed.

TITLE: Iltzsch v. State

INDEX NO.: E.6.h.

CITE: (1/24/2013), 981 N.E.2d 55 (Ind. 2013)

SUBJECT: Restitution - rehearing after reversal permitted

HOLDING: When the State fails to present sufficient evidence to justify Tr. Ct.'s restitution order, the appellate courts should remand the case for a hearing wherein the state can present new evidence. Here, the Court of Appeals reversed D's order for restitution because the only evidence that there was \$711 of damage was from the victim in the Pre-Sentence Report. The Court of Appeals also found that it would be inappropriate to give the State a second bite at the apple with a second restitution hearing. However, the Indiana Supreme Court found precedent that supports remanding for additional evidence. Thus, the case is remanded to Tr. Ct. with instructions to conduct a new restitution hearing at which the State will be permitted to present, and D will be allowed to confront, any additional evidence supporting the victim's property loss. Held, the Court of Appeals opinion at 972 N.E.2d 409 (Ind. Ct. App. 2012) is vacated as to the remand; the remaining portions of the opinion are summarily affirmed; Dickson, C.J., dissenting on the basis that permitting the State a second opportunity to overcome its deficiency in proof is inconsistent with principles prohibiting double jeopardy.

TITLE: J.B. v. State
INDEX NO.: E.6.h.
CITE: (5/27/2016), 55 N.E.3d 831 (Ind. Ct. App. 2016)
SUBJECT: Juvenile court may not reduce restitution order to a civil judgment
HOLDING: Ind. Code § 31-37-19-5(b)(4) permits Tr. Ct. to order juvenile to pay restitution, but does not provide authority to impose a civil judgment as part of a restitution order. Thus, Tr. Ct. erred in ordering J.B. to pay the restitution owed to his victims as a civil judgment in two cases after he violated his probation. Although Tr. Ct. rescinded the civil judgment orders during pendency of appeal, rendering the case moot, Court chose to rule on the merits of the case because it involves an issue of public interest likely to recur.

TITLE: J.L.T. v. State

INDEX NO.: E.6.h.

CITE: (1st Dist.; 5-12-99), Ind. App., 712 N.E.2d 7

SUBJECT: Restitution - limited only by loss of victim

HOLDING: Level of offense has no bearing on amount of restitution Ct. may impose. Juvenile Ct. may order juvenile to pay restitution if victim provides reasonable evidence of victim's loss, which child may challenge at dispositional hearing. Ind. Code 31-3-7-19-5. Here, juvenile argued that maximum amount of restitution could not exceed \$2,500.00, which was maximum amount at which offense was Class D felony. Because victim testified that cost of repair or replacement of headstone which juvenile damaged was approximately \$14,000.00 & evidence revealed that juvenile caused more damage than his cohorts, Tr. Ct. properly ordered juvenile to pay two thirds of total damages, \$9,333.00 in restitution. Held, judgment affirmed.

RELATED CASES: S.G., 956 N.E.2d 668 (Ind. Ct. App. 2011) (juvenile court erred by ordering restitution of \$500.76 which is the amount the victim spent for an iPhone 4G when the phone that was stolen was an iPhone 3G).

TITLE: Kays v. State
INDEX NO.: E.6.h.
CITE: (03-20-12), 963 N.E.2d 507 (Ind. 2012)
SUBJECT: Court may consider social security benefits in determining restitution
HOLDING: Social security benefits may be considered by a Tr. Ct. in determining the "amount the person can or will be able to pay" in restitution pursuant to Ind. Code 35-38-2-2.3(a)(5). The Social Security Act's "anti-attachment provision", 42 U.S.C. § 407(a), states that social security benefits shall not be "subject to execution, levy, attachment, garnishment, or other legal process."

Here, D was convicted of battery, and Tr. Ct. ordered restitution of \$1496.15 to victim for her medical bills. D's sole source of income was \$674 per month in social security disability payments. Court of Appeals concluded *sua sponte* that a restitution order is an "other legal process" pursuant to 42 U.S.C. § 47(a), which cannot be applied to social security benefits. Supreme Court agreed with Court of Appeals that Tr. Ct. improperly failed to inquire into D's ability to pay and improperly failed to establish the manner and time of D's payments. However, nothing in 42 U.S.C. § 407(a) prohibits a Tr. Ct. from considering a D's social security income when determining his or her ability to pay restitution. Noting "scant case authority" on this issue, Court found persuasive decisions from other courts that have permitted consideration of income or other assets that cannot be levied against in assessing a D's overall ability to pay fines or restitution. Held, transfer granted, Court of Appeals' opinion at 945 N.E.2d 806 vacated, judgment reversed and remanded for further proceedings.

TITLE: Kelly v. Robinson

INDEX NO.: E.6.h.

CITE: 479 U.S. 36 (1986) 11/12/1986

SUBJECT: Restitution - not dischargeable in bankruptcy

HOLDING: In interpreting Bankruptcy Code there is "an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." [Citation omitted]. States' interest in administering their criminal justice system, free from federal interference, is one of most powerful considerations that should influence a court considering equitable types of relief. Bankruptcy Code protects from discharge any debt "to the extent such debt is, for a fine, penalty, or forfeiture, payable to & for the benefit of a governmental unit, & is not compensation for actual pecuniary loss." 11 U.S.C. section 523(a)(7). Thus, traditional fines are clearly not dischargeable in bankruptcy. Unlike traditional fines, restitution is forwarded to victim, & may be calculated by reference to harm the offender has caused. However, the criminal justice system is not operated for benefit of victims, but for society. Further, while restitution does resemble judgment "for the benefit of" victim, victim has no control over amount of restitution or decision to award restitution. Decision to impose restitution generally does not turn on victim's injury, but on penal goals of state & situation of criminal proceedings focus on state's interest in rehabilitation/punishment & not victim's desire for compensation. Thus, restitution orders operate "for the benefit of the state & fall within the meaning of 11 U.S.C. section 523(a)(7). Held, restitution orders are not dischargeable in bankruptcy. Marshall & Stevens DISSENT.

TITLE: Kopas v. State

INDEX NO.: E.6.h.

CITE: (4th Dist., 10-2-98), Ind. App., 699 N.E.2d 1193

SUBJECT: Erroneous imposition of fees to law enforcement fund

HOLDING: Tr. Ct. lacked authority to order convicted D to pay costs of \$1,000 to prosecutor's law enforcement fund. Ind. Code 33-19-5-1 lists criminal costs fee of \$120 & various other fees which may be collected from D in criminal action resulting in felony or misdemeanor conviction. Statute does not grant Tr. Ct. authority to assess fees payable to Newton County Prosecuting Attorney Council (NCPAC). Ct. held that fee imposed in this case could not be considered restitution because there was no evidence or other explanation of nature or function of NCPAC, nor was there evidence that NCPAC was damaged in any way, as required by restitution statute. Ind. Code 35-50-5-3(a)(1). Further, no evidence or argument was presented that NCPAC was victim in this case. Unlike D in Hendrickson, App., 690 N.E.2d 765, (see card, this section) who received monetary benefit from his crime of illegal drug dealing, D in this case received no such unjust enrichment from his crime of operating vehicle with BAC of .10 percent or above. Thus, Tr. Ct.'s order of costs payable to NCPAC was unsupported by statute & was therefore improper. Held, remanded with instructions to vacate portion of D's sentence.

TITLE: Ladd v. State
INDEX NO.: E.6.h.
CITE: (1st Dist., 3-26-99), Ind. App., 710 N.E.2d 188
SUBJECT: Restitution order upheld - inquiry into D's ability to pay
HOLDING: In ordering D to pay \$4,270 in restitution to South Central Narcotics Strike Force, Tr. Ct. did not err by failing to inquire into D's ability to pay. Where, as here, restitution is ordered as part of executed sentence & not as condition of probation, inquiry into D's ability to pay is not required. Shaffer, App., 674 N.E.2d 1. In such situation, restitution is merely money judgment, & D cannot be imprisoned for nonpayment. Ind. Code 35-50-5-3(a) & (b). Ct. also held that restitution order was supported by evidence, despite D's challenge to prosecutor's affidavit which was presented as evidence of costs of law enforcement & litigation. Defense counsel specifically stated at sentencing hearing that he did not object to admission of affidavit. Held, no error.

TITLE: Linville v. State

INDEX NO.: E.6.h.

CITE: (3/22/2019), 120 N.E.3d 648 (Ind. Ct. App. 2019)

SUBJECT: D cannot be ordered to pay restitution for crimes to which he did not plead guilty or did not agree to pay

HOLDING: Tr. Ct. erred in ordering D to pay \$98,310 in restitution, which was the total amount alleged stolen in the thirty-four counts D was charged with rather than three counts of theft and three counts of delivering a false sales document to which he pleaded guilty. As part of the plea agreement, D agreed to pay restitution in an amount to be “determined by the court following a restitution hearing.” D did not agree to pay restitution for all counts that were charged. He could only be ordered to pay restitution for amounts stemming from the six crimes for which he pleaded guilty. Held, case remanded to modify restitution order from \$98,310.30 to \$35,729.00, which was the amount defense counsel conceded was owed for the six counts included in the plea agreement.

TITLE: Little v. State
INDEX NO.: E.6.h.
CITE: (4th Dist., 12-30-05), Ind. App., 839 N.E.2d 807
SUBJECT: Erroneous restitution order - duplicated recovery for medical expenses
HOLDING: In prosecution for operating a vehicle while intoxicated causing serious bodily injury, Tr. Ct. erred when it ordered D to pay \$199,582 to victim of crime. Restitution order indicates victim's out of pocket expenses & lost wages totaled \$24,458. Amount of restitution must reflect only actual costs incurred by victim & may not include recovery for duplicated medical charges. Kotsopoulos v. State, 654 N.E.2d 44 (Ind. Ct. App. 1995). Here, an order to pay restitution greater than \$24,458 to victim personally, constitutes "duplicated" recovery because the remainder of his medical expenses were covered by insurance. Although record indicated that victim's insurers have attached subrogation liens to any recovery victim makes against D, record also indicated the liens had been reduced, such that victim may not owe full amount allegedly due to insurers. Thus, record suggests victim may receive duplicated recovery for some of medical costs. Held, judgment reversed & remanded to enter order that does not provide double recovery to victim.

See also: M.L. v. State, App., 838 N.E.2d 535 (Ct. remanded to determine amount of victim's actual damages, where victim was equivocal in his testimony regarding amount of his actual loss).

RELATED CASES: Baker, 70 N.E.3d 388 (Ind. Ct. App. 2017) (restitution for totaled car is determined by value of car, not the difference between cost of new car and insurance proceeds the victim received); Lang, 911 N.E.2d 131 (Ind. Ct. App. 2009) (because financial losses suffered by Conservancy District were far in excess of the restitution award, D failed to demonstrate that the restitution award constituted a double recovery in light of the insurance proceeds which had been paid to the District); Mata, App., 866 N.E.2d 346 (hospital is victim for purpose of restitution statute; if victim had already paid hospital bill, hospital can reimburse victim when D pays).

TITLE: Markland v. State

INDEX NO.: E.6.h.

CITE: (4th Dist., 04-30-07), Ind. App., 865 N.E.2d 639

SUBJECT: Restitution - disinterment & cremation expenses

HOLDING: In theft prosecution, Tr. Ct. did not err in ordering D to make restitution for costs of disinterment & cremation of victim's body, even though these expenses had not actually been incurred before he was sentenced. In ordering restitution, Tr. Ct. shall consider the "property damages of the victim incurred as a result of the crime, based on the actual cost of repair...Ind. Code 35-50-5-3(1). While it is generally true that only actual expenses incurred by victim before the date of sentencing may be included in restitution, Court has recognized a limited exception to this rule when it comes to funeral related expenses. Roach v. State, 695 N.E.2d 934 (Ind. 1998).

Here, D's criminal act of posing as victim's next of kin resulted in damage to victim's family by preventing them from burying victim in a way that they deemed appropriate. D went to county trustee's office to apply for burial assistance & misidentified himself as victim's nephew. By lying to government officials about his relationship to victim & taking matters into his own hands, D's acts were the cause of subsequent funeral expenses. Held, judgment affirmed.

TITLE: Martin v. State
INDEX NO.: E.6.h.
CITE: (06-20-19), Ind. Ct. App., 127 N.E.3d 1235
SUBJECT: Sufficient evidence supported restitution order
HOLDING: Trial court's \$2,000 restitution order following Defendant's guilty plea to auto theft was supported by sufficient evidence. Defendant sold the victim's 1987 Jeep to a salvage yard employee for scrap and was paid \$122. By contrast, the State claimed the Jeep had a value of \$3,500 at the time of the theft. An online automobile price guide filed with the trial court assessed a 1987 Jeep Comanche's "Low Retail" value as \$3,500. During the sentencing hearing, victim testified she valued the Jeep to be worth at least \$2,000. Trial court's restitution award was within the range of evidence presented as to the Jeep's pre-theft value. The award thus was an attempt to make the victim whole rather than award her a windfall. Smith v. State, 990 N.E.2d 517 (Ind.Ct.App. 2013).

TITLE: M.C. v. State

INDEX NO.: E.6.h.

CITE: (4th Dist., 9-23-04), Ind. App., 817 N.E.2d 606

SUBJECT: Erroneous restitution order - accident victims

HOLDING: Tr. Ct. erred in ordering juvenile D to pay \$7,005.60 in restitution to victims of car accident. Restitution order exceeded terms of plea agreement because offenses D pled guilty to did not include an admission of fault for accident or damages for injuries to the victims or their vehicles. Offenses D admitted to establish that he left scene of accident, but do not establish his fault or liability for the accident, thus Tr. Ct. was not authorized to order him to pay restitution to victims. D & prosecutor did not contemplate issue of restitution in plea agreement & D did not specifically agree to pay restitution to victims. Moreover, record was devoid of evidence of loss suffered as a direct & immediate result of D's criminal act. Held, judgment reversed & remanded.

TITLE: Mitchell v. State

INDEX NO.: E.6.h.

CITE: (8/20/90), Ind. App., 559 N.E.2d 313

SUBJECT: Sentencing -- Restitution; determining indigency of D

HOLDING: Determination of whether D is indigent for purposes of restitution determination is within sound discretion of Tr. Ct. & is different from determination of whether D is eligible for indigent counsel. Appointment of indigent counsel is to secure right of representation for D & should not be compared to punishment after finding of guilty. Imposition of restitution is form of punishment & although it may cause some hardship, Tr. Ct. has discretion to determine extent of hardship & whether D can still subsist after payments. In addition, when restitution or reparation is condition of probation, Tr. Ct. shall fix amount, which may not exceed amount person can or will be able to pay & shall fix manner of performance. Ind. Code 35-38-2-2(a). Here, D was convicted of criminal mischief exceeding \$2,500.00. Tr. Ct. ordered him to pay restitution to victim as condition of probation. D claimed that this was error because Tr. Ct. did not inquire into D's ability to pay. Ct. held that statute is not specific as to form Tr. Ct. must follow in determining D's financial status, so fact that Tr. Ct. here used presentence report (PSR) to make decision about amount of restitution to be paid & manner by which payment plan would be established was not error. Fact that D had been found indigent so that he was eligible for indigent counsel made no difference. Held, conviction & restitution payment schedule affirmed.

RELATED CASES: Polen, 578 N.E.2d 755 (inquiry into D's ability to pay certainly met statutory requirement, where Tr. Ct. considered PSR & heard evidence from D & her husband concerning her employment history & financial status).

TITLE: M.L. v. State

INDEX NO.: E.6.h.

CITE: (4th Dist., 12-07-05), Ind. App., 838 N.E.2d 525

SUBJECT: Restitution as condition of probation - inquiry into juvenile D's ability to pay

HOLDING: Although juvenile restitution statute, Ind. Code 31-37-19-5, is silent as to a D's ability to pay, equal protection & fundamental fairness concerns require that a juvenile Ct. must inquire into a juvenile's ability to pay before the Ct. can order restitution as a condition of probation. On the other hand, when restitution is not a condition of probation, but rather a part of an executed sentence, an inquiry into the D's ability to pay is not required. Ladd v. State, 710 N.E.2d 188 (Ind. Ct. App. 1999). Here, record revealed that juvenile's restitution obligation was a condition of his probation, the violation of which could lead to his probation being revoked. Ct. disagreed with State's assertion that juvenile waived his right to inquiry into his ability to pay by agreeing to pay restitution & by entering a plea agreement that left the amount of restitution to the discretion of the juvenile Ct. Held, juvenile Ct.'s restitution order vacated & remanded for new restitution order contingent upon Ct.'s inquiry into D's ability to pay; Friedlander, J., dissenting.

See also: M.L. v. State, No. 42A04-0503-JV-120 (Ind. Ct. App., Dec. 30, 2005).

RELATED CASES: S.S., 68 N.E.3d 594 (Ind. Ct. App. 2017) (where juvenile was 15, did not have a job or a bank account, and lived with his mother, it was an abuse of discretion to order him to pay restitution.); P.J., 955 N.E.2d 234 (Ind. Ct. App. 2011) (juvenile waived right to have Tr. Ct. determine juvenile's ability to pay restitution where juvenile agreed in plea agreement to pay specific amount of restitution; inquiry into ability to pay was also not necessary because restitution was part of sentence, not condition of probation).

TITLE: M.M. v. State
INDEX NO.: E.6.h.
CITE: (4/22/2015), 31 N.E.3d 516 (Ind. Ct. App. 2015)
SUBJECT: Authority to continue restitution after juvenile's discharge from probation
HOLDING: In a case of first impression, Court of Appeals held that a juvenile is still required to pay restitution to the person he was involved in an auto accident with, even though the juvenile court discharged him from probation. M.M. was adjudicated a delinquent and ordered to serve probation. One condition was \$500 in restitution. Upon his discharge from probation a year later, juvenile court did not terminate M.M.'s remaining restitution obligation of \$473.

M.M. argued that the juvenile court erred as a matter of law when it refused to end his restitution obligation after he was discharged from probation. Ind. Code § 31-37-19-5(b)(4), which allows a juvenile court to order restitution, is silent as to whether the court must terminate that obligation upon the minor's discharge from probation when the restitution had been made a condition of the juvenile's probation. Under the adult restitution statute (Ind. Code § 35-50-5-3), when restitution is made a condition of an adult's probation, the probationer must still pay the restitution. See Ind. Code § 35-50-5-3(f); Wininger v. Purdue Univ., 666 N.E.2d 455 (Ind. Ct. App. 1996). A juvenile restitution order results from an act that would be a crime if committed by an adult, and, thus, it is equivalent to an adult restitution order. The rationale for not terminating a restitution obligation upon the discharge of an adult probationer from his probation applies with equal force in the juvenile context. Thus, M.M.'s restitution obligation did not terminate upon his discharge from probation. Held, judgment affirmed and remanded on other grounds.

TITLE: Morris v. State

INDEX NO.: E.6.h.

CITE: (8/23/2013), 985 N.E.2d 364 (Ind. Ct. App. 2013)

SUBJECT: Tr. Ct. could award restitution, even though plea agreement silent on issue

HOLDING: Court granted rehearing on original opinion, 985 N.E.2d 364 (2013), as to restitution issue, and in doing so, found that Tr. Ct. could, in fact, order D to pay restitution, even though plea agreement did not mention restitution. Restitution order was permissible because D entered an open plea, leaving his sentence entirely to Tr. Ct.'s discretion. See Huddleston v. State, 764 N.E.2d 655 (Ind. Ct. App. 2002); Gil v. State, 988 N.E.2d 1231 (Ind. Ct. App. 2013). Court affirmed Tr. Ct.'s finding as to amount of restitution. Held, rehearing granted on restitution issue; Baker, J., dissenting, argued Tr. Ct. tied restitution order to charge that was dismissed pursuant to the plea agreement.

RELATED CASES: Knight, 202 N.E.3d 475 (Ind. Ct. App. 2023) (because plea agreement specifically allowed some discretion in sentencing D, it also left Tr. Ct. with discretion to order \$6490 in restitution); A.H., 10 N.E.3d 37 (Ind. Ct. App. 2014) (same rule should apply in juvenile cases).

TITLE: Nelson v. Colorado
INDEX NO.: E.6.h.
CITE: (4/19/2017), 137 S. Ct. 1249 (2017)
SUBJECT: Exonerated defendant's due process right to recoup restitution, fees, and costs
HOLDING: For an exonerated defendant to recoup financial assessments, the Colorado Exoneration Act ("the Act") requires her to file a civil case and prove her innocence by clear and convincing evidence. This requirement violates the right to due process under the Fourteenth Amendment.

Defendant Nelson was convicted of felonies and misdemeanors for alleged sexual and physical abuse of her children. The Tr. Ct. ordered her to pay \$8,192.50 in costs, fees and restitution. Her convictions were reversed on appeal, and she was acquitted of all charges on retrial. Defendant Madden was convicted of patronizing a child prostitute and attempted sexual assault. He was ordered to pay \$4413.00 in costs, fees and restitution. His convictions were vacated, one on direct review and the other on collateral review. The State did not retry him. Both defendants petitioned for reimbursement but did not seek relief under the Act. Defendant Nelson's Tr. Ct. denied her request outright while Defendant Madden's Tr. Ct. refunded costs and fees but not restitution. The Colorado Court of Appeals reversed both Tr. Ct.s, but the Colorado Supreme Court affirmed both Tr. Ct.s, finding that the failure of the defendants to seek relief under the Act was fatal to their claims.

The Colorado Supreme Court's ruling is reversed because the Colorado statute denies the defendants' right to due process for three reasons. See Mathews v. Eldridge, 424 U.S. 319 (1976). First, defendants' interest in regaining their funds is high. Second, the risk of erroneous deprivation of funds is unacceptable. The Act conditions a refund upon a showing of innocence by clear and convincing evidence even though the reversal of the defendants' convictions means they are presumed innocent. The risk is unacceptably high also because the Act provides no remedies for misdemeanor convictions and, where the recoupment amount is not large, the cost of mounting a claim and hiring counsel would be prohibitive. Third, the State has no interest in withholding the funds, and it has identified no equitable factors supporting its position. Held, cert. granted, opinions of the Colorado Supreme Court reversed, and judgment reversed. Ginsburg, J., joined by Roberts, C.J., and Kennedy, Breyer, Sotomayor, and Kagan, JJ. Alito, J., concurring. Thomas, J., dissenting.

TITLE: P.J. v. State

INDEX NO.: E.6.h.

CITE: (10-05-11), 955 N.E.2d 234 (Ind. Ct. App. 2011)

SUBJECT: Juvenile waived right to hearing about ability to pay restitution

HOLDING: Tr. Ct. did not abuse its discretion in ordering child who had pled guilty to being a delinquent child to pay restitution without conducting a hearing to determine the juvenile's ability to pay restitution. First, the plea agreement explicitly stated that the child would pay a specific amount of restitution instead of leaving the amount of restitution to be paid to the discretion of the Tr. Ct. By entering such an agreement, the juvenile waived his right to have the juvenile court inquire into his ability to pay, which he acknowledged in the plea agreement. See M.L. v. State, 838 N.E.2d 525, 530 n.9 (Ind. Ct. App. 2006), *trans. denied*. Second, and waiver notwithstanding, because the Tr. Ct. accepted the plea, it was strictly bound by its terms. See Allen v. State, 865 N.E.d 686, 689 (Ind. Ct. App. 2007). Third, because the restitution order is part of the juvenile's sentence instead of a condition of probation, the juvenile court was not required to inquire into the juvenile's ability to pay. See M.L., 838 at 529 (*citing Ladd v. State*, 710 N.E.2d 188, 192 (Ind. Ct. App. 1999)). "In such a situation, restitution is merely a money judgment, and a [juvenile] cannot be imprisoned for non-payment." Id. Held, judgment affirmed.

TITLE: Paroline v. United States

INDEX NO.: E.6.h.

CITE: (4/23/2014), 134 S.Ct. 1710 (U.S. 2014)

SUBJECT: Restitution restricted to harm proximately caused by D

HOLDING: Under 18 U.S.C. § 2259, D owed restitution to respondent for possessing two images of respondent being sexually abused by her uncle only to the extent that D proximately caused her losses. Victims should be compensated and Ds should be held accountable for the impact of their conduct on those victims, but Ds should only be made liable for the consequences and gravity of their own conduct, not the conduct of others. Thus, Court found the Circuit Court erred in ordering D to pay full restitution of \$3,400,000 to the respondent.

Chief Justice Roberts and Justices Scalia and Thomas dissented, saying because 18 U.S.C. § 2259 does not explain how to calculate restitution, no restitution award was appropriate. Justice Sotomayor in dissent said the Court should order D to pay full restitution. Held, District Court judgment denying restitution reversed, cert. granted and Circuit Court opinion at 701 F.3d 749 vacated; remanded to District Court for calculation of restitution award. KENNEDY, J., joined by GINSBURG, BREYER, ALITO, and KAGAN, JJ. ROBERTS, C. J., dissenting, joined by SCALIA and THOMAS, JJ. SOTOMAYOR, J., dissenting.

TITLE: Patton v. State
INDEX NO.: E.6.h.
CITE: (1st Dist. 1/16/84), Ind. App., 458 N.E.2d 657
SUBJECT: Sentencing - restitution; payment to avoid incarceration
HOLDING: Tr. Ct.'s imposition of 2-year sentence under plea agreement (stating that D could avoid incarceration by making full restitution of \$2,405.13) did not violate due process or equal protection. Here, D contends he was imprisoned solely because he lacked financial resources to make restitution, citing Bearden v. GA (1983), U.S., 103 S. Ct. 2064, 76 L.Ed.2d 221. In Bearden, D was ordered to pay restitution as a condition of probation. Bearden paid \$200, but then lost his job & was unable to pay remainder. The U.S. S. Ct. held: "If the State determines a fine or restitution to be the appropriate & adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it." 103 S. Ct. at 2070. Ct. distinguishes Bearden. No suspended sentence, probation or condition was imposed. Imprisonment was required under D's plea bargain. Held, no error.

TITLE: Person v. State

INDEX NO.: E.6.h.

CITE: (2/7/2018), 93 N.E.3d 1126 (Ind. Ct. App. 2018)

SUBJECT: Cost of public transportation and pain and suffering not included in restitution statute

HOLDING: After D pled guilty to resisting and leaving the scene of an accident with bodily injury, Tr. Ct. erroneously ordered restitution for victim's public transportation expenses and pain and suffering, because restitution statute does not permit order for those expenses. The restitution was payable to a woman who was injured when D crashed his car into hers while fleeing including \$1,914 for the woman's use of public transportation on days without her car and \$2,385 for her "pain and suffering." However, the cost of public transportation and pain and suffering are not considered under Indiana's restitution statute. See Ind. Code § 35-50-5-3(a). The State also conceded that point, so the Court vacated the portion of the restitution order dealing with those cost considerations. Held, judgment reversed and remanded for correction to reflect reimbursement only for loss of victim's car and medical expenses in the amount of \$2,985.

RELATED CASES: Springer, 798 N.E.2d 431 (Ind. 2003) (reversing portion of restitution order requiring D to pay cost of airline tickets for victim's father because "none of the statutory restitution categories includes any language that could be construed to authorize it").

TITLE: Polen v. State

INDEX NO.: E.6.h.

CITE: (9/25/91), Ind. App., 578 N.E.2d 755

SUBJECT: Restitution -- limited to amounts involved in convictions

HOLDING: Tr. Ct. erred in ordering restitution in amount greater than damages caused by crimes to which she pled guilty. Ind. Code § 35-35-2-2 allows Tr. Ct. to order restitution only for crimes to which D either pleads guilty or is found guilty by trial. Ct., following reasoning in Hughey, 495 U.S. 411, held that award of restitution is authorized only for loss caused by specific conduct which forms basis for offense of conviction. Held, reversed & remanded for modification of restitution order.

RELATED CASES: Dull, 44 N.E.3d 823 (Ind. Ct. App. 2015) (Tr. Ct. abused its discretion by ordering D to pay \$145,633.40 in restitution because part of that amount was based on uncharged acts to which he neither pled guilty nor agreed to pay restitution); Gil, 988 N.E.2d 1231 (Ind. Ct. App. 2013) (Tr. Ct. erred by imposing \$20,000 in restitution when record was devoid of any evidence establishing value of jewelry or other damages caused by burglary for which D pled guilty); Kinthead, App., 791 N.E.2d 243 (from D's statements & supporting exhibits at sentencing hearing, it is evident D agreed to pay restitution in amount greater than sums involved in two counts to which he pled guilty; provision in plea agreement stating that restitution was to be argued by parties as part of sentence did not in itself represent agreement to pay greater amount); Nurseryland, App., 749 N.E.2d 1240 (restitution order requiring D to pay victims who were not named in charge to which D pled guilty was invalid; D made no admissions concerning guilt with regard to other injured victims).

TITLE: Reinbold v. State

INDEX NO.: E.6.h.

CITE: 6/8/90), Ind., 555 N.E.2d 463

SUBJECT: Restitution order proper -- survivors of homicide victims

HOLDING: Tr. Ct. has authority to order that one convicted of felony or misdemeanor make restitution to victim as part of his sentence, Ind. Code 35-50-5-3(a), or as condition of probation, Ind. Code 35-38-2-2(a)(5). Here, D was convicted of voluntary manslaughter & argued that only deceased can be victim of crime, that survivors are not victims, & that Tr. Ct. exceeded its authority in ordering that he made restitution to them. Ct. held that word "victim" in statutes authorizing restitution has not been construed so narrowly as to limit payment of restitution only to person or entity actually subjected to commission of crime. Rather, restitution has properly been ordered payable to those shown to have suffered injury, harm or loss as direct or immediate result of criminal acts of D. Survivors of murder victims, particularly their dependent children, could come within this class. Held, conviction & sentence affirmed.

RELATED CASES: Postiglione, 84 N.E.3d 659 (Ind. Ct. App. 2017) (even though D did not cause victim's injuries, restitution order was proper because she initiated the fracas that resulted in the victim's injuries), Sickels, 982 N.E.2d 1010 (Ind. 2013) (even though custodial parent holds support payments in trust for benefit of children, custodial parent is a "victim" for purposes of Ind. Code 35-50-5-3(a) and is entitled to restitution for arrearage, even if children are emancipated, because law presumes custodial parent used her money to offset arrearage); Nurseryland, App., 749 N.E.2d 1240 (restitution order requiring D to pay victims who were not named in charge to which D pled guilty was invalid; D made no admissions concerning guilt with regard to other injured victims); Rumple, 529 N.E.2d 861 (Tr. Ct. erred in ordering D to pay restitution, where it could not be determined who was victim of his crime of possession of marijuana, in view of Tr. Ct.'s order which did not specify to whom he was to pay restitution).

TITLE: Rich v. State

INDEX NO.: E.6.h.

CITE: (5th Dist., 07-16-08), Ind. App., 890 N.E.2d 44

SUBJECT: Restitution order improper - cost of victim's security system

HOLDING: In burglary prosecution, Tr. Ct. abused its discretion in ordering D to pay for the installation of the victims' security system. Although victims may have suffered emotional distress as a result of D's crime, and may have installed security system as an attempt to alleviate this angst, Indiana's restitution statute does not authorize Tr. Ct. to order a D to pay for such an expense. For crimes involving harm to property, restitution order shall be based "upon a consideration of...property damages of the victim incurred as a result of the crime, based on the actual cost of repair." Ind. Code 35-50-5-3(a). As the victim's owned no security system when D broke into their home, their installation of a security system is not a "repair" to their home, but an upgrade or improvement. Moreover, installation of a new alarm system does not constitute restitution for "property damage" incurred as a result of D's burglary, and no other portion of the statute can be construed to authorize such an order. Court reviewed several other states with restitution statutes similar to Indiana's that have concluded that the inclusion of this cost is improper. Held, judgment affirmed in part, restitution order reversed and remanded with instructions to remove cost of security system.

TITLE: Robers v. United States

INDEX NO.: E.6.h.

CITE: (4/29/2014), 134 S. Ct. 1854 (U.S. 2014)

SUBJECT: District court properly reduced D's restitution by amount banks received from home sales, not higher home values when mortgages were earlier foreclosed

HOLDING: District court properly calculated D's restitution obligation by ordering him to pay the difference between amount banks loaned him and the amount banks received in selling homes that served as collateral for loans to D. District Court correctly rejected D's argument that it should have reduced restitution by value of homes at the time the banks foreclosed the mortgages.

Robers filed fraudulent applications to obtain loans from two banks. He defaulted on the loans, the banks foreclosed the mortgages, and later sold the homes. The proceeds from the home sales were less than the market value of the homes when the banks initially foreclosed the mortgages.

The Mandatory Victims Restitution Act of 1996 (18 U.S.C. § 3663A) requires property crime offenders to pay an amount equal to the value of the property minus the value of the property on the date the property is returned. The property is not “returned” until it is sold and the victim receives money from the sale. Thus, a sentencing court should reduce the amount of restitution by the amount of money a bank receives when it sells houses that were collateral for the fraudulent loans, rather than by the greater value of the houses when the bank foreclosed on them. Held, judgment affirmed. Breyer, J., for the unanimous Court.

TITLE: Rodgers v. State
INDEX NO.: E.6.h.
CITE: (8/7/2015), 40 N.E.3d 969 (Ind. Ct. App. 2015)
SUBJECT: Order to participate in Victim-Offender Reconciliation erroneous
HOLDING: Tr. Ct. erred in ordering D to participate in the Victim-Offender-Reconciliation program, in lieu of conducting a restitution hearing, because D did not agree to participate in the program, a prerequisite under Ind. Code § 35-40-6-4(9). Held, judgment reversed and remanded for a restitution hearing.

TITLE: Sales v. State

INDEX NO.: E.6.h.

CITE: (4th Dist. 6/21/84), Ind. App., 464 N.E.2d 1336

SUBJECT: Sentencing - restitution; ability to pay

HOLDING: Tr. Ct. erred in failing to hold hearing on D's ability to pay before ordering D to pay \$2,500 in restitution to battery victim within one year. Ind. Code 35-7-2-1(a)(5) requires determination of ability to pay, thus ensuring indigent Ds are not denied equal protection. 14th Amend; Ind. Const. Art. 1, Section 23; Tate v. Short (1971), 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130; Williams v. IL (1970), 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586; Brown 322 N.E.2d 708. Here, D was adjudicated an indigent & assigned a public defender to perfect his appeal. Such adjudication indicates D may default on restitution order, whereas wealthier D could satisfy this condition of probation. Held, remanded for resentencing (hearing on indigency & modification of present restitution if D financially is unable to meet its terms).

RELATED CASES: Miller 502 N.E.2d 92 (remanded with instructions to hold hearing/make findings re D's ability to pay \$17,000 in restitution); Mellott, 496 N.E.2d 396 (Tr. Ct. did not err in ordering D to pay restitution to victim (\$405) & to reimburse county for D's medical expenses, without first considering D's ability to pay because D was given 10 & 9 years respectively to pay such amounts); Maxwell, App., 455 N.E.2d 1171 (repayment schedule required for indigent D to repay \$1,234 (welfare fraud) to DPW).

TITLE: Savage v. State

INDEX NO.: E.6.h.

CITE: (10-3-95), Ind., 655 N.E.2d 1223

SUBJECT: Restitution - amount upheld but payment plan required

HOLDING: Probation restitution order may exceed D's current assets & what lifetime discretionary income would be given income level prior to incarceration, but restitution order must contain periodic payment plan which probationer "can or will be able to afford." Here, D was convicted of reckless homicide & criminal recklessness, & Tr. Ct. ordered D to pay \$164,998.59 restitution to Indiana Family & Social Services Administration, on behalf of Medicaid. Ind. Code 35-38-2-2.3(5) requires that amount of restitution not exceed amount D can or will be able to pay. Tr. Ct. considered appropriate factors before reaching its decision to order restitution but failed to incorporate periodic payment plan in its restitution order. Held, transfer granted, remanded for restitution order. Ct. App. decision at 650 N.E.2d 1156 vacated & Judge Sullivan's dissenting opinion adopted.

RELATED CASES: Shepard, App., 839 N.E.2d 1268 (Baker, J., concurring to criticize holding in Savage, 655 N.E.2d 1223, believing that better rule is that Tr. Ct. may wait to determine D's ability to pay restitution & to fix manner of performance until the commencement of probation).

TITLE: Sinn v. State
INDEX NO.: E.6.h.
CITE: (4th Dist., 3-13-98), Ind. App., 693 N.E.2d 78
SUBJECT: Restitution order improper where not part of plea agreement
HOLDING: Tr. Ct. erred in ordering D to pay restitution when plea agreement contained no provision allowing such order. Once plea agreement is accepted, Tr. Ct. may not change terms of plea agreement & is precluded from imposing any sentence other than that required by agreement. Pritshcer, App., 675 N.E.2d 727; Disney, App., 441 N.E.2d 489. Held, judgment reversed.

TITLE: Smith v. State

INDEX NO.: E.6.h.

CITE: (4th Dist. 12/20/84), Ind. App., 471 N.E.2d 1245

SUBJECT: Sentencing - restitution; basis for order

HOLDING: Tr. Ct.'s restitution order is not supported by sufficient evidence where no evidence of specific medical expenses was presented (other than prosecutor's unsworn statement that medicals were \$284.80) & Tr. Ct. failed to inquire into D's ability to pay before setting amount/payment terms. Here, state contends Ind. Code 35-50-5-3 controls because D was not specifically placed on probation. D contends Ind. Code 35-7-2-1(a)(5) controls. Ct. finds probation is merely condition resulting from suspended sentence (which D received). Ind. Code 35-7-2-1 governs probation/suspended sentence restitution orders. Ind. Code 35-50-5-3 governs executed sentence restitution orders. Tr. Ct.'s discretion in setting conditions of probation is limited by Ind. Code 35-7-2-1, which requires restitution (1) reflect actual loss incurred by victim & (2) be based on D's ability to pay. Held, conviction affirmed; remanded for revision of restitution order.

RELATED CASES: Baker, 70 N.E.3d 388 (Ind. Ct. App. 2017) (restitution for totaled car is determined by value of car, not the difference between cost of new car and insurance proceeds the victim received); Hill, 25 N.E.3d 1280 (Ind. Ct. App. 2015) (State failed to show department store suffered actual loss from theft because D was detained before she left store with stolen items); Kellett, App., 716 N.E.2d 975 (ineffective assistance of counsel found for failure to review & object to admission of ledger upon which restitution order was based; see full review at Y.4.b); Antcliff, App., 688 N.E.2d 166 (documentation of D's employment history & financial status was sufficient basis to determine D's ability to pay restitution); Judge, App., 659 N.E.2d 608 (where 27 Ds acted together to cause damage to victims, Tr. Ct. did not err in requiring them to share cost of their concerted damage); Kotsopoulos, App., 654 N.E.2d 44 (although restitution was based on medical expenses incurred "before date of sentencing" as required by Ind. Code 35-50-5-3(a)(2), Tr. Ct.'s order was not supported by evidence; evidence was undisputed that amount of restitution ordered by Tr. Ct. was in excess of officer's actual losses); Batarseh, App., 622 N.E.2d 192 (Restitution may not exceed actual loss of victim due to D's actions. D was convicted of theft & perjury based on scheme to steal orange juice from wholesaler. Ct. relied on computer printouts of company's total losses during period of thefts in ordering restitution amount, but evidence was lacking to show all of loss was attributable to D's illegal acts. Restitution orders can't be based on illicit uncharged acts, Hipskind, 519 N.E.2d 572).

TITLE: S.S. v. State
INDEX NO.: E.6.h.
CITE: (1/17/2017), 68 N.E.3d 594 (Ind. Ct. App. 2017)
SUBJECT: Abuse of discretion to order juvenile to pay restitution
HOLDING: The juvenile court abused its discretion in ordering the juvenile to pay \$200.00 in restitution for the theft of a cell phone because the evidence established he could not afford to pay. The juvenile was fifteen years old, did not have a job or a bank account, and lived with his mother. Equal protection and fundamental fairness require a juvenile court to ask about a juvenile's ability to pay before ordering restitution as a condition of probation. M.L. v. State, 838 N.E.2d 525, 527 (Ind. Ct. App. 2005), *trans. denied*. Here, the court found that the juvenile was indigent but nonetheless ordered him to pay restitution. Held, judgment reversed.

TITLE: T.C. v. State

INDEX NO.: E.6.h.

CITE: (4th Dist., 12-30-05), Ind. App., 839 N.E.2d 1222

SUBJECT: Restitution - measure of damages; retail vs. wholesale value of stolen items

HOLDING: Depending on evidence presented at restitution hearing, Tr. Ct. may award restitution based upon retail value of unsalable stolen merchandise. However, retail value is not necessarily the appropriate measure of damages in every case. Garrett v. State, 333 S.E.2d 432 (Ga. Ct. App. 1985). Here, victim testified that his loss exceeded wholesale cost of stolen merchandise in that "there's some more costs for other associated things [such as] stocking, [shipping, &] long distance calls[.]" Thus, evidence supports an award in an amount more than wholesale value of any unrecovered and/or unsalable items. Held, judgment affirmed in part, reversed in part & remanded to determine amount of victim's actual damages. Baker, J., concurring, believes that in cases of relatively minor shoplifting, appropriate measure of damages should always be retail value of stolen items.

TITLE: Utley v. State
INDEX NO.: E.6.h.
CITE: (4th Dist., 9-18-98), Ind. App., 699 N.E.2d 723
SUBJECT: Restitution order improper - accident victim not "victim of crime"
HOLDING: Tr. Ct. may order D to make restitution to victim's estate, or family of victim who is deceased. Ind. Code 35-50-5-3(a). Restitution is properly ordered payable to those shown to have suffered injury, harm or loss as direct & immediate result of criminal acts of D. Reinbold, 555 N.E.2d 463. Here, jury acquitted D of reckless homicide, but convicted him of failing to stop at scene of accident. Deceased in this case was accident victim & not victim of crime as contemplated by Ind. Code 35-50-5-3. Consequently, no funeral, burial, or cremation costs were incurred by victim's estate because of D's failure to stop at scene of accident. In footnote, Ct. acknowledged possibility of different factual situations where leaving scene of accident could be causally connected to victim's death & therefore warrant imposition of restitution. Held, remanded with instructions to vacate restitution order.

RELATED CASES: Martin, App., 784 N.E.2d 997 (because victim's family suffered financial loss as direct & immediate result of D's criminal act, Tr. Ct. did not abuse its discretion in ordering D to pay victim's funeral expenses); J.P.B., App., 705 N.E.2d 1075 (although juvenile pled guilty to failing to stop & remain at scene of accident resulting in injury to passenger of his car, Tr. Ct. properly ordered juvenile to pay restitution to driver of other car for damage to car).

TITLE: Ware v. State

INDEX NO.: E.6.h.

CITE: (5th Dist., 11-3-04), Ind. App., 816 N.E.2d 1167

SUBJECT: Restitution order improper

HOLDING: In sexual misconduct with a minor prosecution, Tr. Ct. erred in ordering D to pay for all of complaining witness's (CW's) counseling expenses, because Ind. Code 35-50-5-3(a)(2) only authorizes Tr. Ct. to order restitution to victim for expenses incurred before date of sentencing as a result of the crime. Mitchell v. State, 730 N.E.2d 197 (Ind. Ct. App. 2000). Although D waived issue by failing to object at earliest opportunity during his sentencing hearing, Ct. concluded that Tr. Ct. committed fundamental error in imposing this restitution order. Restitution order violated restitution statute, & requirement that D pay for any counseling CW receives as a result of this crime imposes an undue financial burden on D. Held, judgment affirmed in part, reversed in part & remanded to determine costs of any counseling CW received before time of sentencing as a result of D's crimes.

RELATED CASES: Bennett, App., 862 N.E.2d 1281 (despite D's offer to pay restitution to CW, Tr. Ct. committed fundamental error in ordering D to pay CW's unspecified, future counseling & therapy costs); Johnson, App., 845 N.E.2d 147 (Tr. Ct. erred to the extent it ordered D to pay an indeterminate amount of restitution if victim seeks counseling).

TITLE: Wininger v. Purdue University

INDEX NO.: E.6.h.

CITE: (6/13/96), Ind. App., 666 N.E.2d 455

SUBJECT: Sentencing -- Restitution as condition of probation

HOLDING: D pled guilty to criminal mischief charge & was ordered to pay restitution to Purdue University. D made payments during probationary period, but did not continue making payments after probation ended. Ct. held that although Tr. Ct's. generally lose all jurisdiction over D when term of probation expires, expiration of probation period does not terminate obligation to make restitution to crime victim. Therefore, action can be taken either during or after probationary period to recover restitution which was made condition of probation. Ct. held that Purdue University could enforce restitution order in same manner as if order were civil money judgment. Held, judgment affirmed.

TITLE: Wittl v. State

INDEX NO.: E.6.h.

CITE: (4th Dist., 11-27-07), Ind. App., 876 N.E.2d 1136

SUBJECT: Restitution - lost income for business

HOLDING: In auto theft prosecution, Tr. Ct. did not abuse its discretion when it ordered D to pay restitution to rental car company for fair rental value in amount of \$4918.80. The purpose of a restitution order is to impress upon criminal D the magnitude of the loss he has caused & to defray the costs to the victims caused by the offense. Henderson v. State, 848 N.E.2d 341 (Ind. Ct. App. 2006). Ind. Code 35-50-5-3(a)(4) allows Tr. Ct. to base its restitution order upon a consideration of earnings lost by victim as a result of crime. Court rejected D's argument that restitution statute does not specifically authorize Tr. Ct. to provide restitution to a business for lost income & that loss of earnings is generally interpreted as a loss of wages. While a crime victim's lost earnings may more often take form of lost wages, nothing in statute limits earnings to wages only.

Further, restitution order in this case was not speculative. Representative from rental car company testified that D failed to return car for 238 days, that on average company rents the cars on its lot three to four days a week, & that daily rental rate for this vehicle was \$40.99. Damages for deprivation of use of property may be measured by fair rental value for period of conversion. Coffel v. Perry, 452 N.E.2d 1066 (Ind. Ct. App. 1983). Held, judgment affirmed.

TITLE: Wolff v. State

INDEX NO.: E.6.h.

CITE: (5th Dist., 10-06-09), Ind. App., 914 N.E.2d 299 (Ind. Ct. App. 2009)

SUBJECT: Erroneous restitution order

HOLDING: Tr. Ct. abused its discretion in awarding restitution of \$12,789 to victim for lost wages, finding that even though D's criminal recklessness may have led to victim's termination and subsequent loss of earnings, Ind. Code 35-50-5-3-(a)(4) requires a direct and immediate causal connection between a crime and loss of earnings to authorize restitution for lost wages.

Tr. Ct. may order restitution to those who have suffered injury, harm, or loss as a direct and immediate result of a D's criminal acts. Huddleston v. State, 764 N.E.2d 655, 657 (Ind. Ct. App. 2002). Here, D's father, Merrill Wolff, employed both victim and D. D fired a shotgun in victim's direction. Victim did not come to work the next two or three days and did not return Merrill's calls. Two or three days later, victim came in and told Merrill that in light of the incident, he thought he should stay away from his job, partly because a deputy sheriff told victim to not converse with D. Merrill then fired victim. D later pled guilty to Criminal Recklessness. The only issue at sentencing was restitution, where victim claimed that D's criminal recklessness caused him to lose \$12,789 in wages.

Court of Appeals acknowledged that "Wolff's actions in firing his shotgun set in motion a chain of events that eventually led to the termination of [victim's] job." However, Court found D's actions were not the direct and immediate cause of victim's lost earnings; Merrill's decision to fire victim was the direct and immediate cause of the income loss. Court held that the connection between D's firing of the shotgun and victim's loss of earnings was too attenuated to hold D responsible in a criminal proceeding for his father's actions in firing victim. Court did note, however, that victim may have a viable civil claim against Merrill Wolff. Held, judgment reversed.

E. SENTENCING

E.6. Miscellaneous sentencing treatment/alternatives

E.6.k. Work Release (direct commitment)

TITLE: Breda v. State
INDEX NO.: E.6.k.
CITE: (2-19-20), Ind. Ct. App., 142 N.E.3d 482
SUBJECT: Community Corrections violation statute does not violate constitutional separation of powers
HOLDING: The 2015 amendment to Indiana Code § 35-38-2.6-5 added language that the community corrections director (replacing the words "the court") may change the terms and conditions of placement when there is a community corrections violation. Defendant argued this violated separation of powers by delegating judicial authority to a member of the executive branch, i.e., the community corrections director. Court of Appeals held the community corrections director can recommend revocation of placement but it remains the trial court's duty to determine whether revocation will be ordered.

TITLE: Cox v. State
INDEX NO.: E.6.k.
CITE: (3-3-99), Ind., 706 N.E.2d 547
SUBJECT: Revocation of work release - due process requirements; confrontation & cross-examination
HOLDING: Due process requirements for probation revocations are also required when Tr. Ct. revokes D's placement in community corrections program. Thus, D in community corrections program is entitled to representation by counsel, written notice of claimed violations, disclosure of opposing evidence, opportunity to be heard & present evidence, and right to confront and cross-examine witnesses in neutral hearing before Tr. Ct. Isaac, 605 N.E.2d 144. Here, D argued that admission of testimony concerning urinalysis results denied him his due process right to confront and cross examine all witnesses against him. In affirming revocation of D's placement in work release center, Ct. held that use in revocation hearing of regular urinalysis report prepared by company whose professional business it is to conduct such tests does not infringe upon D's confrontation rights. United States v. Bell, 785 F.2d 640 (8th Cir. 1986). Held, transfer granted, Ct. App.' opinion at 686 N.E.2d 181 vacated, revocation of placement in work release center affirmed. See O.9.a for Ct.'s holding regarding inapplicability of evidence and hearsay rules to probation/work release revocation hearings.

Note: As to general question of when hearsay evidence introduced at revocation hearing violates confrontation rights, Ct. did not adopt particular approach or test Tr. Ct. should use when deciding whether to admit proffered hearsay evidence. However, judges may consider any relevant evidence bearing some substantial indicia of reliability, including reliable hearsay.

RELATED CASES: Monroe, App., 899 N.E.2d 688 (Crawford does not apply in community corrections revocation placement hearings; hearsay that officers found gun in home where D was staying on home detention was reliable and its admission did not violate the Sixth Amendment); McQueen, App., 862 N.E.2d 1237 (in light of D's own testimony that he illegally took OxyContin & as a result tested positive for oxycodone in violation of Work Release Center rules, there was no prejudice to him in admission of hearsay testimony regarding results of toxicology report); C.S., App., 817 N.E.2d 1279 (Ct. rejected juvenile's claim that his confrontation rights to cross-examine his accuser were violated because the testing information was presented by a probation officer without knowledge of the testing procedures employed).

TITLE: Crump v. State

INDEX NO.: E.6.k.

CITE: (4th Dist.; 12-15-00), Ind. App., 740 N.E.2d 564

SUBJECT: Work release - administrative hearing prior to Ct. hearing

HOLDING: D was given fair hearing at Tr. Ct. level regarding violation of his work release contract with Community Corrections. Like revocations of probation, hearing is required before revocation of placement in community corrections program. Decker, App., 704 N.E.2d 1101. However, Sixth Amendment right to counsel attaches only in criminal prosecutions; there is no such right in administrative actions. Davis, 174 Ind. App. 433, 367 N.E.2d 1163 (1977). Here, as condition of D's work release, D was not to consume any alcohol. On March 27, upon returning to Community Corrections facility from his employment, corrections officer smelled alcohol on D's breath & D's BAC was .16%. On March 31, Community Corrections held administrative hearing regarding D's alleged violation, at which D admitted to drinking. Based on his admission & BAC, Community Corrections terminated D from work release. On August 26, Tr. Ct. found that D violated conditions of Community Corrections work release & probation. At hearing, D's admission from administrative hearing was placed into evidence. Although D was entitled to counsel at Ct. hearing on violation, he was not entitled to counsel at administrative hearing, & thus, admission of statement was not violation of Sixth Amendment. Even if admission of D's statement was violation of Fifth Amendment right against self-incrimination, odor of alcohol on D's breath & breathalyzer test was non-communicative physical evidence that was sufficient to sustain finding of violation. Moreover, fact that Community Corrections terminated work release without required Ct. hearing did not require reversal because D was eventually given required Ct. hearing. Held, judgment affirmed.

TITLE: Decker v. State

INDEX NO.: E.6.k.

CITE: (2nd Dist., 1-29-99), Ind. App., 704 N.E.2d 1101

SUBJECT: Revocation of placement in work release program - sufficiency; claim of ineffective assistance of counsel (IAC)

HOLDING: As in probation context, community corrections revocation hearing is civil in nature, & to revoke D's placement, State need only prove that revocation was warranted by preponderance of evidence. Here, results of urine screen, showing that there were increased levels of marijuana in D's system, coupled with D's admission that he had taken "a couple of puffs" of marijuana cigarette, were sufficient to show that D had possession of marijuana. Thus, evidence was sufficient to revoke D's placement in community corrections work release program. Ct. also rejected D's claim of IAC based on failure to object to lack of notice of terms & conditions of his placement & failure to object to results of urine screen. Held, judgment affirmed.

TITLE: Flowers v. State

INDEX NO.: E.6.k.

CITE: (4/18/2018), 101 N.E.3d 242 (Ind. Ct. App. 2018)

SUBJECT: Revocation of placement in Community Corrections reversed

HOLDING: The doctrine of res judicata did not preclude Tr. Ct. from revoking D's placement in a community corrections program after a senior judge had ordered D remanded to community corrections almost a month earlier. However, the presiding judge's analysis in revoking D's placement was flawed in two respects. First, the presiding judge stated that any court order by a senior judge "can be reviewed by the presiding judge, as well as modified or altered by the presiding judge." This statement is erroneous because court orders by senior judges must be treated precisely the same as any order entered by any presiding judge. See Ind. Code § 33-23-3-3. Instead, the presiding judge was entitled to revisit senior judge's order by virtue of Ind. Code § 33-23-2-4, which provides that all courts "retain power and control over their judgments for ninety (90) days after rendering the judgments in the same manner and under the same conditions as they retained power and control during the term of court in which the judgments were rendered."

Second, Tr. Ct. erroneously believed that it was required to accept the Community Corrections program's decision to revoke placement. Instead, Tr. Ct. should have treated that decision as a request to revoke D's placement, which it would have been free to grant or deny pursuant to Ind. Code § 35-38-2.6-5(4). Tr. Ct. was not bound to remand D to the Department of Corrections, but could have considered other alternatives as well. Held, judgment reversed and remanded; Riley, J., dissenting, believes that Tr. Ct. properly ordered revocation pursuant to Ind. Code § 35-38-2.6-5(4).

TITLE: Hall v. State

INDEX NO.: E.6.k.

CITE: (8/1/2018), 108 N.E.3d 351 (Ind. Ct. App. 2018)

SUBJECT: Trial court had jurisdiction to hear community corrections revocation petition filed by prosecutor

HOLDING: Ind. Code § 35-38-2.6-5 provides that, if a person who is placed in a community corrections program violates the terms of the placement, "the community corrections director may...[r]equest that the court revoke the placement[.]" Here, a deputy prosecuting attorney, at the request of D's probation officer, filed a petition to revoke D's placement in community corrections. On appeal of the revocation, D argued that trial court lacked jurisdiction to hear the petition to revoke his placement in community corrections because the petition had been filed by the deputy prosecutor instead of the director of the community corrections program. But the position of the person who filed the petition relates neither to the merits of the controversy or the competence of the court to resolve it, and trial court had jurisdiction over the general class of actions to which the petition belongs. See K.S. v. State, 849 N.E.2d 538 (Ind. 2006). Thus, any potential error was procedural, not a jurisdictional error. Further, D failed to preserve the issue for review because he failed to raise it in the trial court. Held, judgment affirmed.

TITLE: Jester v. State
INDEX NO.: E.6.k.
CITE: (3rd Dist., 4-30-01), Ind. App., 746 N.E.2d 437
SUBJECT: Imposition of community service as condition of work release
HOLDING: Tr. Ct. did not exceed its authority when it ordered D to serve one-year executed sentence in work release & perform 160 hours of community service. D argued that since community service is equivalent to term of probation, judge should have suspended portion of his sentence to enable him to complete community service & keep his sentence within statutory maximum of one year. Ct. disagreed & concluded that community service was condition of D's work release & not sentence above & beyond one-year maximum imposed. Community service is reasonable term of placement for person completing sentence on work release. Ind. Code 11-12-5- 2(c); Ind. Code 35-38-2-2.3(a)(13). Held, judgment affirmed.

TITLE: Johnson v. State
INDEX NO.: E.6.k.
CITE: (10/31/2016), 62 N.E.3d 1224 (Ind. Ct. App. 2016)
SUBJECT: Revoking community corrections placement an abuse of discretion
HOLDING: The Tr. Ct. abused its discretion in revoking D's placement in community corrections and ordering him to serve the remainder of his executed sentence in DOC.

The evidence supports the Tr. Ct.'s determination that D violated the requirement that he not leave his apartment. However, under the circumstances, including D's limited mental functioning, scant financial resources, his previous successful placement on work release, the nature of the violation, and the severity of the court's sentence, "we conclude that the Tr. Ct. abused its discretion in finding that Johnson's violation warranted serving the entirety of the remaining portion of his executed sentence in the DOC. Accordingly, we remand to the Tr. Ct. with instructions to enter an order that Johnson be placed on work release for the remaining portion of his executed sentence." Held, judgment reversed.

TITLE: Luster v. State

INDEX NO.: E.6.k.

CITE: (7/15/19), 130 N.E.3d 131 (Ind. Ct. App. 2019)

SUBJECT: Due process requires a trial court must consider a Defendant's competency when that Defendant is participating in a community corrections revocation hearing.

HOLDING: Trial court sua sponte raised Defendant's competency at community corrections revocation hearing and appointed two medical experts to evaluate Defendant. One expert determined Defendant did not "demonstrate the capacity to stand trial for the charges in this legal matter." Nonetheless the trial court proceeded with the revocation proceeding stating that the statute concerning competency contemplates a prejudgment assessment and a community corrections violation was a post-judgment proceeding. The Court of Appeals reversed and remanded the community corrections violation with instructions for the trial court to consider the competency evaluations and to determine if the Defendant is competent to understand and participate in the proceedings against him. The Court of Appeals determines failure to consider evidence of Defendant's competency prior to proceeding with the petition to revoke placement was a violation of due process.

TITLE: Madden v. State
INDEX NO.: E.6.k.
CITE: (2/4/2015), 25 N.E.3d 791 (Ind. Ct. App. 2015)
SUBJECT: Tr. Ct. may delegate decisions re: electronic monitoring to community corrections
HOLDING: Tr. Ct. did not impermissibly delegate its sentencing authority in letting the Jefferson County Community Corrections Department decide whether to put D on electronic monitoring as a condition of probation.

Probation statutes do not bar community correction programs from making decisions about electronic monitoring. Although Ind. Code §35-38-2-1(a)(1) requires a Tr. Ct. to “specify . . . the conditions of the probation” and Ind. Code § 35-38-2-2.3(a)(16) says “the court may require a person to . . . undergo home detention under. . . ” (emphasis added), D mistakenly concludes the import of these statutes is that only a Tr. Ct. may decide about home detention. Indeed, several statutes let Tr. Ct.s delegate this authority to community corrections. For instance, Ind. Code § 35-38-2.5-5(c) lets a Tr. Ct. order a probationer to home detention supervised by community corrections. Ind. Code § 35-38-2.5-6(3) allows a court to order someone on home detention to follow a schedule prepared by community corrections. See also Ind. Code 35-38-2.5-10(d) (requiring community corrections programs to set the monitoring device and surveillance equipment). Held, judgment affirmed. Riley, J., dissenting, arguing that neither the probation nor home detention statutes contain language that allows Tr. Ct.s to delegate this authority.

TITLE: Morgan v. State

INDEX NO.: E.6.k.

CITE: (11/1/2017), 87 N.E.3d 506 (Ind. Ct. App. 2017)

SUBJECT: Statute on revoking community corrections placement is not unconstitutional

HOLDING: The statute that allows a community corrections director to change the terms of a person's placement, and to ask a trial court to revoke the person's placement, does not violate separation of powers principles or the due process clause. See Ind. Code § 35-38-2.6-5 (2015). In 2010, Defendant pled guilty to Class A felony dealing in methamphetamine and Class C felony neglect of a dependent. In 2013, he was placed in a community transition program but violated the program's terms and was ordered to serve two years of the suspended portion of his sentence in a work release program. Because Defendant also violated the terms of this program, the State asked the trial court to revoke Defendant's placement. After hearing the matter, trial court granted the State's request and ordered Defendant to serve the remainder of his suspended sentence in DOC.

The community corrections director did not infringe on the judge's authority to fix Defendant's penalty because he did not change Defendant's sentence. See Lemmon v. Harris, 949 N.E.2d 803, 814 (Ind. Ct. App. 2011) (*citing* Ind. Code § 35-50-1-1). He did not increase Defendant's sentence or alter the two years Defendant was sentenced to serve on work release. Instead, he asked the trial court to revoke the placement, which is the trial court's prerogative under Ind. Code § 35-38-2-6-5(4).

The 2015 amendment to Ind. Code § 35-38-2.6-5 is not facially unconstitutional under the due process clause, even though it removed the provision in the previous version of the statute that required a hearing before revoking a community corrections placement. See Ind. Code § 35-38-2.6-5 (1991). This does not create a due process problem because pursuant to other statutes and case law, a hearing is still required. For instance, community corrections revocations are analogous to probation revocation proceedings - see Cox v. State, 706 N.E.2d 547, 549 (Ind. 1999) – and thus the hearing requirements for revoking a person's probation apply to revoking a person's community correction placement. Held, judgment affirmed.

TITLE: Pavey v. State

INDEX NO.: E.6.k.

CITE: (4th Dist.; 5-21-99), Ind. App., 710 N.E.2d 219

SUBJECT: Work release – notice of conditions; jail rules

HOLDING: Sentencing Ct. sufficiently advised D that rules of jail were included in his terms of work release program. Although community corrections statute does not require Tr. Ct. to give written notice of terms of placement or specify those conditions on record, notice to D of terms of placement is implicit in statute & prerequisite to revocation of placement. Million v. State, 646 N.E.2d 998 (Ind. Ct. App. 1995). Here, Tr. Ct. instructed D that "all components of work release program applied to D, & D acknowledged that he understood phrase "all components." Also, D signed work release agreement which read, "I agree not to violate any rules of the [Jail]." Thus, Tr. Ct. properly revoked D's work release based on violation of rules of Jail, possessing cigarettes.

In addition, filing of work release violation under one cause number was sufficient due process notice that D's placement in work release as community corrections program & following probation could be revoked, along with three year suspended sentence reinstated. D is entitled to written notice of claimed violation of terms of placement. Million, 646 N.E.2d 1003. Here, although D was placed on work release for one- and-half years followed by probation under two cause numbers, State filed under one cause number work release violation alleging that D had violated jail rules. Despite D's contention that he had no notice that his work release & probationary periods in both causes were at issue during revocation, D understood that his plea of guilty as to both charges resulted in one single sentence. Thus, D had notice that his violation of jail rules was basis for probation & work release revocations for both causes. Held, judgment affirmed.

TITLE: Perry v. State

INDEX NO.: E.6.k.

CITE: (1/23/2015), 25 N.E.3d 771 (Ind. Ct. App. 2015)

SUBJECT: 3-year home detention sentence was not erroneous

HOLDING: Sentence requiring D to serve three years home detention via direct placement for D felony receiving stolen property did not exceed statutory maximum for sentences served on home detention. D argues that under IC 35-38-2.5-5, he should have been sentenced to only 6 months as the statute says home detention cannot exceed the minimum sentence for the felony level for which a person is convicted and sentenced, in this case 6 months because D was convicted of a D felony. See IC 35-50-2-7. D's argument, however, assumes he was sentenced to home detention as a condition of probation. See IC 35-50-2.5-5. He was not; he was sentenced via direct placement under IC 35-38-2.6-3. Further, D's reliance on Stith v. State, 766 N.E.2d 1266 (Ind. Ct. App. 2002) is misplaced. Stith noted that the General Assembly "removed the statutory distinction between probation-based home detention and community corrections-based home detention[.]" Id. at 1268. However, that distinction related to credit time, not the maximum time for home detention. Held, judgment affirmed.

TITLE: Puckett v. State

INDEX NO.: E.6.k.

CITE: (02/03/2022), 183 N.E.3d 335 (Ind. Ct. App. 2022)

SUBJECT: Community Corrections director may act through other court services officers to seek revocation

HOLDING: One month after Defendant began serving his sentence through home detention, a community corrections service officer petitioned the trial court to revoke his home detention placement, alleging a failed drug test. Defendant filed a motion to dismiss, arguing that Indiana Code 35-38-2.6-5 allows only the community corrections director to petition for a revocation, not another community corrections employee like a court services officer. The trial court denied Defendant's motion to dismiss, finding the officer was an agent of the director.

The Court of Appeals found the statute informs community corrections directors and prosecutors, respectively, what their options are for addressing placement violations. The statute does not "purport to limit the authority of community corrections directors and prosecutors to act through others. The trial court's unchallenged finding here was that the community corrections service officer who filed the petition was acting on behalf of the director." The Court further declined to apply the Rule of Lenity, citing authority that the rule applies only when ambiguity remains after consulting traditional canons of statutory construction and noting its conclusion that the statute at issue had no such ambiguity. The trial court did not err in denying the motion to dismiss. The Court further found no abuse of discretion in the trial court's sanction. Held, judgment affirmed.

TITLE: State v. Rivera

INDEX NO.: E.6.k.

CITE: (11/6/2014), 20 N.E.3d 857 (Ind. Ct. App. 2014)

SUBJECT: Discretion to order time served for technical community corrections violation

HOLDING: After finding that D technically violated terms and conditions of his direct placement in community corrections, Tr. Ct. did not err in sentencing him to time served as a consequence for that violation. State argued that Tr. Ct. illegally commuted D's fixed sentence, which was set forth in his plea agreement, and sought to have D serve the remaining 161 days of his 545-day sentence at the Hendricks County Jail or in the Department of Correction. Ind. Code § 35-38-2.6-4, which pertains to violation of community corrections placement, allows Tr. Ct. flexibility in sentencing if it revokes D's probation. Stephens v. State, 818 N.E.2d 936 (Ind. 2004).

Following rationale set forth in Stephens, Court held that when revoking placement in community corrections, Tr. Ct. had authority to sentence D to time served, or 384 days, which was less than the length of sentence originally suspended but not less than the statutory minimum for the offense (six months). Tr. Ct.'s initial sentencing order comported with fixed sentence provided for in the plea agreement in all respects. By the explicit terms of the plea agreement, the parties implicitly contemplated that Tr. Ct. retained the power to review whether a violation of terms and conditions regarding D's placement had occurred and decide the consequences for such a violation. Although other sanctions were available to Tr. Ct., ultimately it is the Tr. Ct.'s discretion as to what sanction to impose under Ind. Code § 35-38-2.6-4. Abernathy v. State, 852 N.E.2d 1016 (Ind. Ct. App. 2006). Held, judgment affirmed.

TITLE: Shaffer v. State

INDEX NO.: E.6.k.

CITE: (10-4-01), Ind. App., 755 N.E.2d 1193

SUBJECT: Work release - not considered part of executed portion of sentence

HOLDING: Pursuant to Ind. Code 35-38-2.6-4 & 5, D began serving executed portion of sentence when committed to Department of Correction; portion of D's sentence involving placement on work release does not constitute part of executed sentence. D was sentenced to two years executed & four years suspended with first two of those years on inactive probation on work release, & then active probation for last two years. D argued that sentence imposed by trial Ct. violated plea agreement which capped executed time to three years. Ind. Code 35-38-2.6-4 states that if Ct. places person in community corrections program, it shall suspend sentence for fixed period. Ind. Code 35-38-2.6-5 states that, once placed in community corrections program, if person commits violation, Ct. may revoke placement & commit person to Department of Correction for remainder of sentence. Therefore, from plain language of statutes, if trial Ct. is required to suspend sentence in order for person to be placed in community corrections, then that part of suspended sentence served in work release is not executed time. Held, judgment affirmed; Vaidik, J., concurring, believes that placement in community corrections program as condition of probation should be considered suspended time, but direct placement in community corrections program qualifies as executed time.

TITLE: Toomey v. State

INDEX NO.: E.6.k.

CITE: (5th Dist., 05-27-08), Ind. App., 887 N.E.2d 122

SUBJECT: Revocation of placement in community corrections - no error

HOLDING: On appeal of revocation of D's placement in community corrections, D argued that because his three-year sentence to work release and his three-year sentence to home detention were separate commitments, Tr. Ct. was without authority to revoke both of them based only on his violation of terms of work release. D's sentence did not involve "separate commitments," as work release and home detention was to be coordinated by the Hamilton County Community Corrections program. If D violated the terms of his placement with community corrections, Tr. Ct. could revoke any remaining time with community corrections, regardless which specific community corrections activity he was assigned to when the violation occurred. Even if D's work release and home detention were separate commitments, Court would not find error in revocation to home detention prior to the commencement of that placement. Million v. State, 646 N.E.2d 998 (Ind. Ct. App. 1995). Although D had no notice of specific terms of home detention, he admitted he failed to return to Community Corrections for four days and that violation was grounds for revocation of home detention. Held, judgment affirmed.

TITLE: Treece v. State

INDEX NO.: E.6.k.

CITE: (5/29/2014), 10 N.E.3d 52 (Ind. Ct. App. 2014)

SUBJECT: Community Transition Program - Not limited by DOC disciplinary rules

HOLDING: Community Corrections had the authority to reject D into its his community corrections portion of his sentence based on his violation for fighting while in the Community Transition Program (CTP) at the end of his DOC sentence. A CTP may remove an offender from its program upon a rule violation or take "disciplinary action" against the offender. Ind. Code 11-10-11.5-11.5(b). Here, D was sentenced to DOC time, followed by time in a Community Corrections program and probation. The last 120 days of his DOC commitment was ordered to be served in CTP which is run by Community Corrections. During that time, he was removed from the program for kicking another offender in his face and sent back to DOC. Upon completion of his DOC sentence, Community Corrections refused to accept him for the Community Corrections phase of his sentence. Tr. Ct. revoked his time on Community Corrections and returned D to DOC. The statutory framework shows that CTP is not a DOC program but a community corrections program provided for person committed to the DOC. Community corrections programs set their own rules and policies to which an offender is subjected. Although Chapter 11-11-5 applies to offenders who are assigned to a CTP, the disciplinary rules in Ind. Code 11-11-5-3 and 4 do not limit the authority of CTPs to impose their own disciplinary measures on persons in their programs who violate their rules. As such, the Tr. Ct. did not abuse its discretion by revoking D's placement in Community Corrections based on Community Corrections' refusal to accept D.

E. SENTENCING

E.6. Miscellaneous sentencing treatment/alternatives

E.6.I. Other

TITLE: Arrowood v. State

INDEX NO.: E.6.I.

CITE: (8/18/2020), 152 N.E.3d 663 (Ind. Ct. App. 2020)

SUBJECT: Defendant not denied right to counsel in community correction revocation hearing;
more lenient due process standard applied

HOLDING: After the State filed a motion to revoke Defendant's placement in community corrections for a violation of its terms, the trial court conducted a hearing on the petition. Defendant did not appear in person but was represented by counsel. The trial court revoked Defendant's placement and ordered her to serve the balance of her sentence in incarceration. The Court of Appeals held that because the revocation of probation or community corrections placement is civil, not criminal, in nature, Article 1, section 13 of the Indiana Constitution is inapplicable. The Court declined to hold that the right to counsel at all criminal prosecutions extends to revocation hearings and instead held such proceedings are governed by principles of due process, *citing* Baum v. State, 533 N.E.3d 1200 (Ind. 1989).

TITLE: Benitez v. State

INDEX NO.: E.6.l.

CITE: (11/23/2022), 199 N.E.3d 811 (Ind. Ct. App. 2022)

SUBJECT: Appellate rule 7(B) review is not available to challenge appropriateness of order that Defendant serve previously suspended sentence following termination from drug court

HOLDING: Defendant pleaded guilty to possession of methamphetamine, a level 6 felony. As part of his sentence the trial court stayed 547 days on condition that he successfully complete a drug court program. Defendant committed several violation of the rules he was expected to follow as a participant in the drug court program and the State filed a petition to terminate his participation in the program. At the hearing to determine if he had violated the conditions of the drug court program, Defendant offered explanations which the trial court considered and rejected in terminating him from the program. On direct appeal, Defendant argued the trial court abused his discretion in terminating him from the diversion program but the Court of Appeals found the trial court had considered his testimony but did not abuse its discretion in terminating his participation in drug court. Defendant also argued the imposition of the previous sentence was inappropriate under Indiana Appellate Rule 7(B) review. The Court of Appeals held that participation in a drug program is akin to probation and a trial court's actions as to the appropriateness of a sentence in a post-sentence probation violation proceeding is not a criminal sentence contemplated by Indiana Appellate Rule 7(B) review and therefore that rule is not available to challenge appropriateness of the order that Defendant serve his previously suspended sentence following termination from drug court.

TITLE: BMV v. Hargrave

INDEX NO.: E.6.l.

CITE: (2/2/2016), 51 N.E.3d 255 (Ind. Ct. App. 2016)

SUBJECT: OWI diversion not available for CDL holders

HOLDING: D, a commercial driver's license holder who pled guilty to two OWI charges, could not participate in a diversion program that would allow eventual dismissal of his charges, because Indiana has adopted federal law that bars diversion for CDL holders.

Police found D slumped over in his pick-up truck, reeking of alcohol. He was charged with two counts of OWI. The BMV suspended his license, and D surrendered his CDL. Upon D's guilty plea, the trial court referred D to diversion. The BMV intervened and filed a Motion to Correct Error, arguing that federal law, adopted by Indiana, bars diversion for people, like D, who hold CDLs. The trial court denied the Motion to Correct Error.

49 C.F.R. § 384.225(b) and (d) requires states to post all convictions under state or local traffic laws on the Commercial Drivers' License Information System ("CDLIS"). To that end, 49 C.F.R. § 384.226 provides that "[t]he State must not mask, defer imposition of judgment, or allow [a person] to enter into a diversion program that would prevent a . . . CLD holder's conviction . . . from appearing on the CDLIS driver record"

Allowing D to surrender his CDL, avoid conviction by completing a diversion program, and then return to driving professionally with no record of his offenses is "precisely what the anti-masking law is designed to prevent." Thus, "[w]e agree with the State that . . . a reasonable interpretation of the federal regulation" is that "a person who holds a CDL license at the time he commits a traffic violation may not participate in a diversion program or have judgment deferred on that conviction." Held, judgment reversed.

TITLE: Brooks v. State
INDEX NO.: E.6.l.
CITE: (2nd Dist., 3-23-98), Ind. App., 692 N.E.2d 951
SUBJECT: Termination of in-home detention - evidentiary standard
HOLDING: Based upon similarity of in-home detention program & probation, standard of review for petition to terminate in-home detention privileges is analogous to that of probation revocation hearing. Thus, alleged violation need be proven only by preponderance of evidence. King, App., 642 N.E.2d 1389. Here, Tr. Ct. was entitled to infer from arresting officer's testimony that cocaine & drug paraphernalia found on ground where D had been standing belonged to D. Evidence was sufficient for Tr. Ct. to conclude that D violated terms of his in-home detention by committing criminal offense. Held, judgment affirmed.

TITLE: Deurloo v. State

INDEX NO.: E.6.l.

CITE: (5th Dist., 1-27-98), Ind. App., 690 N.E.2d 1210

SUBJECT: Violation of pretrial diversion agreement - due process

HOLDING: D was not deprived of her Fourteenth Amendment right to procedural due process when she was summarily terminated from prosecutor's pretrial diversion program without adequate notice or opportunity for hearing before Ct. Ind. Code 33-14-1-7 grants prosecutor discretion to withhold formal prosecution in appropriate cases to afford D opportunity to successfully complete alternative course of action. Aside from few details outlined in statute, organization & administration of pretrial diversion program is left entirely to prosecutor. Whether individual is entitled to procedural due process is dependent upon whether she is being deprived of property or liberty interest. Bd. of Regents v. Roth, 408 U.S. 564 (1972); Hopper, App., 546 N.E.2d 106. D's status as pretrial diveree differs from that of parolee, probationer, or individual in rehabilitative treatment, because she had not yet come before Ct. to answer charge against her & was not under Ct. supervision. Fact that D had been terminated from pretrial diversion program in no way impacted subsequent criminal proceedings. D did not have protected liberty interest in remaining in pretrial diversion program, & therefore was not entitled to due process hearing prior to her termination from program. Thus, Tr. Ct. did not err in denying D's request for such hearing. Held, conviction affirmed. Sullivan, J., concurring, noted that D did not seek interlocutory appeal from order denying claim of entitlement to notice & opportunity to be heard. Had she done so, Judge Sullivan would have held that, in absence of such notice & opportunity to be heard, prosecution should not have gone forward.

TITLE: Graffenread v. State
INDEX NO: E.6.1.
CITE: (7/17/2014), 13 N.E.3d 496 (Ind. Ct. App. 2014)
SUBJECT: D not entitled to deferral of dealing charge
HOLDING: Tr. Ct. did not err in denying D's petition to defer Count 2, dealing marijuana, as Ind.

Code 35-48-4-12 allows deferral of only possession charges.

Police found 26 grams of marijuana, a metal grinder, a digital scale, and a box of plastic bags in D's car. The State charged D with: 1) possession and 2) dealing. The Tr. Ct. granted D's request to defer Count 1 (possession), meaning if D completes conditions imposed by the Tr. Ct., it will dismiss Count 1. Because Ind. Code 35-48-4-12 does not make dealing in marijuana eligible for deferral, the Tr. Ct. correctly denied D's request to defer Count 2.

Further, D's appeal is premature. In arguing for deferral of Count 2, D assumes he will successfully complete the Tr. Ct.'s conditions. He has yet to do so.

Also, there is no authority for D's claim that the eventual dismissal of the possession charge would, under Trial Rule 41(B), constitute an adjudication on the merits and thus, because of the double jeopardy prohibition, preclude prosecution on the dealing charge, which would be based on the "same act or transaction." However, double jeopardy would not be implicated because dealing contains an element that possession does not – intent to deliver. Cf. Richardson v. State, 717 N.E.2d 32, 50 (Ind. 1999). Held, judgment affirmed.

TITLE: Hendrix v. Evans

INDEX NO.: E.6.l.

CITE: 715 F.Supp. 897 (7th Cir. 1989) 03/15/1989

SUBJECT: Sentencing -- educational training

HOLDING: Plaintiffs, who were incarcerated at Indiana State Prison, alleged myriad of constitutional violations. One Plaintiff's request to participate in continuing education program was denied & he claimed this was infringement of liberty interest protected by due process clause. Ct. held that use of permissive term "may" in Ind. Code 11-10-8-3 & Ind. Code 11-10-8-2 makes any decision to grant or deny educational training discretionary with prison administrators, & denial of request for such training does not infringe on any constitutionally protected liberty interest. Held, Plaintiff's motion for summary judgment & judgment on pleadings with respect to his equal protection claim on denial of academic & vocational training denied without prejudice.

TITLE: Hogan v. State

INDEX NO.: E.6.l.

CITE: (3/5/2018), 95 N.E.3d 181 (Ind. Ct. App. 2018)

SUBJECT: Remand to amend abstract of judgement to allow Purposeful Incarceration

HOLDING: The Tr. Ct. should have granted D's request to issue an amended abstract to include language to clarify that D was eligible for Purposeful Incarceration. D pled guilty to two counts of robbery and criminal confinement, both as Class B felonies. At sentencing, the Tr. Ct. clearly intended to make D eligible for Purposeful Incarceration, a program where a judge agrees to consider a sentence modification if an inmate completes a DOC therapeutic program. See www.in.gov/idoc/2798.htm. To be eligible for Purposeful Incarceration, an abstract of judgment must include the following language: "Upon successful completion of the clinically appropriate substance abuse treatment program as determined by IDOC, the court will consider a modification to this sentence." See <https://secure.in.gov/idoc/files/PI%20FAQ%20Updated%2012.15.pdf>. The abstract of judgment did not include this language. Thus, D asked the Tr. Ct. to issue and amended the abstract of judgment to include this language. A new judge reviewed the request and denied it, finding that D was asking the Tr. Ct. to modify his sentence. In so finding, the Tr. Ct. was wrong. D simply asking the Tr. Ct. to amend the abstract of judgment to conform to the original judge's clear desire to let D participate in Purposeful Incarceration. Held, judgment reversed and remanded to the Tr. Ct. to issue an amended abstract of judgment.

TITLE: Jarrett v. State

INDEX NO.: E.6.l.

CITE: (06-22-05), Ind., 829 N.E.2d 930

SUBJECT: No contact order as part of executed sentence vacated

HOLDING: After ordering three-year executed sentence for battery with no time suspended, Tr. Ct. erred in ordering a no-contact order between D & his ex-wife & his young daughter, which included a provision keeping him from writing letters to his daughter. Statutes setting penalties for felonies do not, by their own terms, authorize imposition of a no-contact order as part of an executed sentence. Laux v. State, 821 N.E.2d 816 (Ind. 2005). However, when a Ct. suspends part of a sentence, it can certainly condition that suspension on no-contact. Id. In Laux, Ct. also noted that Indiana Cts. possess substantial power to grant injunctive relief to those who may be victims of violence, in accordance with procedural & substantive prerequisites set forth in Indiana Civil Protection Order Act. See Ind. Code 5-2-9-5. Held, transfer granted, Tr. Ct. directed to correct abstract of judgment & to vacate no-contact order.

RELATED CASES: Hamed, App., 852 N.E.2d 619 (Tr. Ct. did not act within statutorily prescribed limits when it extended no contact order for duration of D's sentence for criminal recklessness).

TITLE: Legg v. State
INDEX NO.: E.6.l.
CITE: (12/10/2014), 22 N.E.3d 763 (Ind. Ct. App. 2014)
SUBJECT: No error in declining to sentence D under alternative juvenile sentencing scheme
HOLDING: Tr. Ct. did not abuse its discretion in refusing to sentence D under the alternative sentencing scheme for juveniles who have been waived into and convicted in adult court. See Ind. Code § 31-30-4-2.

Upon hearing someone knock on her door, Trisha Kirk opened the door and saw D (age 16), who asked to see Trisha's son, Darren Kirk. Darren came outside and saw an unidentified person with D, who began wrestling with Darren. Moments later, the unidentified person gave his gun to D and told him to "pop" Darren, which D did, causing Darren to die moments later. When this happened, Darren's seventeen-year-old brother was also outside on the porch and Darren's mother and two-year-old brother were just inside the front door.

In an issue of first impression, Court found that the alternative sentencing statute (Ind. Code § 31-30-4-2) offers no guidance about when it should be used, so when deciding whether to use the alternative sentencing statute, courts may consider factors used to decide whether a juvenile should be waived to adult court, such as whether the juvenile has committed a heinous act, is beyond rehabilitation in the juvenile system, and whether it is in the best interests of the community's safety and welfare to make the child stand trial as an adult. See Ind. Code § 31-30-3-2. Applying these three factors from the waiver statute, Court found that the Tr. Ct. did not abuse its discretion in declining to sentence D under the alternative sentencing scheme for juveniles convicted in adult court. See Ind. Code § 31-30-4-2. The Court also found that D's fifty-five-year sentence for murder was not inappropriate. See Ind. Appellate Rule 7(B). Held, judgment affirmed.

TITLE: Maher v. State

INDEX NO.: E.6.l.

CITE: (3rd Dist., 04-22-93), Ind. App., 612 N.E.2d 1063

SUBJECT: License suspension under Ind. Code 35-48-4-15(a)

HOLDING: Provision of Ind. Code 35-48-4-15(a), requiring that on conviction for possession of cocaine "the Ct. shall. . . order that the person's (1) operator's license be suspended [and (2) the person's] ability to register motor vehicles be suspended" for at least 180 days but not more than two years, is not unconstitutional under equal protection, substantive due process, or privileges & immunities clauses. Although D argued that loss of license meant loss of job & support, Ct. noted that there exists no fundamental right to drive based upon a fundamental right to employment. Ruge v. Kovach (1984), 467 N.E.2d 673, Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). Ct. also rejected D's equal protection arguments: that Ind. Code 35-48-4-15 infringes on right to travel & chills right to migrate. In Ruge, Ct. held fundamental right to interstate travel did not imply fundamental right to drive, because suspension of license does not necessarily curtail person's freedom to move from state to state. Class of individuals affected by Ind. Code 35-48-4-15 (a) are those convicted of controlled substance offenses. Because statute does not implicate fundamental right or affect suspect class, State need only show classification has reasonable basis. State offered two interests in support of statute; highway safety by keeping those likely to be impaired by drugs off road & reducing distribution & use of drugs by requiring convicted individuals to get rides or take public transportation to consummate illegal drug transactions. Ct. concluded there was reasonable basis for classification, & therefore no equal protection violation.

Also, Ct. rejected argument that statute violated Privileges & Immunities clause. D argued that Ind. Code 35-48-4-15 places greater burden on Ind. citizens than out-of-state citizens, but Ct. found he could not properly make privileges & immunities claim because he is citizen of Ind., & he & other citizens had opportunity to elect representatives of Ind. General Assembly. Held, license suspension upheld, Hoffman, J., dissenting, Sullivan, J., concurring on some issues & concurring in result on others.

NOTE 1: Dissent contains some very good arguments on why driver's license is entitlement or property interest. **NOTE 2:** Ind. Code 9-24-15-6.5, amended, effective 7-1-93, allows those suspended under Ind. Code 35-48-4-15 to obtain hardship license.

RELATED CASES: Adams, 960 N.E.2d 793 (Ind. 2012) (driver's license properly suspended where D/passenger "used" vehicle to transport marijuana).

TITLE: Mefford v. State
INDEX NO.: E.6.l.
CITE: (2/15/2021), 165 N.E.3d 571 (Ind. Ct. App. 2021)
SUBJECT: Termination from drug court program and imposition of agreed-upon sentence affirmed
HOLDING: Distinguishing Holsapple v. State, 148 N.E.3d 1035 (Ind. Ct. App. 2020), which invalidated a zero-tolerance punishment resulting from a probation violation, the Court of Appeals affirmed Defendant's termination from participation in a drug court program, the entry of conviction for two Level 6 felonies and his five-year executed sentence. Notwithstanding the COVID-19 pandemic and its unfortunate consequences, the trial court did not have discretion to impose anything less than the executed five years provided in Defendant's plea agreement. Unlike Defendant, Holsapple was not participating in Drug Court through a Section 14 deferral and "must have been referred to [Drug Court] as a condition of probation." Defendant's sentence was not a stayed sentence; it was a conviction and sentence that was deferred while he participated in Drug Court, which would be imposed if he was terminated from the program.

TITLE: Miller v. State
INDEX NO.: E.6.l.
CITE: (6/14/2018), 105 N.E.3d 194 (Ind. Ct. App. 2018)
SUBJECT: COA lacks authority to review D's sentencing claim re "Purposeful Incarceration"
HOLDING: The Court of Appeals could not review D's claim that his sentence was inappropriate because the Court lacks the power to grant D the relief he seeks. D alleged that the Tr. Ct. should have recommended him for the Department of Corrections's (DOC's) "Purposeful Incarceration," a drug and alcohol treatment program that can eventually result in a reduced sentence. Entry into the program, however, is left to the sole discretion of the DOC. Ds have no right to placement in a program, and Tr. Ct.s have no authority to require the DOC to place a particular D into a program. Cf. Cohn v. Strawhorn, 721 N.E.2d 342, 348-49 (Ind. Ct. App. 1999) (Indiana law does not create "a statutory entitlement to educational programming for all, every, any, or each person committed to the DOC" and it "is absurd to conclude that the General Assembly could have intended that all DOC inmates be entitled to substance abuse treatment regardless of whether they in fact suffer from substance abuse"). Held, judgment affirmed.

TITLE: Mueller/Evans v. State

INDEX NO.: E.6.l.

CITE: (2nd Dist., 11-16-05), Ind. App., 837 N.E.2d 198

SUBJECT: Denial of indigents to pretrial diversion unconstitutional

HOLDING: Requiring payment of a fee as an absolute condition of participating in a pretrial diversion program discriminates against indigent persons in violation of Fourteenth Amendment. Prosecutor had policy of providing diversion program with payment of \$150 user fee & \$80 class fee. The class fee would sometimes be waived, but never the user fee. Ind. Code 33-39-1-8 makes payment of fees a condition of diversion at a prosecutor's discretion. D conceded the statute was constitutional on its face but challenged the application of the statute by the prosecutor. While a prosecutor has broad discretion in the administration of a pretrial diversion program, these decisions cannot violate the constitution. Bordenkircher v. Hayes, 434 U.S. 357 (1978). Here, nothing in record suggested Ds were excluded from the program, except for their asserted inability to pay the fees. Indigency alone does not place one in a suspect classification for Fourteenth Amendment review & thus rational basis analysis is applicable to the present case. Relying on language from Griffin v. Illinois, 351 U.S. 12 (1956) & Art. I, ' 12 of the Indiana Constitution, Ct. found that denial from participation in program based on Ds' inability to pay the \$230 in fees violated their rights under the federal constitution. (Decision also provided lengthy review of cases finding & not finding constitutional violations for failure to pay fines or fees).

Ct's. frequently make indigency determinations & it should be no great burden for a Ct. to make such indigency determinations in pretrial diversion cases. A finding of indigency with respect to Ct.-appointed counsel may not necessarily be dispositive of whether a D can afford to pay a fine. If found unable to pay, a D must be offered an alternative to full payment of the fee in the form of a partial waiver, reasonable payment schedule or a non-financial requirement such as community service. Held, judgment reversed & remanded for indigency hearing.

TITLE: Ott v. State
INDEX NO.: E.6.l.
CITE: (10/16/2013), 997 N.E.2d 1083 (Ind. Ct. App. 2013)
SUBJECT: No error in denying request to reduce D felony to A misdemeanor
HOLDING: Tr. Ct. did not err in denying D's motion to convert a D felony to an A misdemeanor pursuant to Ind. Code 35-50-2-7(c), where D pled guilty to a felony before Indiana started to designate felonies by distinct classes.

In April of 1977, D pled guilty to felony possession of LSD, and in May of 1977, Tr. Ct. sentenced him to five years. At the time, Indiana did not designate felonies by class but did so six weeks after D was sentenced. D argued that the legislature's intent was to make possession of LSD a Class D felony, making him now eligible for a reduction of his conviction to an A misdemeanor. Court rejected this argument, holding that based on language in relevant statutes, it could not say the legislature provided for modification of a felony conviction to a misdemeanor for a felony committed before designation of felonies into distinct classes. Held, judgment affirmed.

TITLE: Perkins v. State

INDEX NO.: E.6.l.

CITE: (4th Dist.; 9-10-99), Ind. App., 715 N.E.2d 1016

SUBJECT: Sentencing alternative - conditional discharge for possession of marijuana

HOLDING: Tr. Ct. may impose sentence when D violates conditions of conditional discharge. If person who has no prior conviction of offense relating to controlled substances pleads guilty to possession of marijuana or hashish as Class A misdemeanor, Tr. Ct., without entering judgment of conviction & with consent of person, may defer further proceedings. Upon violation of condition of custody, Tr. Ct. may enter judgment of conviction. However, if person fulfills conditions of custody, Ct. shall dismiss charges against him. IC. 35-48-4-12. D has no right to conditional discharge; rather, it is conditional liberty & alternative to commitment to DOC that may be granted at sole discretion of Tr. Ct. Here, D pled guilty under Ind. Code 35-48-4-12 & later tested positive for controlled substances. As statute makes clear, once agreement is entered into, further proceedings are simply deferred until either conditions are satisfied & D is discharged, or they are violated & Ct. proceeds with case. Moreover, D signed agreement that stated that upon violation of conditions, Tr. Ct. can sentence D accordingly. Although statute does not mention imposition of sentence upon violation of conditions, Tr. Ct. properly entered judgment of conviction & appropriate sentence for commission of Class A misdemeanor. Held, judgment affirmed.

TITLE: Perry v. State

INDEX NO.: E.6.l.

CITE: (1/23/2015), 25 N.E.3d 771 (Ind. Ct. App. 2015)

SUBJECT: 3-year home detention sentence was not erroneous

HOLDING: Sentence requiring D to serve three years home detention via direct placement for D felony receiving stolen property did not exceed statutory maximum for sentences served on home detention. D argues that under IC 35-38-2.5-5, he should have been sentenced to only 6 months as the statute says home detention cannot exceed the minimum sentence for the felony level for which a person is convicted and sentenced, in this case 6 months because D was convicted of a D felony. See IC 35-50-2-7. D's argument, however, assumes he was sentenced to home detention as a condition of probation. See IC 35-50-2.5-5. He was not; he was sentenced via direct placement under IC 35-38-2.6-3. Further, D's reliance on Stith v. State, 766 N.E.2d 1266 (Ind. Ct. App. 2002) is misplaced. Stith noted that the General Assembly "removed the statutory distinction between probation-based home detention and community corrections-based home detention[.]" Id. at 1268. However, that distinction related to credit time, not the maximum time for home detention. Held, judgment affirmed.

TITLE: Smith v. State

INDEX NO.: E.6.l.

CITE: (5th Dist., 03-08-93), Ind. App., 610 N.E.2d 265

SUBJECT: Period of home detention

HOLDING: Ct. rejected D's argument that home detention of six months was erroneous because of Ind. Code 35-38-2.5-5, requiring that aggregate time in home detention may not exceed minimum term of imprisonment under Ind. Code 35-50-2 or 35-50-3. D argued that minimum for A misdemeanor was zero jail time, & therefore six months on home detention was inappropriate. Ct. noted that Ind. Code 35-50-3 does not identify minimum sentences for misdemeanors, but specifies only maximum sentences, & that because home detention clearly applies to misdemeanors as well as felonies, D's interpretation would make it impossible to give meaning to statute. Held, sentence affirmed. For additional issue on misdemeanor probation, see card at F.1.c.1.

RELATED CASES: Perry, 25 N.E.3d 771 (Ind. Ct. App. 2015) (3-year term of home detention via direct placement for D felony conviction was proper; see IC 35-38-2.6-3; D's argument that sentence should have not exceeded 6 months under IC 35-38-2.5-5 was based on mistaken assumption that he was sentenced to home detention as a condition of probation; see full review, this section).

TITLE: Smith v. State

INDEX NO.: E.6.l.

CITE: (10/25/2022), Ind. Ct. App., 198 N.E.3d 395

SUBJECT: Erroneous grant of State's motion to revoke pretrial diversion agreement

HOLDING: Defendant and State signed a diversion agreement and filed it with trial court wherein the State agreed to withhold prosecution if Defendant complied with various terms. A week later, the State moved to revoke the agreement and to add a felony count to the cause based on the discovery of "additional information related to this case." The trial court specifically found that Defendant "ha[d] been compliant with the terms of the agreement" but granted the State's motion, allowing it to renege on the agreement.

The Court of Appeals found the diversion agreement was a contract supported by consideration and the State was bound by the agreement's terms. The Court noted the bargained for exchange was requiring Defendant to complete specific terms that were detrimental to him, waiving his rights against unlawful search and seizure, jury trial, and speedy trial, and that the State also benefitted by avoiding trial. The Court further found that the State's revocation of the agreement was a breach of its terms. It was undisputed that the agreement had been properly executed and Defendant did not violate any of its terms. Held, judgment reversed and remanded with instructions to dismiss with prejudice.

TITLE: State v. Nix

INDEX NO.: E.6.l.

CITE: (5th Dist., 09-07-05), Ind. App., 833 N.E.2d 541

SUBJECT: State must object to treatment in lieu of prosecution; C.R. 4 (C) time attributed to D

HOLDING: Ct. found that dismissal of OWI & other charges was proper pursuant to treatment in lieu of prosecution statute, Ind. Code 12-23-6-1, as State failed to object to D's motion requesting such treatment. Ct. agreed with State that for Ind. Crim. Rule 4(C) & speedy trial purposes, time elapsing because of such request is attributable to the D & this request would extend the 4 (C) timeline by 140 days. Ind. Code 12-23-7-2(4) also states a request for treatment constitutes a formal speedy trial waiver. Further, if an individual is accepted for treatment during pendency of a felony charge, a Ct. may only defer the trial or withhold the judgment with the consent of the prosecutor. Ind. Code 12-23-7-8 (Ct.'s emphasis). However, where State fails to lodge an objection to participation in treatment in lieu of prosecution, waiver occurs. State v. Barlow, 390 N.E.2d 1046 (Ind. Ct. App.1979). Here, D completed treatment prior to State seeking a trial date. As D successfully completed treatment, Tr. Ct. did not err in granting his request to dismiss the case. Held, judgment affirmed.

TITLE: State v. Thomas
INDEX NO.: E.6.l.
CITE: (3rd Dist., 05-18-05), Ind. App., 827 N.E.2d 577
SUBJECT: D's placement in community corrections home detention program affirmed
HOLDING: Tr. Ct. did not exceed its statutory authority in sentencing D to serve executed sentence in community corrections home detention program for his Class B felony robbery conviction. D was eligible for this sentence under Ind. Code 35-38-2.6-1(a)(1), which applies to sentencing of a person convicted of a felony whenever any part of the sentence may not be suspended under Ind. Code 35-50-2-2 or Ind. Code 35-50-2-2.1. Ind. Code 35-50-2-2(b)(1) provides that a Tr. Ct. may suspend only that part of the sentence that is in excess of the minimum sentence γ if the crime committed was a Class A or B felony & the person has a prior unrelated felony conviction. In challenging D's placement, State argued that nothing in the record suggested that D's criminal history rendered the present offense non-suspendable. However, majority determined D had a previous felony conviction for marijuana possession which under Ind. Code 35-50-2-2(b)(1) meant the Tr. Ct. could only suspend D's sentence in excess of the minimum sentence. Further, majority disagreed with dissent's position that only the mootness issue could be addressed, as D only argued mootness (because a new order had been issued after a violation of community correction rules) & conceded the law & facts as to the State's argument. *Citing* several decisions, majority held that when a party concedes an issue "it is nevertheless the duty & responsibility" of the reviewing Ct. to determine the law as applied to the facts. See Myers v. State, 116 N.E.2d 839 (Ind. 1954). Held, judgment affirmed; Baker, J. concurring in part & dissenting for reasons stated above.

TITLE: Trice v. State

INDEX NO.: E.6.l.

CITE: (11/13/2018), 114 N.E.3d 496 (Ind. Ct. App. 2018)

SUBJECT: Expired firearm permit is not "misuse" of firearm

HOLDING: D's conviction of carrying a handgun without a license does not amount to a conviction of misuse of a firearm. Thus, Tr. Ct. erred by ordering the destruction of D's handgun, despite his expired permit. The phrase "misuse of a firearm" has not been legislatively defined in Indiana for purposes of Ind. Code section § 35-47-3-2(b), which punishes those convicted of misusing firearms by authorizing destruction of their firearms. Considering the dictionary definition of "misuse," Court noted the word is defined as "incorrect or improper use," "an occasion when something is used in an unsuitable way or in a way that was not intended" or "the act of using something wrongly or in a dishonest way."

Here, D's handgun was in the console of his vehicle, and officer became aware of its existence when D answered affirmatively and honestly the officer's inquiry as to whether he had any weapons in the vehicle. However, although D possessed the handgun, he did not use it. Therefore, the definitions of the term "misuse" can best be applied here to mean that a conviction for the misuse of a firearm must involve some use of the firearm that is incorrect, improper, or unsuitable. D did not use the handgun; rather, he merely possessed it. Thus, it defies logic and relevant precedent to say that he misused the handgun. Held, order to destroy D's handgun reversed; Crone, J., dissenting, argued that carrying a handgun without a license is a misuse, just as driving a motor vehicle without a license is misuse of the vehicle.

E. SENTENCING

E.6. Miscellaneous sentencing treatment/alternatives

E.6.n. Conversion to Class A Misdemeanor/Alternative Misdemeanor Sentencing (AMS) (IC 35-50-2-7; IC 35-38-1-1.5)

TITLE: Leeth v. State

INDEX NO.: E.6.n.

CITE: (1st Dist., 06-14-07), Ind. App., 868 N.E.2d 65

SUBJECT: Converted class D felony - D fulfilled all conditions

HOLDING: Tr. Ct. erred in denying D's petition to convert his Class D felony conviction to a Class A misdemeanor upon successful completion of his probation. Pursuant to Ind. Code 35-38-1-1.5 a), Tr. Ct. may enter judgment of conviction as a Class D felony & expressly provide for modification of conviction to a Class A misdemeanor within three years if the AMS requirements of Ind. Code § 35-50-2-7 are satisfied & the person fulfills certain conditions. Here, because D had not committed a prior felony that was reduced to a misdemeanor & instant offense was not one of domestic battery or possession of child pornography, AMS requirements of Ind. Code § 35-50-2-7 were satisfied. Moreover, prosecutor consented to proposed modification of conviction in plea agreement & Tr. Ct. implemented conditions of agreement in judgment of conviction. Where, as here, D satisfactorily completes the probation conditions set by the Ct. under Ind. Code § 35-38-1-1.5 (a) within the prescribed time period, Tr. Ct. must convert the conviction to a Class A misdemeanor. Ind. Code § 35-38-1-1.5 (d). State did not present evidence that D violated or did not complete the conditions during the probationary period, & probation officer filed a discharge stating he had successfully completed probation. Therefore, Tr. Ct. did not have any reason to deny D's petition under Ind. Code § 35-38-1-1.5 (c) & was required to convert judgment of conviction to misdemeanor pursuant to subsection (d). Held, judgment reversed & remanded to modify D's conviction to a Class A misdemeanor.

RELATED CASES: Smith, 71 N.E.3d 368 (Ind. 2017) (unambiguous terms of D's plea agreement precluded converting felony conviction to a misdemeanor pursuant to amended version of Ind. Code § 35-50-2-7(d); see full review, this section), Boyle, 947 N.E.2d 912 (Ind., 2011) (Ind. Code 35-38-1-1.5 provides Tr. Ct.s the only authority to grant misdemeanor modification after sentencing; because State did not consent to misdemeanor modification in D's plea agreement, D was not entitled to modification ten years after conviction; even had the State agreed, Tr. Ct., pursuant to Ind. Code 35-38-1-1.5 only has the authority to grant modification to a misdemeanor within three years of conviction); Brunner, 947 N.E.2d 411 (Ind. 2011) (Tr. Ct. lacked authority to modify D's conviction to a misdemeanor years after he had served his sentence; Tr. Ct.'s authority under Ind. Code 35-50-2-7 (b) to enter a judgment as a misdemeanor is limited to the time of sentencing); Recker, 904 N.E.2d 724 (Ind. Ct. App. 2009) (where D asked for repeated extension of probation in which to fulfill community service condition, Tr. Ct. had discretion to deny conversion to Class A misdemeanor; where D committed new offense during extension of probationary period, Tr. Ct. had no discretion to convert conviction to Class A misdemeanor).

TITLE: State v. Smith
INDEX NO.: E.6.n.
CITE: (3/28/2017), 71 N.E.3d 368 (Ind. 2017)
SUBJECT: Defendant's plea agreement precluded AMS
HOLDING: The unambiguous terms of Defendant's plea agreement precluded converting his felony conviction to a misdemeanor pursuant to the amended version of Ind. Code § 35-50-2-7(d).

In 2000, Defendant pled guilty to theft, agreeing with the State that "he would be precluded from asking for misdemeanor treatment." At that time, Tr. Ct.s could convert sentences only at the time of sentencing. However, in 2012, the General Assembly amended Ind. Code § 35-50-2-7 to allow sentences to be converted after they had been entered. In 2015, Defendant petitioned for AMS based on the amended statute. The Tr. Ct. granted the petition, and the Court of Appeals affirmed.

The stipulation in Defendant's plea agreement that "he would be precluded from asking for misdemeanor treatment" is unambiguous. Not holding Defendant to this agreement would deny the State the benefit of its bargain. Thus, the Tr. Ct. exceeded its authority when it granted Defendant's request of misdemeanor treatment. Held, transfer granted, Court of Appeals opinion at 58 N.E.3d 224 (Ind. Ct. App. 2016) vacated, and judgment reversed.

RELATED CASES: Leech, Ind. App., 868 N.E.2d 65 (unambiguous terms of D's plea agreement precluded converting felony conviction to a misdemeanor pursuant to amended version of Ind. Code § 35-50-2-7(d); see full review, this section); Ott, 997 N.E.2d 1083 (Ind. Ct. App. 2013) (Tr. Ct. did not err in denying D's motion to convert a D felony to A misdemeanor pursuant to Ind. Code 35-50-2-7(c), where D pled guilty to a felony before Indiana started designate felonies by distinct classes; see full review, this section); Boyle, 947 N.E.2d 912 (Ind., 2011) (Ind. Code 35-38-1-1.5 provides Tr. Ct.'s. the only authority to grant misdemeanor modification after sentencing; because State did not consent to misdemeanor modification in D's plea agreement, D was not entitled to modification ten years after conviction; even had the State agreed, Tr. Ct., pursuant to Ind. Code 35-38-1-1.5 only has the authority to grant modification to a misdemeanor within three years of conviction); Brunner, 947 N.E.2d 411 (Ind. 2011) (Tr. Ct. lacked authority to modify D's conviction to a misdemeanor years after he had served his sentence; Tr. Ct.'s authority under Ind. Code 35-50-2-7 (b) to enter a judgment as a misdemeanor is limited to the time of sentencing); Recker, 904 N.E.2d 724 (Ind. Ct. App. 2009) (where D asked for repeated extension of probation in which to fulfill community service condition, Tr. Ct. had discretion to deny conversion to Class A misdemeanor; where D committed new offense during extension of probationary period, Tr. Ct. had no discretion to convert conviction to Class A misdemeanor).

TITLE: State v. Smith

INDEX NO.: E.6.n.

CITE: (8/2/2016), 58 N.E.3d 224 (Ind. Ct. App. 2015)

SUBJECT: AMS statute applies retroactively

HOLDING: Tr. Ct.'s reduction of D's 2000 Class D felony theft conviction pursuant to the 2014 amendment to Ind. Code § 35-50-2-7 did not run afoul of the general prohibition against retroactive application of statutes because the plain language of the statute applies not only to those who committed crimes after June 30, 2015, but also to those whose crimes were "committed before July 1, 2014," making the statute apply both prospectively and retroactively.

In 2000, D pled guilty to Class D felony theft. In May of 2015, he asked the Tr. Ct. to convert his conviction to a Class A misdemeanor under Ind. Code § 35-50-2-7(d) (2014). The Tr. Ct. granted his request.

Even though this relief was not available when D was sentenced in the year 2000, there is no retroactivity problem. Under the version of Ind. Code § 35-50-2-7 in effect at the time, a Tr. Ct. could convert a Class D felony into an A misdemeanor only at the time of sentencing. See State v. Brunner, 947 N.E.2d 411, 416 (Ind. 2011). The 2012 amendment to the statute allowed Tr. Ct.s to consider a D's post-sentencing behavior when deciding whether to convert the conviction, so "Tr. Ct.s were permitted to modify convictions and sentences that had already been entered." Cf. Alden v. State, 983 N.E.2d 186, 189 (Ind. Ct. App. 2013), *trans. denied*. With the 2014 amendment, the legislature explicitly granted Tr. Ct.s authority to convert a Class D felony conviction, entered before July 1, 2014, to an A misdemeanor, assuming statutory requirements are met. Held, judgment affirmed.

TITLE: State v. Smith

INDEX NO.: E.6.n.

CITE: (8/2/2016), 58 N.E.3d 224 (Ind. Ct. App. 2015)

SUBJECT: Plea agreement did not bar AMS

HOLDING: The plea agreement D entered in 2000 did not bar Tr. Ct. from converting D's Class D felony theft conviction to an A misdemeanor, even though the plea agreement said D could not seek "misdemeanor treatment" for the conviction. The plea agreement foreclosed only those remedies that were available to D at that time, which was to seek such reduction before the Tr. Ct. imposed final sentence. See Ind. Code § 35-50-2-7. As amended in 2012 and 2014, the statute allows a Tr. Ct. to convert the felony to a misdemeanor after a Tr. Ct. has sentenced the person. When the parties reached the plea agreement in 2000, they could not have anticipated that post-sentencing AMS would become available. Thus, the plea agreement did not foreclose conversion of the conviction, and the Tr. Ct. had authority to convert the felony to a misdemeanor. Held, judgment affirmed.

TITLE: State v. Vankirk
INDEX NO.: E.6.n.
CITE: (10-05-11), 955 N.E.2d 765 (Ind. Ct. App. 2011)
SUBJECT: AMS allows modification of lifetime driving forfeiture to suspension
HOLDING: Addressing a reserved question of law, Court held that Tr. Ct. did not err in finding that modification of D's sentence for operating a motor vehicle while habitual traffic offender from a D felony to an A misdemeanor pursuant to AMS meant that D's driving privileges were no longer suspended for life.

In 2005, D pled guilty to operating a motor vehicle while a habitual traffic violator, a class D felony. The State agreed to alternative misdemeanor sentencing ("AMS") under Ind. Code § 35-38-1-1.5 if D successfully completed his probation. Once D completed probation, Tr. Ct. modified the judgment to a class A misdemeanor. However, it did not address the prior forfeiture of D's driving privileges. In January 2009, D was stopped for a moving violation. The State charged him with operating a motor vehicle while privileges are forfeited for life. After a bench trial, Tr. Ct. found that forfeiture of a driving license is not proper for class A misdemeanors. Thus, it found that when D was stopped for the moving violation, he was not driving after his driving privileges had been suspended for life. It found, as a matter of law, that because D was sentenced to a class A misdemeanor, "his driving privileges could only have been suspended and not forfeited."

Both Indiana Code § 9-30-10-16 and Indiana Code § 35-38-1-1.5(e) address suspension of driving privileges, but only 9-30-10-16 also addresses forfeiture of driving privileges. Thus, AMS sentence modification does not prohibit modifying a D's driving privileges from forfeiture to suspension.

However, neither Ind. Code § 9-30-10-16 nor Ind. Code § 35-38-1-1.5 prevents a Tr. Ct. from ordering additional suspension of driving privileges upon conversion of a class D felony conviction to a class A misdemeanor conviction. "We therefore remind Tr. Ct.s and parties to plea agreements that any order or plea agreement regarding future alternative sentencing should specify an additional period, if any, of suspension of the convicted person's driving privileges upon the entry of a judgment for conviction of a class A misdemeanor for an offense under Indiana Code section 9-30-10-16 (a)." Held, judgment affirmed.

TITLE: Troxell v. State

INDEX NO.: E.6.n.

CITE: (10-25-11), 956 N.E.2d 164 (Ind. Ct. App. 2011)

SUBJECT: Misdemeanor conversion - judicial estoppel requires enforcement of plea agreement

HOLDING: Tr. Ct. abused its discretion by denying D's petition for alternative misdemeanor sentencing. Indiana Code 35-28-1-1.5 provides two different mechanisms by which a Class D felony could be reduced to a Class A misdemeanor. Although in Boyle v. State, 947 N.E.2d 912 (Ind. 2001), the Indiana Supreme Court applied a three-year time limit to any request for misdemeanor conversion, the plain language of the statute imposes a three-year time limit for requesting misdemeanor conversion only on the first mechanism, *i.e.*, "the automatic conversion" provision.

Here, D pled guilty to a Class D felony in return for three years of probation. However, the plea agreement included the language that he "may petition to have this matter reduced to a Class A misdemeanor upon successful completion of probation, but the State reserves the right to object to such a reduction." When D petitioned for the misdemeanor after three years, the State objected and the Tr. Ct. found that D's petition was time-barred under Ind. Code. 35-38-1-1.5. But, Court of Appeals found that D's plea did not entitle him to an automatic conversion upon which the statute imposes a three-year time limit. Thus, in 2006 before the Boyle decision, the parties could not have known that his petition would be limited by the same time limits as the automatic conversion provision. Moreover, judicial estoppel prevents a party from assuming a position in a legal proceeding inconsistent with one previously asserted. Because the State entered into a plea agreement that did not permit D to petition for a reduction until after three years had passed, it cannot now claim that D is time barred from petition for a reduction because he did not do so within three years. Held, judgment reversed.

RELATED CASES: Fields, 972 N.E.2d 974 (Ind. Ct. App. 2012) (Tr. Ct. did not have statutory authority under Ind. Code 35-38-1-17 to convert D's felony conviction to a misdemeanor).

E. SENTENCING

E.7. Commitment (Ind. Code 35-38-3)

TITLE: Brock v. State

INDEX NO.: E.7.

CITE: (2d Dist. 8/20/90), Ind. App., 558 N.E.2d 872

SUBJECT: Commitment to county jail - felony sentence

HOLDING: Tr. Ct. had authority to order D's one-year executed sentence for possession of marijuana to be served in county jail consecutive to one-year misdemeanor driving while suspended sentence. D argues that statutes require transfer of sentenced individual to Department of Correction (DOC) without delay. Ind. Code 35-38-1-14 requires that Tr. Ct. send to DOC copy of presentence report & related materials when convicted person is sentenced to imprisonment. However, Ind. Code 35-38-3-2 directs that Tr. Ct., without delay, certify & send copies of judgment & sentence to receiving authority. Receiving authority is defined at Ind. Code 35-38-3-1 as: (1) DOC; (2) sheriff, if incarceration is authorized in county jail; or (3) facility or place designated by DOC. Question remaining is who may authorize incarceration in county jail. Prior to 1983, statutes required sheriff, within 5 days of sentencing, to convey convicted person to placement designated by DOC. This section was repealed & replaced by Ind. Code 35-38-3-1, which simply requires that sheriff transport person to receiving authority. Logical interpretation is that legislature intended that authority to order incarceration in county facility was not limited to DOC. Additional support for this interpretation is found in Title 11, which empowers DOC to evaluate "committed" offenders & classify & assign them to facility or program. Rationale for evaluation & assignment by DOC rather than Tr. Ct. is separation of powers, & this principle is not violated by commitment to county jail rather than state DOC. In any event, D has shown no harm resulting from his incarceration in county jail rather than DOC. Held, commitment to county jail affirmed.

TITLE: Prater v. State

INDEX NO.: E.7.

CITE: (8/31/2016), 59 N.E.3d 314 (Ind. Ct. App. 2015)

SUBJECT: Erroneous commitment of Level 6 offender to DOC

HOLDING: D pled guilty to aiding in dumping controlled substance waste, a Level 6 felony, and was sentenced to one and one half years at the Department of Correction (DOC). However, the plain language of Ind. Code § 35-38-3-3(d) prohibits a Tr. Ct. from sentencing a person after December 31, 2015 to the DOC unless certain circumstances are met. Because none of the circumstances have been met here, Tr. Ct. erred by ordering D to serve his sentence in the DOC. D could be placed on probation, in the county jail, or in community corrections. Held, judgment affirmed in part, reversed in part and remanded to impose a sentence which complies with Ind. Code § 35-38-3-3(d).

TITLE: Mitchell v. State

INDEX NO.: E.7.

CITE: (02/28/2022), 184 N.E.3d 705 (Ind. Ct. App. 2022)

SUBJECT: Trial court erred in ordering defendant to serve sentence at DOC.

HOLDING: Defendant pleaded guilty to Level 6 felony methamphetamine possession and Class C misdemeanor possession of paraphernalia. He argued the trial court abused its discretion when it sentenced him to the Department of Correction (DOC) for a Level 6 felony and misdemeanor. The State conceded that the trial court lacked statutory authority to order the sentence served in the DOC under Indiana Code 35-38-3-3. The Court of Appeals remanded with instructions to correct its abstract of judgment and sentencing order so Defendant can be transferred to the county jail. The Court of Appeals rejected Defendant's other argument that the 1.5-year executed sentence was inappropriate in light of the nature of the offense and character of the offender. Defendant failed to take advantage of rehabilitative efforts offered to him and his remorse did not justify reducing the sentence.

Note: In 2022, the Legislature repealed the statutory restriction in IC 35-38-3-3 for commitment of level 6 felony offenders to the DOC.

E. SENTENCING

E.7. Commitment (Ind. Code 35-38-3)

E.7.a. Record of judgment/sentence/degree of security recommendation (Ind. Code 35-38-3-2(c) and 5)

TITLE: Stuck v. Aikens

INDEX NO.: E.7.a.

CITE: 760 F. Supp. 740 (7th Cir. 1991) 02/22/1991

SUBJECT: Sentencing -- recommendation as to degree of security

HOLDING: D was convicted of second degree murder & sentenced to life in prison. He contended that his transfer, through no fault of his own, to prisons with greater security & restrictions violated his constitutional rights. Ct. held that determination of degree of security assigned to convicted person generally is within province of department of corrections, & that transfer of prison inmate to prison with greater security & restrictions did not violate prisoner's constitutional rights. Held, summary judgment granted for various state & prison officials.

E. SENTENCING

E.7. Commitment (Ind. Code 35-38-3)

E.7.b. GBMI (Guilty but mentally ill) (Ind. Code 35-36-2-5(b))

TITLE: Whitt v. State

INDEX NO.: E.7.b.

CITE: (10/1/86), Ind., 497 N.E.2d 1059

SUBJECT: GBMI - sentence exceeds life expectancy

HOLDING: Tr. Ct. did not err in sentencing D, found GBMI by jury, to maximum years (60). Here, D contends it is manifestly unjust for Tr. Ct. to sentence person found GBMI to maximum penalty when it exceeds D's life expectancy. Ct. finds nothing in statute indicating person found GBMI should be treated & released. DOC is charged with safety & welfare of all of its inmates & is required to furnish necessary medical attention for each of them, including mentally ill inmates. Ct. notes this is true notwithstanding passage of statute referring to GBMI. "Even though [D] would remain an inmate in one of our penal institutions he would nevertheless benefit by treatment for his mental illness[;] his quality of life could be improved by reason of such treatment." Ct. finds no error in sentence. See Green, 469 N.E.2d 1169 (50-year sentence for murder following GBMI affirmed). Held, no error. Dixon CONCURS IN RESULT without opinion.

E. SENTENCING

E.7. Commitment (Ind. Code 35-38-3)

E.7.c. Commencement of sentence (Ind. Code 35-38-3-2(d))

TITLE: Woods v. State

INDEX NO.: E.7.c.

CITE: (01/14/92), Ind., 583 N.E.2d 1211

SUBJECT: Delay in commencement of sentence - loss of Tr. Ct. jurisdiction

HOLDING: Tr. Ct. loses jurisdiction over D after certification of affirmance of conviction, if it does not act to initiate commencement of sentence within reasonable time. D appealed original conviction & appeal was denied & certified to Tr. Ct. Nothing was done to initiate D's commitment to DOC for 5« years. When Tr. Ct. then ordered execution of D's sentence, he argued that Ct. had waited too long to commit him, but Ct. of Appeals af- firmed Tr. Ct.'s order, Woods, App., 578 N.E.2d 715. Ind. S.Ct. granted transfer & modified Smith, 190 N.E. 169, relied on by Ct. of Appeals & Tr. Ct. S.Ct. found Taylor, 120 N.E.2d 165, (where delay was between guilt determination & sentencing) while involving different facts, contained principle of law with logical application to instant case. In Taylor, majority held "[a]n American citizen is entitled to live without a Damocles sword hanging over his head." Five-and-one-half year delay here was great enough to make later commitment inequitable. Tr. Ct. lost jurisdiction because of delay & D's discharge should have been granted. Ct. found that this situation was type fore- seen in Ind. Const. when S. Ct. was granted power to review & revise sentences in Art. 7, Sec. 4. Held, D's commitment set aside & discharge ordered.

RELATED CASES: Minnick, 965 N.E.2d 124 (Ind. Ct. App. 2012) (purpose of prompt sentencing - allowing an American citizen to live without the sword of Damocles dangling over his head - does not apply where D spent the entire time of delay incarcerated, mostly under a sentence of death).

E. SENTENCING

E.7. Commitment (Ind. Code 35-38-3)

E.7.e. Institutional assignment/degree of security (Ind. Code 35-38-3-5 and 6)

TITLE: Parker v. State

INDEX NO.: E.7.e.

CITE: (8/28/89), Ind. App., 542 N.E.2d 1026

SUBJECT: Sentencing -- determination of locale for incarceration

HOLDING: D was not entitled to enforcement of alleged term of plea agreement which entitled him to serve remainder of prison term in Kentucky. Plea agreement did not provide as condition of plea that State would recommend D be allowed to serve his time in Kentucky. Since D offered no evidence to support his contention, & since determination of locale for incarceration is function vested by legislature & Department of Correction & not Tr. Ct., Tr. Ct. did not err when it refused to compel Indiana Department of Correction to release D to Kentucky officials. Held, denial of motions for specific performance of plea agreement or in alternative modification of sentence affirmed.

TITLE: Reed v. State

INDEX NO: E.7.e.

CITE: (6/25/85), Ind., 479 N.E.2d 1248

SUBJECT: Sentencing - institutional assignment

HOLDING: Where D provides no facts or authority to support his claim that he would be in danger if committed to a maximum-security facility (MSF), Ct. finds no error. Here, 18 year-old 5' 2", 110 pound physically attractive white male argues placement in MSF would be cruel & unusual punishment because his physical attributes make him a target for extreme abuse. Ct. finds D waived issue by failing to raise claim at sentencing. Ind. Code 35-4.1-5-3(c) [now Ind. Code 35-38-3-5(c) (now applicable only to murder)] requires Ds sentenced for murder & Class A felonies to be confined in MSF for at least first 2 years of sentence. Person convicted of crime has no identifiable right to assignment to particular institution. Barnes, 435 N.E.2d 235. State does have duty to take reasonable precautions to preserve life, health & safety of prisoners. Mere potential for inadequate individual care/security does not present question of constitutional dimension. See generally Naked City, App., 460 N.E.2d 151 (card at S.2). Held, no error.

RELATED CASES: Lindsey, App., 877 N.E.2d 190 (placement in the Orange County jail to serve 8-year sentence was not cruel and unusual).

E. SENTENCING

E.8. Bifurcated proceedings other than 30-year habitual

TITLE: Hines v. State

INDEX NO: E.8.

CITE: (1-21-04), Ind., 801 N.E.2d 634

SUBJECT: Bifurcated trial - Unlawful Possession of Firearm by Serious Violent Felon

HOLDING: Ct. granted transfer to adopt & incorporate by reference the opinion of the Ct. App. in Hines v. State, 794 N.E.2d 469 (Ind. Ct. App. 2003), agreeing that D's request for a bifurcated trial on charges of robbery & unlawful possession of a firearm by a serious violent felon (SVF) should have been granted. Specifically, Ct. agreed that the prejudice arising from evidence of prior felony convictions needed to sustain the unlawful possession of firearm by SVF charge substantially outweighed its probative value for the robbery charge. Specifically, the S.Ct. highlighted two portions of the Ct. App.' decision: 1) Spearman v. State, 744 N.E.2d 545 (Ind. Ct. App.2001), involved the denial of a bifurcated trial when tried solely for the crime of unlawful possession of a firearm by a SVF, & (2) The Ct. App. properly analyzed the effect of D's offer to stipulate to the serious violent felon charge if found guilty of the robbery. Ct. noted that "while it is generally true that the State is entitled to prove its case by evidence of its own choice... the United States S. Ct. has determined that this general rule has virtually no applicability where" the issue is a D's legal status independent of the criminal behavior later charged against him. Old Chief v. United States, 519 U.S. 172, 186-187 (1997). Held, transfer granted, D's convictions reversed & Ct. App.' opinion adopted & incorporated by reference.

RELATED CASES: Carpenter, 15 N.E.3d 1075 (Ind. Ct. App. 2014) (D failed to show prejudice and right to bifurcated trial on charge for possession of gun by SVF by preliminary instruction that included citation to SVF statute); Russell, 997 N.E.2d 351 (Ind. 2013) (no abuse of discretion in partial bifurcation of trial); Dugan, App., 860 N.E.2d 1288 (Tr. Ct. did not abuse its discretion in refusing to bifurcate trial where only charge was SVF in possession of firearm; however, Ct. implicitly suggests that parties & judges refer to statute cite rather than to "serious violent felon" when D stipulates to his prior conviction); Gray, App., 841 N.E.2d 1210 (appellate counsel ineffective for not arguing SVF bifurcation issue; see full review at Y.4.c); Causey, App., 808 N.E.2d 139 (Ct. found no 6th Amend. violation of D's right to a fair & impartial jury nor a due process violation where D was tried before same jury on the same day for firearm possession charge after his acquittal on robbery charge; D agreed to these proceedings, & invited the error by stipulating to the bifurcation proceedings prior to trial).

TITLE: Williams v. State

INDEX NO.: E.8.

CITE: (5th Dist., 09-21-05), Ind. App., 834 N.E.2d 225

SUBJECT: Serious violent felon - bifurcation; jury instruction

HOLDING: In its preliminary instructions in trial for possession of firearm by serious violent felon, Tr. Ct. properly instructed jury as follows: The D is charged with Illegal Possession of a Firearm. The trial of charge will be in two (2) stages. In the first stage, there will be a trial on the issue of whether the D knowingly or intentionally possessed the firearm as charged. If you find beyond a reasonable doubt that the D knowingly or intentionally possessed the firearm as charged, there will be a second stage of the trial. In the second stage, there will be a trial of the issue of whether the D committed a crime by possessing a firearm.

Ct. rejected D's argument that this instruction implied that a second phase of trial was inevitable. Instruction clearly stated that there would be a second phase of trial if, & only if, jury first concluded beyond a reasonable doubt that D had knowingly or intentionally possessed a firearm.

Ct. approved of Tr. Ct. having bifurcated trial so as to avoid any labeling of D as a "serious violent felon" until after jury decided whether he had in fact possessed firearm. With bifurcation, however, comes difficulty of explaining to jury why the D is facing trial for merely possessing a firearm. Tr. Ct. here struck proper balance between advising jury that D had been charged with a firearm-related crime & avoiding identifying D as a "serious violent felon" from the outset of trial. Although current precedent does not require Tr.Cts. to bifurcate SVF trials, bifurcation procedure serves the ends of justice in such trials. Ct. urged Indiana trial judges to use this procedure in SVF cases. Held, judgment affirmed in part & reversed in part on other grounds.

E. SENTENCING

E.8. Bifurcated proceedings other than 30-year habitual

E.8.a. Habitual Class D felony offender (Ind. Code 35-50-2-71- prior to 7-1-93 only)

TITLE: Hensley v. State

INDEX NO.: E.8.a.

CITE: (10/1/86), Ind., 497 N.E.2d 1053

SUBJECT: Habitual offender - Class D felonies; application of statute

HOLDING: Tr. Ct. did not err in enhancing D's Class D felony conviction by 30 years. Ct. rejects D's contention that he should be eligible for sentencing under Ind. Code 35-2-7.1, which provides for an enhancement of 8 rather than 30 years, where D's prior convictions were also Class D felonies. Ct. finds legislature's intent directly/clearly expressed. Statute excludes any felonies committed before 9/1/85 (effective date of statute). Here, both of D's prior convictions occurred before 9/1/85. Held, no error.

TITLE: Parker v. State

INDEX NO.: E.8.a.

CITE: (1st Dist., 8-31-01), Ind. App., 754 N.E.2d 614

SUBJECT: Constitutionality of firearm enhancement statute

HOLDING: Tr. Ct. did not err in enhancing D's 40-year sentence for Class A felony robbery an additional five years pursuant to Ind. Code 35-50-2-11(b)(1). Statute provides for five-year sentence enhancement based on D's use of handgun in commission of felony that results in death or serious bodily injury. D argued that he was denied due process when Tr. Ct. enhanced his sentence for use of handgun during course of robbery, & that sentencing statute is unconstitutional. Other than fact of prior conviction, any fact that increases penalty for crime beyond prescribed statutory maximum must be submitted to jury & proved beyond reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466 (2000). There is distinction between facts that constitute elements of crime, which must be charged & proven beyond reasonable doubt, & mere "sentencing factors," which need not be charged or supported by jury verdict. Jones v. United States, 526 U.S. 227 (2000). Application of Indiana statute under which D's sentence was enhanced did not offend due process under Jones & Apprendi standard. Charge that D used handgun during robbery was submitted to jury, & to reach its verdict jury must have determined beyond reasonable doubt that State proved he did. Held, no error.

E. SENTENCING

E.8. Bifurcated proceedings other than 30-year habitual

E.8.b Habitual substance offender (Ind. Code 35-5-2-10)

TITLE: Bauer v. State
INDEX NO.: E.8.b.
CITE: (5th Dist., 11-05-07), 875 N.E.2d 744 (Ind. Ct. App. 2007)
SUBJECT: Habitual substance offender (HSO) - suspendability
HOLDING: Disagreeing with Reffett v. State, 844 N.E.2d 1072 (Ind. Ct. App. 2006) & Howard v. State, 873 N.E.2d 685 (Ind. Ct. App. 2007), Court held that an enhanced sentence imposed under HSO statute (Ind. Code 35-50-2-10) may be suspended. In Williams v. State, 430 N.E.2d 756 (Ind. 1982), S.Ct. interpreted then-existing version of Indiana's suspension statute (Ind. Code 35-50-2-2) to prohibit Tr. Ct. from suspending D's HO enhancement. In contrast to the version of Ind. Code 35-50-2-2 addressed in Williams, current version of statute permits Tr. Ct. to suspend all or that part of sentence that is in excess of the minimum for certain felonies. Plain language of Ind. Code 35-50-2-10(f), which is similar to that of statutes governing sentences for underlying felonies, does not require HO enhancements to be fully executed. When legislature does not want any part of an additional term of imprisonment suspended, it has expressly provided so. See, e.g., Ind. Code 35-50-2-2(f). While HSO statute clearly reflects legislature's intent to punish & deter recidivistic conduct, Ind. Code 35-50-2-2 clearly establishes legislature's intent as to when suspension is appropriate. When considering duration of sentence, a year is still a year, regardless of whether it is executed or suspended.

Here, D was convicted of OWI & has two prior OWI convictions, thus Tr. Ct. could have suspended only that part of sentence in excess of minimum sentence pursuant to Ind. Code 35-50-2-2(b)(4). D's other convictions were class D felonies, which carry a six-month minimum sentence. HSO statute requires Tr. Ct. to sentence a person found to be a HSO to an additional fixed term of at least three years but not more than eight years. Where class D felony serves as underlying offense for HSO finding, sentencing range for that felony is enhanced such that new sentencing range is three & a half years to eleven years. Thus, the minimum sentence D could have potentially received for class D felony conviction & HSO finding is three & a half years. Tr. Ct. imposed a six-year sentence, & pursuant to terms of Ind. Code 35-50-2-2, could have suspended any part of the sentence in excess of three & a half years. See Collins v. State, 583 N.E.2d 761 (Ind. Ct. App. 1991) (suspendability of HSO sentence depends on application of Ind. Code 35-50-2-2 to underlying conviction). Held, judgment affirmed in part, reversed in part & remanded.

Note: This case implicitly holds that if an underlying felony is suspendible below the minimum, the additional fixed term is suspendible below the minimum, 3 years, also.

RELATED CASES: Young, 901 N.E.2d 624 (Ind. Ct. App. 2009) (addressing legality of D's sentence sua sponte, Ct. held that Tr. Ct. erred in suspending the entire habitual substance offender enhancement and in ordering all but 240 days of D's sentence on Class D felony conviction would be suspended; Tr. Ct. could only suspend that portion of sentence in excess of three and a half years).

TITLE: Collins v. State

INDEX NO.: E.8.b.

CITE: (2d Dist. 12/30/91), Ind. App., 583 N.E.2d 761

SUBJECT: Habitual Substance Offender (HSO) may be suspendible

HOLDING: HSO enhancement, Ind. Code 35-50-2-10, is suspendible if underlying offense is suspendible. D was convicted of operating vehicle while intoxicated (OWI) with previous conviction of OWI, & operating vehicle after being determined to be habitual traffic offender (HTO), & Ct. found D was also HSO. D was sentenced to 3 years consecutively on each of first 2 convictions, & first conviction was enhanced by 3 years due to HSO status, for total of 9 years, of which 6 were suspended. Ct. determined that HSO enhancement was nonsuspendible.

Ct. distinguished Devaney, Ind. App., 578 N.E.2d 386, where HSO was determined to be nonsuspendible. In Devaney, State received Writ ordering Tr. Ct. not to suspend any part of HSO enhancement, but Tr. Ct. suspended part anyway. On appeal, Ct. relied not only on Writ from Ind. S.Ct., but also found purpose & mandatory language of HSO statute prohibited suspension of any portion of any enhancement. Judge Shields concluded that under certain circumstances, the enhancement could be suspended, & relied instead on the Writ as law of the case. Ct. now determines that Judge Shields was correct & that present case differs from Devaney because there, D was being sentenced for his second felony conviction, making underlying offense non-suspendible, while in instant case D was being sentenced for his first felony conviction, which was suspendible. Because HSO enhancement was attached to suspendible sentence, it was also suspendible. Held, remanded for reconsideration of sentence.

RELATED CASES: Reffett, App., 843 N.E.2d 1072 (Tr. Ct. erred when it suspended two years of the five-year HSO enhancement it imposed).

TITLE: Freeman v. State
INDEX NO.: E.8.b.
CITE: (11-22-95), Ind., 658 N.E.2d 68
SUBJECT: No habitual substance offender enhancement - Operating while intoxicated (OWI)
HOLDING: OWI conviction which is enhanced from class A misdemeanor to class D felony under provisions of Ind. Code 9-30-5-3 may not also be enhanced under habitual substance offender (HSO) provisions of Ind. Code 30-50-2-10. Legislature did not intend general HSO enhancement to apply to OWI convictions. Instead, Ind. Code 9-30-5 (formerly Ind. Code 9-11-2) includes more detailed & specific system of progressive punishment for Ds who are repeatedly convicted of OWI offenses. When statutes cannot be harmonized, & legislature dealt with subject in detailed manner in one statute & in general manner in another, detailed statute will supersede general one. Sanders, 466 N.E.2d 424. Here, Tr. Ct.'s application of HSO enhancement to D's two prior OWI convictions was improper. Ind. Code 9-11-2 (recodified at Ind. Code 9-30-5) was only enhancement to which D should have been subject. Held, transfer granted, HSO enhancement reversed; Sullivan, J., dissenting.

Note: in 1996, statutory definition of "substance offense" was amended by adding "offense under Ind. Code 9-30-5" see Schnepp, App., 768 N.E.2d 1002; Weaver, App., 702 N.E.2d 750; Weida, 693 N.E.2d 598 (D's sentence as class D felony & enhancement under HSO statute were proper given statutory amendment).

RELATED CASES: King, App., 848 N.E.2d 305 (underlying OWI conviction committed before 1996 amendment to statute was a "substance offense" under Ind. Code 35-50-2-10); Roberts, App., 725 N.E.2d 441 (agreeing with majority in Weida that amendment to HSO statute illustrated legislature's intent that D felony OWI could be used as predicate offense to HSO); Settle, App., 709 N.E.2d 34 (Tr. Ct. erred by sentencing D under 1996 version of HSO statute, because 1993 version of statute was in effect at time underlying offense was committed); Burp, App., 672 N.E.2d 439 (elevated sentence for OWI cannot also be enhanced under Ind.'s general HO statute); Morphew, App., 672 N.E.2d 461 (misdemeanor OWI conviction is properly enhanced under HSO statute where enhancement under specific OWI statute is inapplicable); Devore, 657 N.E.2d 740 (Tr. Ct. erred by enhancing D's punishment under both OWI statute & HSO statute).

TITLE: Hendrix v. State

INDEX NO.: E.8.b.

CITE: (12-20-01), Ind., 759 N.E.2d 1045

SUBJECT: Prosecutor's discretion to charge habitual offender or habitual substance offender

HOLDING: When D commits three felony substance abuse convictions & meets requirements of both habitual offender (HO) statute & habitual substance offender (HSO) statute, prosecutor has discretion to seek the harsher HO enhancement rather than HSO enhancement. Ct. rejected argument that legislature intended all substance abuse offenders to be charged & punished more leniently, under HSO statute. Where two criminal statutes overlap such that both are appropriate under circumstances, prosecutor has discretion to charge under either statute. Skinner v. State, 736 N.E.2d 1222. This principle applies in habitual offender context as well.

However, in this case, Tr. Ct. erred in its conclusion that HO enhancement had to be attached to most severe felony of which D was convicted. Where HO proceeding follows multiple felony convictions, jury finding of HO status is not linked to any particular conviction. Greer v. State, 680 N.E.2d 526. Tr. Ct. therefore has discretion to choose which sentence to enhance. Winn v. State, 748 N.E.2d 352. Held, judgment affirmed in part & remanded for re-sentencing & for Tr. Ct. to enhance either Class B felony or Class A felony conviction.

TITLE: Marshall v. State

INDEX NO.: E.8.b.

CITE: (2d Dist. 6/19/86), Ind. App., 493 N.E.2d 1317

SUBJECT: Habitual substance offender

HOLDING: Tr. Ct. erred in denying D's motion for judgment on the evidence at conclusion of habitual substance offender proceeding. Here, D was charged with & convicted of possession. Statutory definition of "substance offender" in effect at the time of D's trial did not include crime of possession. Ind. Code 35-50-2-10. Penal statutes must be construed against state [Pennington, 426 N.E.2d 408; Cape, 400 N.E.2d 161] & cannot be enlarged by construction [Gore, App., 456 N.E.2d 1030]. Another rule of construction also applies: *expressio unius est exclusio alterius*, which means "[w]hen certain items are specified or enumerated in statute, then, by implication other items not so specified are excluded." [Citations omitted.] Ct. notes legislature later amended statute to include possession. With no indication to contrary, Ct. presumes legislature intended change. Van Orman, App., 416 N.E.2d 1301. Held, possession conviction affirmed; sentence enhancement reversed.

TITLE: Morphew v. State
INDEX NO.: E.8.b.
CITE: (5th Dist., 10-29-96), Ind. App., 672 N.E.2d 461
SUBJECT: Habitual substance offender enhancement - operating while intoxicated (OWI)
HOLDING: Tr. Ct. properly enhanced D's misdemeanor OWI conviction pursuant to Ind.'s habitual substance offender statute, Ind. Code 35-50-2-10. In Freeman, 658 N.E.2d 68 (this section), S.Ct. held that OWI sentence enhanced under Ind. Code 9-30-5-3 may not also be enhanced under habitual substance offender statute. However, Freeman holding is inapplicable in cases where, as here, both enhancement provisions do not apply. General enhancement provision of habitual substance offender statute applies in instances where specific scheme provided by Ind. Code 9-30-5 is inapplicable. In this case, D's most recent OWI conviction did not occur within five years of his prior conviction, thus enhancement of most recent conviction was not proper under Ind. Code 9-30-5-3. Because Ind. Code 9-30-5 could not serve as enhancement for D's current conviction, habitual substance offender statute was properly applied. Held, judgment affirmed.

TITLE: Murray v. State

INDEX NO.: E.8.b.

CITE: (2nd Dist., 11-19-03), Ind. App., 798 N.E.2d 895

SUBJECT: Habitual substance offender (HSO) - possession of precursors cannot be used as predicate offense

HOLDING: Crime of possession of chemical reagents or precursors with intent to manufacture methamphetamine is not a predicate "substance offense" for purposes of enhancing a sentence under HSO statute, Ind. Code 35-50-2-10(a)(2). A "substance offense" is defined as a "Class A misdemeanor or felony in which possession, use, abuse, delivery, transportation, or manufacture of alcohol or drugs is a material element of the crime." "Drug" is defined by HSO statute as "a drug or a controlled substance (as defined in Ind. Code 35-48-1)." Ind. Code 35-50-2-10(a)(1). In turn, a "controlled substance" is defined as "a drug, substance, or immediate precursor in schedule I, II, III, IV or V..." Ind. Code 35-48-1-9. Ct. concluded that the term "immediate precursor" does not include precursors listed in Ind. Code 35-48-4-14.5, which is statute defining crime of possession of precursors with intent to manufacture. Rather, "controlled substance" includes only those drugs, substances, or immediate precursors identified in statutes defining schedules of controlled substances. Thus, precursors listed in Ind. Code 35-48-4-14.5(a) are not "controlled substances" & are not "drugs" as required to establish a predicate substance offense, unless they are included in Schedule I, II, III, IV, or V. None of precursors which D possessed -- pseudoephedrine, ether, or lithium metal -- are included in any schedule of controlled substances. In addition, Ct. concluded that "manufacture...of drugs" is not a material element of crime of possession of precursors with intent to manufacture, & thus, cannot support a determination that possession of precursors with intent to manufacture is a substance offense. Held, HSO determination vacated.

TITLE: Reffett v. State
INDEX NO.: E.8.b.
CITE: (1st Dist., 04-07-06), Ind. App., 843 N.E.2d 1072
SUBJECT: Habitual substance offender (HSO) - not a separate crime; suspendability
HOLDING: Tr. Ct. erred in considering D's HSO finding to be a separate crime & imposing a separate sentence for that finding, rather than enhancing sentence for D's substance offense conviction. A habitual offender finding does not constitute a separate crime nor result in a separate sentence, but rather results in a sentence enhancement imposed upon conviction of a subsequent felony. Greer v. State, 680 N.E.2d 526 (Ind. 1997).

Citing State v. Williams, 430 N.E.2d 756 (Ind. 1982), Ct. held that Tr. Ct. also erred when it suspended two years of the five-year HSO enhancement it imposed. Held, judgment reversed & remanded for re-sentencing.

Note: In Collins v. State, 583 N.E.2d 761 (Ind. Ct. App. 1991), not cited in this decision but implicitly upheld in Stanek v. State, 603 N.E.2d 152 (Ind. 1992), Ct. explained that although Williams is still good law, it is no longer correct that habitual offender enhancement is never suspendible, because change in Ind. Code § 35-50-2-2 now permits Cts. to suspend sentences for certain felonies.

RELATED CASES: Howard, App., 873 N.E.2d 685 (while Tr. Ct. is required to order the habitual offender enhancement to be fully executed, the general sentencing guidelines apply to Tr. Ct.'s sentence for the underlying conviction; therefore, Tr. Ct. had authority to suspend up to nine years of the fifteen-year sentence for D's underlying burglary conviction).

TITLE: Roell v. State

INDEX NO.: E.8.b.

CITE: (4th Dist., 9-28-95), Ind. App., 655 N.E.2d 599

SUBJECT: Habitual substance offender - insufficient evidence

HOLDING: Ct. sua sponte reversed D's habitual substance offender adjudication on basis that evidence was insufficient to show that D was twice convicted & twice sentenced for prior unrelated substance convictions. Ct. noted that D committed second offense before, as opposed to after, he committed & was sentenced upon first offense. Ind. Code 35-50-2-10(c) requires State to demonstrate commission of second offense subsequent to sentence upon first offense. Held, habitual substance offender adjudication reversed, remanded for resentencing.

TITLE: State v. Downey

INDEX NO.: E.8.b.

CITE: (6-28-02), Ind., 770 N.E.2d 794

SUBJECT: Habitual substance offender & elevated marijuana possession conviction - double enhancement

HOLDING: Absent explicit legislative direction, a sentence imposed following conviction under a progressive penalty statute may not be increased further under either the general habitual offender statute or a specialized habitual offender statute. Here, D had marijuana possession charge elevated from Class A misdemeanor to Class D felony because D had previously been convicted of possession of marijuana. Ct. agreed with Judge Robb's analysis in her dissent in Ct. App. wherein she argued that there is clear legislative direction to impose double punishment under Indiana's habitual substance offender statute for any offense alleging possession of drug. Ind. Code 35-50-2-10 permits a habitual substance offender enhancement to be imposed on person convicted of three unrelated "substance offense[s]." "Substance offense" is defined to include "a Class A misdemeanor or a felony in which the possession of drugs is a material element of the crime." Ind. Code 35-50-2-10(a)(2). By its specific inclusion of drug possession misdemeanors & felonies in category of offenses that are subject to habitual substance offender enhancement, Legislature intended to authorize such enhancement notwithstanding existence of drug possession progressive penalty statute. Held, transfer granted, Ct. App.' opinion at 746 N.E.2d 113 (Ind. 2000) vacated, remanded for further proceedings.

RELATED CASES: Guthery, 180 N.E.3d 339 (Ind. Ct. App. 2021) (same prior conviction may be used to find conviction non-suspendible and as predicate offense for an habitual offender enhancement).

TITLE: Venters v. State

INDEX NO.: E.8.b.

CITE: (5/7/2014), 8 N.E.3d 708 (Ind. Ct. App. 2014)

SUBJECT: HSO - no consecutive enhancements

HOLDING: Tr. Ct. was without authority to order D's enhanced sentences to run consecutively. A Tr. Ct. cannot order consecutive habitual offender sentences. This rule even applies to those circumstances where a D, after being arrested for one crime, commits another crime. Breaston v. State, 907 N.E.2d 992, 995 (Ind. 2009). The rule applies equally to the habitual substance offender (HSO) enhancement. Aslinger v. State, 2 N.E.3d 84 (Ind. Ct. App. 2014). Here, on February 19, 2009, D was sentenced on an HSO enhancement and on January 4, 2013, a habitual offender enhancement. On April 3, 2013, the Tr. Ct. sentenced D to three years on the OVWI, enhanced by seven years on the HSO, and ordered the sentence to be served consecutively to his previously enhanced sentences. Regardless of whether the enhancements were under the HSO or HO statutes, they could not run consecutively. As such, the Tr. Ct. abused its discretion by ordering the enhancements to be served consecutively. Held, judgment reversed and remanded to Tr. Ct. with instructions to run D's enhanced sentences concurrently with any previous sentenced enhanced by the HO or HSO offender status.

RELATED CASES: Young, 57 N.E.3d 857 (Ind. Ct. App. 2015) (because there is no statutory authorization for stacking general and specialized habitual offender enhancements, Ct. remanded with instructions to run the habitual and repeat sexual offender enhancements concurrently).

E. SENTENCING

E.8. Bifurcated proceedings other than 30-year habitual

E.8.c. Habitual vehicular substance offender (Ind. Code 9-30-10, formerly 9-12-1-4)

TITLE: Clark v. BMV

INDEX NO.: E.8.c.

CITE: (2d Dist. 11/6/86), Ind. App., 499 N.E.2d 283

SUBJECT: Habitual traffic offender - probationary restricted license

HOLDING: Tr. Ct. erred in denying D's petition for probationary restricted driver's license based upon its findings that although D operates vehicle for commercial/business purposes, his mileage for such purposes is not substantially in excess of average driver's mileage. Here, D's mileage relating to employment at car dealership would average 65 miles per week, including demonstration drivers & errands. Ct. concludes Ind. Code 9-12-2-5 was intended to ameliorate economic harshness of license suspension upon one whose livelihood depends presently upon operation of vehicle, if past poor driving record may have partially resulted from business/commercial mileage driven in excess of that of average driver. Assessment of future mileage would be speculative at best. Held, reversed; remanded for further proceedings.

TITLE: Weekly v. State

INDEX NO.: E.8.c.

CITE: (6/29/2018), 105 N.E.3d 1133 (Ind. Ct. App. 2018)

SUBJECT: HVSO finding is not a separate, consecutive sentence but attaches to underlying felony conviction

HOLDING: Trial court erred when it ordered the habitual vehicular substance offender (HVSO) portion of D's sentence to be consecutive to the sentence for the felony conviction. Ind. Code § 9-30-15.5-2(d) provides that a court shall sentence a person found to be a habitual vehicular substance offender to an additional fixed term of at least one (1) year but not more than eight (8) years of imprisonment, to be added to the term of imprisonment imposed under IC 35-50-2 or IC 35-50-3." The "to be added" language in the HVSO statute is equivalent to the "attach" language in Indiana's habitual offender statute (Ind. Code 35-50-2-8(j)). A habitual offender finding does not constitute a separate crime or result in a separate sentence. Instead, it enhances a sentence imposed. Therefore, trial court erred when it ordered the HVSO sentence to run separate and consecutive to D's Level 6 sentence for operating while intoxicated. Held, judgment affirmed in part, reversed in part, and remanded with instructions.

RELATED CASES: McDonald, 173 N.E.3d 1043, (Ind. Ct. App. 2021) (Tr. Ct. improperly entered D's HVSO sentencing enhancement as a separate, consecutive sentence rather than specifically attaching it to one of his felony convictions).

E. SENTENCING

E.8. Bifurcated proceedings other than 30-year habitual

E.8.d. Prior conviction as enhancer

E.8.d.1. In general

TITLE: Horton v. State

INDEX NO.: E.8.d.1.

CITE: (4/21/2016), 51 N.E.3d 1154 (Ind. 2016)

SUBJECT: Judicially-noticed case file not entered into record sufficient to support domestic battery enhancement

HOLDING: State presented sufficient evidence that D had previously been convicted of domestic battery to support elevated D-felony offense, despite fact that prior conviction's sentencing order was unsigned and a judicially-noticed case file was never entered into the record. Ind. Evidence Rule 201(b)(5) now permits court to take judicial notice of "records of the court of this state." Although the best practice is to enter the particular documents into the record, Tr. Ct.'s omission of those documents here hindered appellate review but did not constitute error. The judicially-noticed case file showing D's prior conviction was part of the record in this case so Court could procure copies of the file from trial-court clerk--much as the parties could have done under Appellate Rule 32 to resolve disagreements as to the accuracy (including completeness) of the Clerk's Record. Held, transfer granted, Court of Appeals' memorandum opinion vacated, D-felony domestic battery conviction reversed on other grounds and remanded for new trial.

TITLE: Shepard v. United States

INDEX NO.: E.8.d.1.

CITE: 544 U.S. 13 (2005) 03/07/2005

SUBJECT: Judicial Fact finding, Prior Convictions

HOLDING: The federal Armed Career Criminal Act requires a minimum 15 year prison sentence for anyone possessing a firearm after three prior convictions for serious drug offenses or violent felonies. When determining whether a D's prior convictions qualify as violent felonies, Tr. Ct.s may look to the statutory elements of the prior offense, charging documents, written plea agreements, transcripts of guilty plea hearings, jury instructions, and factual findings by the judge to which the D assented, but may not use police reports or 'complaint applications' to determine whether a prior conviction was for a predicate offense under ACCA.

In Taylor v. United States, 495 U.S. 575 (1990), the Court interpreted the 'burglary' language in ACCA to mean only "generic burglary," or entry into a building, and not into a boat or car. The Court also held in Taylor that a court sentencing under the ACCA could look to the statutory elements, charging documents, and jury instructions of prior trial convictions to determine whether a prior trial conviction was for an ACCA predicate offense.

Before his federal prosecution for possession of a firearm, Shepard had pleaded guilty to burglary several times in state court. The Government argued at sentencing that Shepard's state convictions qualified as predicate offenses under ACCA. State law defined burglary broadly, including entries into boats and cars. The Government urged the District Court to examine police reports from Shepard's state cases to determine whether each of his prior burglary convictions was for entry into a building. The U.S. Supreme Court held, based on Taylor, that a Tr. Ct. may not use police reports or 'complaint applications' to determine whether a prior guilty plea was to a predicate offense under ACCA.

TITLE: Smith v. State
INDEX NO.: E.8.d.1.
CITE: (2d Dist. 6/30/83), Ind. App., 451 N.E.2d 57
SUBJECT: Bifurcation - Sweet applies where prior conviction serves to enhance
HOLDING: Upon remand for new trial on DWI charge where prior DWI conviction is alleged, Tr. Ct. must follow bifurcated information & trial procedures set forth in Sweet, 439 N.E.2d 1144 (see card at E.8.d.3. Statutory scheme for drug dealing charges dealt with in Sweet is "virtually indistinguishable" from intoxicated driver provisions under which D was tried. Both statutes provide for enhancement from Class A misdemeanor to Class D felony upon proof of previous similar conviction. As in Sweet, proof of D's prior conviction was allowed into evidence prior to trier-of-fact's determination on foundation charge. Ct. finds procedures set out in Sweet (further outlined in Lawrence, 286 N.E.2d 830 (bifurcated information & trial required in habitual offender charges)) should apply to Class D felony charges under intoxicated driver statute, Ind. Code 9-4-1-54, & must be followed at D's new trial (granted for invalid jury trial waiver). Held, conviction reversed; remanded. **NOTE:** Ind. Code 35-38-1-19, effective 9/1/83, requires bifurcated proceedings in all situations in which penalty for offense is increased upon proof of prior conviction.

E. SENTENCING

E.8. Bifurcated proceedings other than 30-year habitual

E.8.d.2. OWI (Ind. Code 9-30-5-3, formerly 9-11-2-3)

TITLE: Beldon v. State

INDEX NO.: E.8.d.2.

CITE: (05-05-10), Ind., 926 N.E.2d 480

SUBJECT: Proper enhancement - Class D felony and HSO

HOLDING: Tr. Ct. did not abuse its discretion by using the same prior conviction to elevate a Class A misdemeanor OWI to a Class D felony OWI and to support a HSO finding. Absent explicit legislative direction, a sentence imposed following conviction under a progressive penalty statute may not be increased further under either the general habitual offender statute or a specialized habitual offender statute. However, the legislature has specifically provided that prior convictions for OWI, including those where the charge had been elevated because of a prior conviction, can properly serve as predicate offenses for HSO enhancements. Haymaker v. State, 667 N.E.2d 113, 115 (Ind. 1996). Here, D was convicted of Class D felony OWI, elevated due to a 2003 OWI. D was also sentenced as a HSO based on the 2003 OWI and a 1992 OWI. Because Ind. Code 35-50-2-10(b) includes an offense under Ind. Code 9-30-5 as a substance offense which can be used to support HSO finding, using the 2003 OWI to support the Class D felony OWI and the HSO finding was not an impermissible double enhancement. Held, transfer granted, judgment affirmed and Court of Appeals' opinion at 906 N.E.2d 895 vacated.

RELATED CASES: Light, 28 N.E.3d 1106 (Ind. Ct. App. 2015); Brock, 983 N.E.2d 636 (Ind. Ct. App. 2013) (enhanced auto theft conviction was not used to support general habitual offender enhancement as D claimed; likewise, general habitual enhancement was attached to D's intimidation conviction, not the enhanced auto theft conviction).

TITLE: Boothe v. State

INDEX NO.: E.8.d.2.

CITE: (4th Dist. 9/13/82), Ind. App., 439 N.E.2d 708

SUBJECT: Bifurcation - DWI; jury instructions

HOLDING: It is error in bifurcated DWI trial (Class D felony - prior DWI conviction) to instruct jury in second stage that it can consider any evidence presented in first stage of the proceeding regarding guilt of latest offense. Here, D objected to such instruction arguing it permitted jury to consider irrelevant evidence. Ct. on appeal requires D to show prejudice. Held, no prejudice shown, thus no error.

TITLE: Brown v. State

INDEX NO.: E.8.d.2.

CITE: (2nd Dist., 05-10-93), Ind. App., 613 N.E.2d 69

SUBJECT: Vacation of prior Operating While Intoxicated (OWI) as enhancer

HOLDING: Where D pled guilty to OWI as D felony, but received alternative A misdemeanor sentence, subsequent vacation of prior OWI conviction did not require vacation of plea, only reduction of conviction to misdemeanor. D was convicted of D felony OWI with prior unrelated conviction pursuant to agreement that called for alternative A misdemeanor sentence. Subsequently both of prior convictions were vacated in post-conviction relief (PCR) proceedings because D had not been properly advised of constitutional rights at time of pleading guilty. He then filed for PCR, seeking to vacate instant conviction on ground that had he known prior convictions were invalid, he would not have pled guilty. PCR petition was denied. Ct. found D suffered no prejudice in denial of PCR because Tr. Ct. sentenced him as class A misdemeanant. While sentence enhancement as HO cannot stand when prior convictions are vacated, decisions have rejected argument that conviction must be set aside when particular statute imposes sanctions for violations committed when D has mere status of having conviction. Lewis v. U.S. (1980), 445 U.S. 55; Gentry (1988), App., 526 N.E.2d 1187, *trans. denied*. Ct. found it clear that vacated prior convictions could not support elevation of instant OWI to D felony, but also found D did plead to offense of OWI as class A misdemeanor without prior conviction. Because D admitted committing OWI & received alternative sentencing, only conviction as D felony must be vacated. While D testified that he would not have pled guilty if he had known priors were invalid, PCR Ct. has exclusive authority to weigh evidence & was entitled to disbelieve his self-serving testimony.

TITLE: Burp v. State

INDEX NO.: E.8.d.2.

CITE: (1st Dist., 10-23-96), Ind. App., 672 N.E.2d 439

SUBJECT: Felony OWI conviction - no habitual offender enhancement

HOLDING: Elevated sentence for operating while intoxicated (OWI) as class D felony under Ind. Code 9-30-5-3 cannot also be enhanced under Ind.'s general habitual offender statute, Ind. Code 35-50-2-8. Ct. noted that Ind. Code 9-30-5-3 is habitual offender statute because it provides for progressively severe punishments for repeat offenders. Freeman v. State, 658 N.E.2d 68 (Ind. 1995). Here, notwithstanding fact that D's OWI charge was elevated on basis of previous OWI conviction while habitual offender enhancement was based on previous convictions for conspiracy to commit robbery & battery, D's sentence may not be twice enhanced on basis of different habitual offender statutes. Held, habitual offender enhancement reversed, OWI conviction affirmed.

RELATED CASES: Puckett, App., 843 N.E.2d 959 (habitual offender charge cannot attach to already-enhanced conviction for OWI).

TITLE: Livingston v. State

INDEX NO.: E.8.d.2.

CITE: (1st Dist. 5/4/89), Ind. App., 537 N.E.2d 75

SUBJECT: Enhancement for prior DWI - sufficiency

HOLDING: Evidence was insufficient to support enhancement of D's conviction for driving with .10 BAC, due to prior DWI conviction. State introduced 3 documents, all bearing same name as D: 1) certified copy of BMV driving record showing "DWI-Liquor" notation on 9/27/82; 2) certified copy of docket sheet showing change of plea & sentence for DWI on 9/27/82; & 3) certified copy of abstract of Ct. record showing conviction for DWI on 9/27/82. State presented no other evidence. In enhancement proceedings concerning prior offenses, mere documentary evidence relating to conviction of one with same name as D is not sufficient to demonstrate that it was indeed D who was convicted of prior offense. Sullivan, App., 517 N.E.2d 1251. State argues that these documents reflect not only same name, but same birth date & social security number, as well. State cites Fozzard, 518 N.E.2d 789 & Sapp, 513 N.E.2d 178. However, in Fozzard, State's evidence included photograph which jury could compare with D, & in Sapp, State's evidence included fingerprints, which expert witness testified matched D's. Here, no such evidence was introduced, & 2 documents admitted contained different birth dates. Held, reversed & remanded with instructions to vacate enhanced conviction & re-sentence D accordingly.

RELATED CASES: Dillon, 993 N.E.2d 240 (Ind. Ct. App. 2013) (Tr. Ct. should have dismissed felony enhancement for misdemeanor OWI charge because at time of charge, D did not have OWI conviction within previous five years, if only because State inadvertently dismissed previous 2009 OWI conviction); Jones, App., 716 N.E.2d 556 (taken together, documents & officer's testimony sufficiently established that D was person who was convicted of prior DUI); Keegan, App., 564 N.E.2d 533 (providing evidence that links D by name only to previous conviction is insufficient to prove prior conviction; documentary evidence of prior conviction containing same date of birth as present D & source of D's birth date sufficiently proved prior conviction).

TITLE: Mann v. State

INDEX NO.: E.8.d.2.

CITE: (8-3-01), Ind. App., 754 N.E.2d 544

SUBJECT: OWI prior conviction enhancement - substantially similar foreign law for Ct. to decide

HOLDING: Tr. Ct. should have taken judicial notice of Ohio's operating while intoxicated (OWI) statute & determined that it was substantially similar to Indiana's OWI statute. D was convicted of OWI with a previous conviction. "Previous conviction" is defined in Ind. Code 9-13-2-130 as a conviction in either Indiana or another jurisdiction if elements of crime are substantially similar. Following Tr. Ct.'s refusal to take judicial notice of Ohio statute & similarity, defense counsel moved for directed verdict due to State's failure to prove that the statutes were substantially similar. Tr. Ct. denied motion & left the issue for the jury to decide. Determination of foreign law is a question of law for Ct. to decide. Ind. Code 34-38-4-1. Held, conviction affirmed because Ohio statute & similarity should have been noticed by Tr. Ct.

TITLE: Morphew v. State
INDEX NO.: E.8.d.2.
CITE: (5th Dist., 10-29-96), Ind. App., 672 N.E.2d 461
SUBJECT: Using prior uncounseled misdemeanor conviction to enhance sentence
HOLDING: Tr. Ct. properly considered D's prior misdemeanor operating while intoxicated (OWI) conviction when it enhanced his sentence for subsequent OWI offense under habitual substance offender statute. Sentencing Ct. may consider D's uncounseled misdemeanor conviction to enhance sentence for subsequent conviction, so long as prior uncounseled misdemeanor conviction did not result in prison sentence. Nichols v. U.S., 114 S.Ct. 1921 (1994), (expressly *overruling* Baldasar, 446 U.S. 222). Here, D did not receive prison sentence for his prior uncounseled OWI conviction, thus Tr. Ct. properly used it to enhance his subsequent conviction. Held, denial of motion to dismiss habitual substance offender charge affirmed.

TITLE: State v. Rans

INDEX NO.: E.8.d.2.

CITE: (3rd Dist., 11-28-00), Ind. App., 739 N.E.2d 164

SUBJECT: Enhanced operating while intoxicated (OWI) conviction - erroneous use of prior out-of-state conviction based on more broadly defined offense

HOLDING: D's previous misdemeanor conviction in Michigan of driving vehicle while visibly impaired (DWVI) did not constitute a "previous conviction of operating while intoxicated" as required by Ind. Code 9-30-5-3 to support OWI as Class D felony. "Previous conviction of operating while intoxicated" includes previous conviction in any other jurisdiction in which elements of crime for which conviction was entered are substantially similar to elements of crime described in Ind. Code 9-30-5-1 through Ind. Code 9-30-5-9. Here, D pled guilty to OWI as Class A misdemeanor under Ind. Code 9-30-5-2, which requires evidence that D lost ability to drive normally to such extent that it was unsafe or endangered any person. Blinn, 677 N.E.2d 51 (Ind. Ct. App. 1997). In contrast, Michigan's DWVI statute is more broadly defined crime, requiring proof that D merely operated vehicle "with less ability than would an ordinary, careful & prudent driver[.]" i.e., that there was simply reduction in ability to drive normally. Definition of OWI under Ind. Code 9-30-5-2 cannot reasonably be interpreted to include any visible alcohol-related impairment without regard to whether that impairment exposes others to harm or danger. Accordingly, because Michigan's DWVI statute encompasses broader range of prohibited conduct, it is not substantially similar to Ind. Code 9-30-5-2 & did not constitute prior conviction of OWI under Ind. Code 9-30-5-3. To hold otherwise would extend application of this statute to encompass convictions for conduct requiring lower degree of intoxication than do Indiana's existing alcohol-related driving statutes & would be contrary to well-settled rule that penal statutes be strictly construed against State to avoid enlarging them beyond fair meaning of their language. State v. Sheldon, App., 692 N.E.2d 947. Thus, Tr. Ct. did not err when it acquitted D of OWI as Class D felony. Held, judgment affirmed; Sullivan, J., concurring.

RELATED CASES: Akins, 824 N.E.2d 676 (Tr. Ct. erred in granting D's motion to dismiss Class D felony OWI charge, because D's prior OWI conviction in Michigan qualified as a substantially similar prior conviction for OWI pursuant to Ind. Code 9-13-2-130).

TITLE: State v. Messenger

INDEX NO.: E.8.d.2.

CITE: (5th Dist., 4-28-95), Ind. App., 650 N.E.2d 702

SUBJECT: Enhanced OWI conviction - erroneous vacation of entire predicate offense

HOLDING: Tr. Ct. erred in dismissing OWI charges as class D felonies. In August, 1988, D was convicted of OWI as class A misdemeanor. Three years later, D was again charged with OWI & pled guilty to offense as class D felony. D filed petition for PCR challenging his 1988 conviction, which was granted. D then filed petition in Madison County Ct. seeking to correct 1991 conviction on grounds it was no longer correct because 1988 conviction on which 1991 conviction was based had been set aside by way of PCR. County Ct. agreed & entered order dated 7-13-93 vacating & setting aside 1991 conviction, & entering new OWI conviction as of that date. D then filed Motion to Dismiss pending charges in Marion Municipal Ct. (Tr. Ct.), arguing that he did not have conviction prior to February, 1993. Tr. Ct. agreed & dismissed charges as enhanced. Enhanced conviction of OWI as D felony cannot stand where predicate offense has been vacated. Brown v. State, App., 613 N.E.2d 69. Where D successfully challenges enhancement of his conviction for OWI as D felony, enhanced portion of offense may be vacated, but underlying offense is left undisturbed. Here, when D successfully challenged his 1991 conviction of OWI as D felony, predicate offense of OWI as class A misdemeanor was not affected. Although County Ct.'s order entering A misdemeanor conviction was dated 7-13-93, Ct. would not interpret it as judgment of conviction for new charge as of that date. Only enhanced portion of offense was set aside, thus D had prior OWI conviction when State filed instant charges. Held, order of dismissal reversed. Sullivan, J., dissenting, argued that County Ct. vacated entire conviction, not merely enhancement.

TITLE: Woodruff v. State
INDEX NO.: E.8.d.2.
CITE: (6/26/2017), 80 N.E.3d 216 (Ind. Ct. App. 2017)
SUBJECT: Enhancements for habitual offender and firearm was not impermissible double enhancement
HOLDING: Tr. Ct. did not err in applying both the habitual offender enhancement and the firearm enhancement to Defendant's sentence for aggravated battery. This was not an impermissible double enhancement. Double enhancement analysis is proper when the proof of previous criminal conduct is the basis of more than one enhancement. "There is no impermissible double enhancement here because only one type of repeat offender statute that enhanced Woodruff's conviction was applied. Ultimately, Woodruff's aggravated battery conviction resulted in a dual enhancement, not for the same prior crimes, but for committing aggravated battery with a firearm while being a habitual offender." See Dye v. State, 972 N.E.2d 853, 857 (Ind. 2012), *aff'd on reh'g*, 984 N.E.2d 625 (Ind. 2013). Held, judgment affirmed.

E. SENTENCING

E.8. Bifurcated proceedings other than 30-year habitual

E.8.d.3. Drugs (Ind. Code 35-48-4-10(b)(1)(C); Ind. Code 35-48-4-11)

TITLE: Burgess v. United States

INDEX NO.: E.8.d.3.

CITE: (4/16/2008), U.S., 553 U.S. 124; 06-11429, Supreme Court of the United States

SUBJECT: State misdemeanor qualifies as felony under Controlled Substance Act

HOLDING: Unanimous Court held that a state drug conviction identified as a misdemeanor by statute but carrying a maximum sentence of two years qualified as a felony drug offense under the Controlled Substances Act, which doubles the mandatory minimum sentence for certain federal drug crimes if the D was previously convicted of a "felony drug offense." Court held that because the term "felony drug offense" in 21 U.S.C. § 841(b)(1)(A) is defined exclusively by § 802(44) and does not incorporate § 802(13)'s definition of "felony," a state drug offense punishable by more than one year qualifies as a "felony drug offense," even if state law classifies the offense as a misdemeanor. Court used statutory construction principles and the CSA's drafting history to come to its conclusion. Court also rejected Petitioner's argument that the rule of lenity should be applied in determining the question as the touchstone of the rule of lenity is statutory ambiguity and Congress expressly defined "felony drug offense" in a manner that is coherent, complete, and by all signs exclusive.

TITLE: Sweet v. State
INDEX NO.: E.8.d.3.
CITE: (9/28/82), Ind., 439 N.E.2d 1144
SUBJECT: Bifurcation - prior marijuana/hashish conviction
HOLDING: Procedures made applicable to habitual criminal charge by Lawrence, 286 N.E.2d 830 apply to all criminal charges which allege, pursuant to Ind. Code 35-48-4-10(iii), a prior marijuana/hashish conviction. Separate charging instrument & bifurcated trial required. Ct. notes similarity of Ind. Code 35-48-4-10(iii) & habitual offender statute it had considered in Lawrence. Here, D was even more severely prejudiced than D in Lawrence, because of prejudice in foundation charge & in the 7 other counts (also dealing). Information alleged prior marijuana conviction. Information read to jury & sent to jury room. Held, convictions on all 8 counts reversed & remanded. Ct. points out state is still justified in using prior conviction evidence for impeachment purposes/to refute D's claim of good character. **NOTE:** Ind. Code 35-38-1-19, effective 9/1/83, requires bifurcated proceedings in all situations in which penalty for offense is increased upon proof of prior conviction.

E. SENTENCING

E.8. Bifurcated proceedings other than 30-year habitual

E.8.d.4. Firearms (Ind. Code 35-47-2-23(c))

TITLE: Afanador v. State

INDEX NO.: E.8.d.4.

CITE: (01/28/2022), 181 N.E.3d 462 (Ind. Ct. App.)

SUBJECT: Double enhancement claim rejected where predicate offenses supporting progressive penalty and habitual offender finding were entered on same day but were not part of same res gestae

HOLDING: Trial court did not err in using Defendant's auto theft conviction to enhance his offense to a Level 5 felony under a progressive-penalty statute and his Class C felony handgun conviction to enhance his sentence pursuant to Indiana's general habitual offender statute. Judgment of conviction for the two predicate offenses were entered on the same day but were not part of the same res gestae, as they occurred five years apart, involved different victims, and were assigned separate cause numbers. Previously, Defendant had been convicted of Class C felony forgery in 2002, Class C felony carrying a handgun without a license in 2012 and Level 6 felony automobile theft in 2017. Although the criminal act underlying the handgun offense occurred in 2012, five years before the criminal act underlying the auto theft offense in 2017, the trial court entered the convictions and sentences for both offenses on the same day in 2019. Following Defendant's Level 6 felony auto theft conviction in 2021, the trial court used his 2019 auto theft conviction to elevate the offense to a Level 5 felony. The trial court also found Defendant to be a habitual offender based on his 2002 forgery conviction and 2012 handgun offense.

On appeal, Defendant argued that because his handgun and auto theft convictions could not both be used to support a sentence enhancement under the general habitual offender statute, the use of both convictions to support simultaneous sentence enhancements resulted in an impermissible double enhancement of his sentence.

The Court of Appeals held that the plain language of Indiana's general habitual offender statute [IC 35-50-2-8(f)] prohibited the State from using Defendant's predicate handgun and auto theft convictions that had been entered on the same day to support an enhancement under that statute. However, the State was not prohibited from using the two offenses to support separate enhancements under different recidivist offender statutes because the two crimes were not part of the same res gestae. See Dye v. State, 984 N.E.2d 635 (Ind. 2013). And IC 35-50-2-8(f) expressly states its definition of "unrelated" is intended for "purposes of this section" — the general habitual offender statute — "'only," rather than to all double enhancements. Defendant's predicate 2002 forgery conviction was "unrelated" to both the handgun and auto theft predicates. Therefore, the trial court did not err in using Defendant's predicate auto theft conviction to enhance his offense under the progressive-penalty statute and also relying upon his predicate handgun conviction (along with the forgery conviction) to enhance his sentence pursuant to Indiana's general habitual offender statute. Held, judgment affirmed.

TITLE: Borden v. United States

INDEX NO.: E.8.d.4.

CITE: (U.S.), (06/10/2021), 141 S. Ct. 1817

SUBJECT: Crime involving recklessness does not count as a “violent felony” that will trigger ACCA’s sentencing enhancement

HOLDING: A criminal offense with a “*mens reas*” of recklessness does not qualify as a “violent felony” under the Armed Career Criminal Act (ACCA). The ACCA mandates a 15-year minimum sentence for offenders found guilty of illegally possessing a gun if they have three or more prior convictions for a “violent felony.” A “violent felony” is defined to include a number of specifically enumerated offenses, as well as any offense that “has an element the use, attempted use, or threatened use of physical force against the person of another.” Here, Defendant argued that the enhancement under ACCA did not apply because one of the three prior offenses that the government relied on was a conviction under Tennessee law for reckless aggravated assault, which can result from a less culpable legal standard than purposefully or knowingly causing injury. Court held that the phrase “against the person of another” when modifying a volitional act like the “use of force” in ACCA’s definition necessarily encompasses only purposeful or knowing crimes, not reckless ones. Thomas, J., concurring; Kavanaugh, J., joined by Roberts, C.J., Alito and Barrett, JJ., dissenting, accused majority of adopting a tortured reading of phrase “against the person of another” to limit the reach of the statute. “The Court’s decision overrides Congress’s judgment about the danger posed by recidivist violent felons who unlawfully possess firearms and threaten future violence.”

TITLE: Chambers v. United States

INDEX NO.: E.8.d.4.

CITE: (U.S.), (01/13/09 2009), 129 S. Ct. 687

SUBJECT: Failure to report to jail not "violent felony" for federal sentencing enhancement

HOLDING: Failure to report to jail or prison to serve a sentence is not the equivalent of escape and is not a "violent felony" that can lead to enhanced sentencing under the Armed Career Criminal Act. 18 U.S.C. ' 924 (e)(1) imposes a 15-year mandatory minimum prison term on someone convicted of having a gun illegally, if the individual has three prior convictions for "a violent felony or a serious drug offense." Statute defines "violent felony" as a crime punishable by more than one year's imprisonment that, inter alia, "involves conduct that presents a serious potential risk of physical injury to another." Whether a crime is a violent felony is determined by how the law defines it and not how an individual offender might have committed it on a particular occasion. "[W]hile an offender who fails to report must be doing something at the relevant time, there is no reason to believe that the something poses a serious potential risk of physical injury...To the contrary, an individual who fails to report would seem unlikely, not likely, to call attention to his whereabouts by simultaneously engaging in additional violent and unlawful conduct." Thus, district court erred in treating D's conviction for failure to report for weekend confinement as a "violent felony" under ACCA. Held, judgment reversed and remanded. Alito and Thomas, JJ., concurring in result.

RELATED CASES: Johnson v. U.S., 130 S. Ct. 1265 (since the Florida offense of battery by offensive touching does not require the use of physical force, it does not qualify as a predicate for enhanced sentencing under the federal ACCA).

TITLE: Conrad v. State

INDEX NO.: E.8.d.4.

CITE: (3rd Dist., 4-30-01), Ind. App., 747 N.E.2d 575

SUBJECT: Improper double enhancement - habitual offender & serious violent felon

HOLDING: D convicted of unlawful possession of firearm by serious violent felon may not have his sentence enhanced again under general habitual offender statute by proof of same felony used to establish that D was serious violent felon. Where there is ambiguity in potential punishments, Rule of Lenity dictates that conflict should be resolved against penalty. Ross v. State, 729 N.E.2d 113 (Ind. 2000). D's serious violent felon status does not serve to "enhance" sentence in traditional sense of word. However, as practical matter, D's serious violent felon status does realistically serve as "enhancement" in that it increases potential punishment for possession of firearm from nothing at all to six to twenty years imprisonment & fine up to \$10,000. Thus, although Ross interprets different statute & is not directly on point, Ct. held the decision should effectively preclude enhancement under general habitual offender statute of D's sentence for unlawful possession of firearm by serious violent felon. Moreover, because material element of crime may not also constitute aggravating circumstance to support enhanced sentence, enhancement in this case violated general principles regarding enhancement of sentences in Indiana. Smith, 675 N.E.2d 693. Held, judgment affirmed in part, reversed in part, & remanded with instructions to vacate habitual offender sentence enhancement; Baker, J, dissenting, argued that there was insufficient evidence to support D's conviction & that trial counsel rendered ineffective assistance.

RELATED CASES: Sweatt, 887 N.E.2d 81 (although there are no double enhancement implications with using the same prior conviction to support a SVF conviction and a HO enhancement attached to a different conviction, the SVF conviction cannot run consecutively to the conviction to which the HO enhancement is attached; see full review at E.5.g); Olatunji, App., 788 N.E.2d 1268 (Ross & Conrad do not broadly prohibit double use of prior felony conviction as sentence enhancement factor under all circumstances, but only where it is twice used as separate & discrete conviction to doubly enhance D's sentence for one present conviction); Gray, App., 786 N.E.2d 804; Anderson, App., 774 N.E.2d 906 (Where D is convicted of multiple felonies, one of which is possession of firearm by SVF, & is found to be HO, case law does not preclude use of one felony both to prove D was SVF & HO, where sentence for felony conviction other than possession of firearm by SVF is sentence that is enhanced under general HO statute); Lewis, App., 769 N.E.2d 243 (distinguishing Conrad, Ct. held that when felony convictions used to classify D as a SVF & to classify him as an habitual offender are different, there is no impediment to imposing an habitual offender enhancement upon a sentence for unlawful possession by a SVF); Lewis, App., 774 N.E.2d 941 (on rehearing, although Ct. could not tell from record whether Tr. Ct. disposed of HO allegation that was attached to possession by SVF, it does not matter because HO allegation that went to trial was attached to resisting charge).

TITLE: Dye v. State

INDEX NO.: E.8.d.4.

CITE: (3/21/2013), 984 N.E.2d 625 (Ind. 2013)

SUBJECT: SVF conviction and HO enhancement are impermissible double enhancement

HOLDING: On rehearing, Supreme Court affirmed its ruling that D was subjected to an impermissible double enhancement, where he was sentenced for unlawful possession of a firearm by a serious violent felon ("SVF"), which was enhanced under the general habitual offender ("HO") statute. However, the Court both narrowed its rationale and, for the first time, invoked the Rule of Lenity.

Here, the State based the SVF charge on D's 1998 conviction for attempted battery while armed with a deadly weapon. For the HO enhancement, one of the convictions it cited was D's 1998 conviction for possession of a handgun within 1000 feet of a school. This latter charge arose from the same *res gestae*, that is, the same "uninterrupted transaction" as the SVF charge.

In its initial decision, the Court appeared to hold that as a matter of law, a person could not be sentenced under a progressive-penalty statute such as the SVF statute and also be adjudicated as an HO, regardless of whether the same prior crime was used to support the SVF charge and the HO enhancement. On rehearing, the Court pulled back, saying the double enhancement prohibition applied only where the same crime was used to support both the SVF charge and the HO enhancement. However, the Court expanded the concept of the same crime to include offenses that were part of the same *res gestae*, which the Court found was the case with the convictions supporting the SVF charge and the HO enhancement. Allowing an enhancement under these circumstances would contradict the Rule of Lenity. It would be "incongruous to hold that two offenses are so related they could not be used together for an habitual offender enhancement are, at the same time, so unrelated that they may support a double enhancement in the form of an SVF count and an habitual offender enhancement." Held, rehearing granted for the limited purpose of clarifying Court's initial opinion. Massa, J., dissenting.

TITLE: Fletcher v. State

INDEX NO.: E.8.d.4.

CITE: (4th Dist. 3/25/87), Ind. App., 505 N.E.2d 491

SUBJECT: Bifurcation - prior firearms conviction

HOLDING: Tr. Ct. erred in refusing to grant D bifurcated trial on handgun count. Lawrence, 286 N.E.2d 830. Bifurcation requirement applies any time current charge is escalated by prior conviction. Sweet, 439 N.E.2d 1144 (drug dealing cases); Ours, App., 452 N.E.2d 1073 (DWI). Ct. finds dicta in Woods, 471 N.E.2d 691 indicates approval that bifurcation should extend to cases involving illegal possession of handgun. Ct. concludes Tr. Ct. violated D's due process rights by admitting evidence regarding his prior convictions before jury reached verdict on foundation charge. Held, conviction reversed & remanded for new trial.

RELATED CASES: Person, App., 764 N.E.2d 743; Spearman, App., 744 N.E.2d 5345 (in prosecution for unlawful possession of firearm by serious violent felon, Tr. Ct. did not violate D's rights to due process when it denied D's motion to bifurcate portions of proceedings).

TITLE: Jacobs v. State

INDEX NO.: E.8.d.4.

CITE: (10-13-05), Ind., 835 N.E.2d 485

SUBJECT: Ross rule on double enhancement applies retroactively on collateral review

HOLDING: Holding in Ross, 729 N.E.2d 113, that a misdemeanor handgun charge enhanced to a felony could not be further enhanced by use of general HO statute, applies in post-conviction proceedings to persons whose cases were resolved prior to that holding. New rules of criminal procedure do not apply to cases which have become final before new rule was announced, unless new rule: 1) places certain kinds of primary, private individual conduct beyond power of criminal lawmaking authority to proscribe, or 2) is watershed rule of criminal procedure that implicates fundamental fairness of criminal proceedings. Daniels, 561 N.E.2d 487. *Citing Bousley*, 523 U.S. 614 (1998), D argued that Daniels analysis does not apply where Ct. interprets relevant sections of criminal code, & substantive rules generally apply retroactively to cases on collateral review. In context of post-conviction relief, substantive rules should be considered those that either define criminal behavior itself, or define the penalties applicable to that behavior. Ct. concluded that its decision in Ross falls more fittingly into substantive rule category, *i.e.*, that general habitual offender statute had not been intended to punish a particular form of criminal activity in a particular manner. Thus, Ross should be applied retroactively. Held, transfer granted, Ct. App.' opinion on other issues summarily affirmed, post-conviction Ct. ordered to vacate habitual offender conviction. *See also: Jones*, 835 N.E.2d 1002 (D's voluntary guilty plea to HO enhancement did not automatically preclude post-conviction relief when there has been a change in substantive law; further, D did not waive claim by failing to plead a new issue through rehearing or transfer; however, on remand State may seek to reposition general HO finding to any one of other felonies that D was convicted of in same proceeding).

TITLE: Johnson v. United States

INDEX NO.: E.8.d.4.

CITE: (03-02-10), 559 U.S. 133, 130 S. Ct. 1265, 176 L. Ed. 2d 1, (U.S. 2010)

SUBJECT: Federal sentencing enhancement - violent force required for "violent felony"

HOLDING: Since the Florida offense of battery by offensive touching does not require the use of physical force, it does not qualify as a predicate for enhanced sentencing under the federal Armed Career Criminal Act, 924(e)(2)(B)(i). The Florida felony battery offense can be committed by merely "actually and intentionally touching" another person, "no matter how slight." In the context of the ACCA's definition of "violent felony," the phrase "physical force" means violent force--that is, "force capable of causing physical pain or injury to another person." The term "force" contemplates strength or energy, violence, and pressure directed against a person. It involves "a degree of power not satisfied by the merest touching." Although at common law "force" was a legal term of art satisfied by even the slightest touching, nothing in the text of the ACCA suggests that Congress meant to define "violent felony" with a term of art which defined a misdemeanor at common law. Court refused to remand to allow the government to argue that the battery satisfied 924(e)(2)(B)(ii)'s residual "otherwise" clause, because the government had previously disclaimed reliance on that provision at sentencing. Held, Eleventh Circuit Court of Appeals' opinion at 528 F.3d 1318 reversed. Alito, J., joined by Thomas, J, DISSENTING, argues that because "physical force" can mean "the merest touching," Florida's felony battery statute falls within the scope of the ACCA.

TITLE: Mathis v. U.S.

INDEX NO.: E.8.d.4.

CITE: (6/23/2016), 136 S. Ct. 2243 (U.S. 2016)

SUBJECT: Iowa burglary convictions not violent felonies under Armed Career Criminal Act

HOLDING: D's Iowa convictions for burglary do not qualify as predicate violent felonies under the Armed Career Criminal Act. See 18 U.S.C. § 924(e). Thus, D could not be subjected to the fifteen-year mandatory-minimum sentence for being a felon in possession of a firearm. See id. The test for whether felony convictions qualify as violent felonies is whether the elements of the crime match the generic version of the same crime. Under the generic offense, burglary requires unlawful entry into a building or other structure. However, the elements of the Iowa version are broader: unlawful entry into any building, structure, or land, water, or air vehicle. Because the Iowa elements are broader, D cannot be subjected to the mandatory-minimum sentence. See Taylor v. United States, 495 U.S. 575, 600-01 (1990). Held, cert. granted and judgment reversed. Kagan, J., joined by Roberts, C.J., and Kennedy, Thomas, and Sotomayor, JJ; Kennedy, J. and Thomas, J., filed concurring opinions. Breyer, J., dissenting, joined by Ginsburg, J.; Alito, J., dissenting.

TITLE: Miller v. State

INDEX NO.: E.8.d.4.

CITE: (11/1/2021), 177 N.E.3d 893 (Ind. Ct. App. 2021)

SUBJECT: Failure to bifurcate SVF charge - fundamental error

HOLDING: In prosecution for possession of a firearm by a serious violent felon (SVF) and other charges, trial court committed fundamental error in instructing jury that Defendant had a prior robbery conviction, and that possession of the firearm was already established because it elevated the two other charges of dealing and possession of a narcotic drug. Court could "think of no reason why a jury should be made aware of the fact of a defendant's prior conviction to support an SVF charge during the phase where the other primary charges are being tried." The preliminary jury instruction should not have been used because of its prejudicial nature and Defendant's counsel should have moved for bifurcation of the SVF charge. Bifurcation serves the purpose of protecting a defendant's right to the presumption of innocence and ensures a fair trial. Even though the State dismissed the SVF charge after the jury had rendered its verdict, that did not balance the rights Defendant was deprived of during the trial. Believing that "a bright line must be drawn here," Court concluded that "the prejudicial nature of the prior-crimes evidence in the primary charge phase of the trial erodes if not eviscerates the defendant's right to the presumption of innocence. This is so no matter the level of sophistication of the juror tasked with divorcing himself from applying that knowledge to the primary charge." Here, "Defendant does not receive a fair trial because of this fundamental error."

TITLE: Mills v. State
INDEX NO.: E.8.d.4.
CITE: (06-21-07), Ind., 868 N.E.2d 446
SUBJECT: Improper double enhancement - habitual offender & serious violent felon
HOLDING: A person convicted of unlawful possession of a firearm by a serious violent felon may not have his or her sentence enhanced under the general habitual offender statute by proof of the same felony used to establish that the person was a serious violent felon. Accord, Conrad v. State, 747 N.E.2d 575 (Ind. Ct. App. 2001). Absent explicit legislative direction, a sentence imposed following conviction under a "progressive penalty statute" may not be increased further under either the general habitual offender statute or a specialized habitual offender statute. State v. Downey, 770 N.E.2d 794 (Ind. 2002). Disagreeing with Townsend v. State, 793 N.E.2d 1092 (Ind. Ct. App. 2003), Ct. held that 2001 amendment to general habitual offender statute, which prohibited double enhancements in specific situations, did not provide sufficiently explicit legislative direction to overcome the general rule against double enhancements "absent explicit legislative direction." "Except as otherwise provided by this section" language in Ind. Code 35-50-2-8(a) does not foreclose judicial application of the longstanding rule against double enhancements.

Here, D was not entitled to post-conviction relief because he failed to directly appeal the denial of his motion to withdraw his guilty plea. D cannot now use Post-Conviction Rule 1 proceedings to raise a claim that should have been appealed directly. Moreover, D achieved favorable outcomes from his guilty plea, *i.e.*, resolution of other pending charges with concurrent sentences. Held, transfer granted, Ct. App.' opinion at 855 N.E.2d 296 vacated, denial of post-conviction relief affirmed.

RELATED CASES: Dye, 984 N.E.2d 625 (Ind. 2013) (on rehearing; to constitute impermissible double enhancement for SVF charge and HO adjudication, convictions used must be the same crime but court expanded concept of "same crime" to include separate crimes that were part of the same uninterrupted criminal transaction); Brock, 983 N.E.2d 636 (Ind. Ct. App. 2013) (enhanced auto theft conviction was not used to support general habitual offender enhancement as D claimed; likewise, general habitual enhancement was attached to D's intimidation conviction, not the enhanced auto theft conviction); Shepherd, 985 N.E.2d 362 (Ind. Ct. App. 2013) (D's status as both a SVF and an HO did not lead to impermissible double enhancement because each status was supported by a different prior conviction); Fowler, 977 N.E. 2d 464 (Ind. Ct. App. 2012) (because D received a benefit from his plea agreement, *i.e.*, 35-year sentencing cap instead of possible 56-year sentence, he is precluded from challenging his sentence as illegal under the Mills rule); Dugan, 976 N.E.2d 1248 (Ind. Ct. App. 2012) (Mills applies retroactively to cases that were final at the time Mills was decided; D's plea to the HO enhancement in exchange for the minimum sentence on the enhancement did not waive the issue; a minimum sentence on an illegal sentence is not a benefit of the plea); Graham, App., 903 N.E.2d 538 (D did not waive his improper double enhancement claim by pleading guilty without benefit of a plea agreement); Sweatt, 887 N.E.2d 81 (although there are no double enhancement implications with using the same prior conviction to support a SVF conviction and a HO enhancement attached to a different conviction, the SVF conviction cannot run consecutively to the conviction to which the HO enhancement is attached; see full review at E.5.g).

TITLE: Pickett v. State

INDEX NO.: E.8.d.4.

CITE: (8/30/2017), 83 N.E.3d 717 (Ind. Ct. App. 2017)

SUBJECT: Denial of motion to bifurcate reversed

HOLDING: On Interlocutory review, the Court of Appeals ruled the Tr. Ct. abused its discretion in denying D's motion to bifurcate his charge for possession of a firearm by a serious violent felon charge ("SVF") from his other six charges. The State's proposed changes to the language of the SVF charge and SVF jury instruction would not decrease the prejudice D would suffer from the State introducing evidence about the conviction that qualifies him for the SVF charge, a prior conviction for escape.

D was charged with seven counts, including murder and the SVF charge. In denying D's request to bifurcate, the Tr. Ct. adopted the State's proposal: remove the words "serious violent felon" from both the charging instrument and the jury instruction and replace them with a citation to the SVF statute, Ind. Code § 35-47-4-5. These changes would supposedly inoculate D from prejudice from the State introducing evidence about the escape conviction while the jury would be hearing evidence regarding D's alleged guilt on the non-SVF charges. The State's proposed changes will not reduce the risk of prejudice to D. The jury would still know about the escape conviction as it considers D's guilt on the non-SVF charges, which would allow the jury to draw an inference of guilt based on facts unrelated to the non-SVF charges. See Spearman v. State, 744 N.E.2d 545, 547 (Ind. Ct. App. 2001). Further, the escape conviction has no relevance under the Evidence Rule 404(b) exceptions for proof of motive, intent, or identify. Held, judgment reversed and remanded for proceedings consistent with Court's opinion.

TITLE: Ross v. State
INDEX NO.: E.8.d.4.
CITE: (5-25-00), Ind., 729 N.E.2d 113
SUBJECT: Double enhancement - habitual offender & handgun enhancement
HOLDING: It was improper to enhance D's handgun conviction to Class C felony due to prior felony, & then use Class C felony handgun conviction to support D habitual offender (HO) enhancement. When faced with general statute & specific statute on same subject, more specific one should be applied. Also, statutes which are criminal or penal in nature or which are in derogation of common-law right must be strictly construed, & where there is ambiguity, it must be resolved against penalty. Dowd v. Sullivan, 217 Ind. 196, 27 N.E.2d 82 (1940). Here, handgun statute which elevates possession of handgun to Class C felony based on prior felony is more detailed & specific statute than general HO statute which is general prohibition on repeat offenses regardless of activity involved. Thus, misdemeanor conviction under handgun statute, once elevated to felony conviction, should not be enhanced again under general HO statute. Held, judgment affirmed in part & reversed in part, explicitly disapproving of Thomas, App., 684 N.E.2d 222.

Note: Holding does not alter decisions in Hampton, 526 N.E.2d 1154, & Woods, 471 N.E.2d 691, both of which held that there was no DJ violation by this double enhancement. Here, Ct. used rules of statutory construction to hold that Legislature did not intend such double enhancement. However, Ross may be used to challenge Dennis, App., 686 N.E.2d 9012 (Class D felony prosecution can be enhanced under HO statute), & Williams, App., 676 N.E.2d 1074 (Class D felony auto theft can be enhanced under HO statute).

RELATED CASES: Goodman, App., 863 N.E.2d 898 (D's sentence was impermissibly doubly enhanced when Tr. Ct. erroneously based his Class C felony auto theft & habitual offender finding on same prior felony conviction; see full review at E.8.d.7); Jacobs, 835 N.E.2d 485 (Ross rule on double enhancement applies retroactively; see full review, this section); Olatunji, App., 788 N.E.2d 1268 (nothing in Ross prohibited use of either unrelated handgun conviction, or previous unrelated felony conviction that caused handgun conviction to be enhanced, as predicate felony offenses in determining that person to be an HO after committing a third unrelated felony); Burrus, App., 763 N.E.2d 469 (Tr. Ct. did not abuse its discretion when it enhanced D's dealing in cocaine conviction due to his HO status rather than enhancing his conviction for carrying handgun without license); Conrad, App., 747 N.E.2d 575 (Ross should effectively preclude enhancement under general habitual offender statute of D's sentence for unlawful possession of firearm by serious violent felon; see full review, this section).

TITLE: Thomas v. State

INDEX NO.: E.8.d.4.

CITE: (4th Dist., 8-15-97), Ind. App., 684 N.E.2d 222

SUBJECT: Double jeopardy - habitual offender & handgun enhancement

HOLDING: Prior robbery conviction can be used to support conviction for carrying handgun without license as class C felony & as prior unrelated felony conviction under habitual offender statute. D cannot be charged under two habitual offender statutes based on same offense. Freeman, 658 N.E.2d 68; Devore, 657 N.E.2d 740. Here, D was not charged under two habitual offender statutes, but was charged with habitual offender enhancement & carrying handgun without license as Class C felony. Class C felony handgun offense is separate crime from carrying handgun without license as Class A misdemeanor. Elevation from Class A misdemeanor to Class C felony for prior robbery conviction is not enhancement as contemplated in habitual offender statute, & does not render application of habitual offender statute in any way duplicative. Thus, State was not barred from using robbery conviction as underlying felony to support habitual offender charge. Held, judgment affirmed.

TITLE: Wooden v. United States

INDEX NO.: E.8.d.4.

CITE: (03/08/2022), US Supreme Court, 142 S. Ct. 1063

SUBJECT: Burglarizing 10 units in single storage facility constitute only one conviction for purposes of enhancement under Armed Career Criminal Act

HOLDING: The Armed Career Criminal Act (ACCA) mandates a minimum 15-year minimum penalty for offenders in possession of a gun who have at least three prior convictions for specified felonies "committed on occasions different from one another." 18 U.S.C. 924(e). Here, the Court threw out the ACCA enhancement for Defendant who was designated a "career criminal" based on his burglary convictions for breaking into a single mini-storage facility and stealing items from ten separate storage units. Defendant did not commit his crimes on different "occasions" but rather rose from a single criminal episode, thus he should not have been subject to the mandatory-minimum enhancement because the burglaries count as only one prior conviction under the ACCA. Defendant's "one-after-another-after-another burglary...occur redone one 'occasion,'" under a natural construction of that term and consistent with the reason it became part of the ACCA." The government's contrary view could make someone a career offender in the space of a minute. Whether criminal activities occurred on one occasion or different occasions may depend on several circumstances, including timing, location, and the character and relationship of the offenses. Congress's amendment of ACCA to add the single occasion requirement was based on its belief that a person who robbed a restaurant and did nothing else, is not a career offender. Wooden's burglary of a single storage facility does not suggest the "special danger" posed by an "armed career criminal." Gorsuch, J., joined in part by Sotomayor, J., concurring to express his view that the rule of lenity should come into play when courts struggle to decide whether crimes were committed as part of a single "occasion." Kavanaugh, J., concurring to caution against resorting to the rule of lenity except in cases where a statute is "grievously ambiguous."

E. SENTENCING

E.8. Bifurcated proceedings other than 30-year habitual

E.8.d.6 Prostitution

TITLE: State v. Dennis

INDEX NO.: E.8.d.6.

CITE: (2nd Dist., 10-28-97), Ind. App. 686 N.E.2d 901

SUBJECT: Proper habitual offender enhancement - prior prostitution convictions

HOLDING: Use of D's two D felony prostitution convictions, each of which had been enhanced from A misdemeanors based on two prior prostitution convictions, to sentence D as habitual offender did not violate double jeopardy. Where two statutes address same subject, Ct. strives to harmonize them where possible; however, when statutes cannot be harmonized & legislature deals with subject in detailed manner in one statute & in general manner in other, detailed statute will supersede general one. Freeman, 658 N.E.2d 68. Here, Ind. Code § 35-45-4-2, which enhances prostitution from A misdemeanor to D felony based on two prior prostitution convictions, can be harmonized with Ind. Code § 35-50-2-8, habitual offender statute. When read together, enhancement & habitual offender statutes provide for progressive scheme of punishment. Thus, because legislature intended possibility that both statutes be simultaneously applied, Tr. Ct. improperly dismissed D's habitual offender sentence enhancement. Held, judgment reversed & remanded.

E. SENTENCING

E.8. Bifurcated proceedings other than 30-year habitual

E.8.d.7. Other

TITLE: Adcock v. State

INDEX NO.: E.8.d.7.

CITE: (08-27-10), 933 N.E.2d 21 (Ind. Ct. App. 2010)

SUBJECT: Amendment to Repeat Sexual Offender (RSO) Notice - no error

HOLDING: Tr. Ct. did not err in allowing State to amend RSO Notice after opening arguments in RSO phase of trial to reflect that D's prior conviction for child molesting was entered on May 16, 1986, not December 18, 1990, as the original Notice stated.

A D must be given a reasonable opportunity to prepare a defense against an amended charge. Baker v. State, 922 N.E.2d 723, 729 (Ind. Ct. App. 2010). Here, the amendment to the RSO Notice was not one of substance because: a) any defenses available under the original Notice were equally available under the amended Notice and b) D's evidence would apply to the Notice in either form. See Fajardo v. State, 859 N.E.2d 1201, 1207 (Ind. 2007). The original Notice properly identified the relevant prior offense and gave sufficient notice of the proposed sentence enhancement. Further, the amended Notice did not change the material elements for an RSO finding, i.e., that D had a prior conviction for a sex offense. Even with the incorrect conviction date, the original Notice fulfilled its purpose of advising D that the State intended to have him sentenced as a RSO. Thus, D failed to show that immaterial defect in original Notice substantially prejudiced his ability to prepare a defense. Held, judgment affirmed.

TITLE: Bishop v. State

INDEX NO.: E.8.d.7.

CITE: (2d Dist. 7/10/89), Ind. App., 540 N.E.2d 1246

SUBJECT: Auto theft enhancement - prior conviction

HOLDING: Evidence was sufficient to support enhancement of D's conviction for auto theft, based on prior conviction. When statute imposes greater punishment upon 2d conviction for offense, prior conviction must be alleged in information & proved at trial. Minton, 214 N.E.2d 380. Charging information alleged that D's prior conviction for auto theft occurred in Marion County, IN. At trial, D acknowledged prior conviction, which may serve as evidence in determining whether enhancement is proper. See McVey, 531 N.E.2d 458; Gillie, 465 N.E.2d 1380. However, D argues that there was no evidence that it occurred in IN pursuant to statute on which current conviction was based. Majority responds that there was no evidence that prior conviction did not occur in IN, & notes that D made no effort to challenge specific allegation in information. Held, conviction & enhancement affirmed. Shields, J., DISSENTS, lamenting majority's willingness to shift burden of proof to D.

TITLE: Brown v. State
INDEX NO.: E.8.d.7.
CITE: (2nd Dist., 7-10-97), Ind. App., 683 N.E.2d 600
SUBJECT: Using prior uncounseled misdemeanor conviction to enhance sentence
HOLDING: Tr. Ct. did not err in enhancing D's battery conviction from Class A misdemeanor to Class D felony based upon prior uncounseled misdemeanor battery conviction. Sentencing Ct. may consider D's uncounseled misdemeanor conviction to enhance sentence for subsequent conviction only if prior conviction did not result in prison sentence. Nichols v. United States, 114 S.Ct. 1921 (1994) (expressly *overruling* Baldasar, 446 U.S. 222). However, Tr. Ct. proceedings are clothed with presumption of regularity, Smith v. State, 477 N.E.2d 857 (Ind. 1985), & it is incumbent upon D to prove, by a preponderance of evidence, that there was actual lack of representation without knowing waiver of counsel in earlier proceeding. In this case, D failed to sustain his burden to successfully challenge validity of prior misdemeanor conviction, or that his right to counsel was violated. Neither party disputed that D's prior conviction was uncounseled & resulted in prison sentence. Trial counsel was not ineffective in failing to effectively challenge validity of D's prior misdemeanor conviction, because D failed to show that he was prejudiced by counsel's deficient performance. Held, convictions affirmed.

TITLE: Goodman v. State

INDEX NO.: E.8.d.7.

CITE: (5th Dist., 04-04-07), Ind. App., 863 N.E.2d 898

SUBJECT: Habitual offender & auto theft - impermissible double enhancement

HOLDING: D's sentence was impermissibly doubly enhanced when Tr. Ct. erroneously based his Class C felony auto theft & habitual offender finding upon same prior felony conviction. D's present conviction for auto theft was enhanced once from a class D felony to a C felony under a specific progressive penalty statute, Ind. Code 35-43-4-2.5(b), because of his prior auto theft conviction, & again under Indiana's habitual offender statute. State acknowledged that Indiana courts have in the past disfavored double enhancements, but argued that 2001 amendments to Ind. Code 35-50-2-8, which codified certain S.Ct. opinions regarding double enhancements, demonstrate that double enhancements such as D's, which were not specifically enumerated in these amendments as exceptions, are therefore permissible.

In State v. Downey, 770 N.E.2d 794 (Ind. 2002), Court held that, absent explicit legislative direction, a sentence imposed following conviction under a progressive penalty statute may not be increased further under either general habitual offender statute or a specialized habitual offender statute. D's auto theft was enhanced not once, but twice, first under a progressive penalty statute to a class C felony, & then to support habitual offender charge, both of which were based upon same prior offense. It was these double enhancements which S.Ct. considered impermissible in Downey. Further, Court was unconvinced that General Assembly's mere failure to specifically enumerate double enhancement at issue as an exception under Ind. Code 35-50-2-8 therefore deems it permissible.

Held, habitual offender determination & four-year sentence enhancement reversed & remanded. Robb, J, concurring, concluded that double enhancement was impermissible under reasoning of Olatunji v. State, 788 N.E.2d 1268 (Ind. Ct. App. 2003). Olatunji noted that double use of prior felony conviction as sentencing enhancement is prohibited where, as here, prior conviction is twice used as a separate & discrete conviction to doubly enhance D's sentence for one present conviction. Barnes, J., dissenting, argued that this case does not fall within any of the exceptions for application of general habitual offender statute listed in Ind. Code 35-50-2-8(b).

TITLE: Landis v. State

INDEX NO.: E.8.d.7.

CITE: (4th Dist., 3-17-98), Ind. App., 693 N.E.2d 570

SUBJECT: Bifurcation - prior stalking conviction as enhancer

HOLDING: In stalking prosecution, Tr. Ct. erred in denying D's motion to bifurcate different phases of his trial. Proceedings are bifurcated in cases where prior convictions serve to enhance present conviction, in recognition that evidence of prior crimes is generally inadmissible in criminal cases. Johnson, App., 544 N.E.2d 164. State introduced certified copy of D's prior stalking conviction during trial & elicited testimony from victim regarding events that led up to D being charged with prior stalking offense. Ct. was unable to say that jury absorbed this information & waited to consider it until after they determined D's guilt on present charge. Thus, Tr. Ct.'s failure to bifurcate guilt & penalty phases of trial violated D's right to due process. Held, conviction reversed & remanded for new trial.

RELATED CASES: Landis, 704 N.E.2d 113 (Ct. App. correctly held that when State seeks enhanced penalty based on prior conviction for stalking, D is entitled to bifurcated proceeding in which proof of prior conviction is submitted to jury only after it has rendered guilty verdict on present offense; however, State may present evidence of prior acts that are probative of crime of stalking, subject to Ind. Rules of Evidence, but evidence of any former convictions should be admitted only in "sentencing hearing" contemplated by Ind. Code 35-38-1-2(c)).

TITLE: Smith v. State
INDEX NO.: E.8.d.7.
CITE: (04-20-05), Ind., 825 N.E.2d 783
SUBJECT: Constitutionality of repeat sexual offender statute - jury determination not required to impose recidivist sentencing enhancement

HOLDING: Indiana's repeat sexual offender statute, Ind. Code 35-50-2-14, is constitutional under both Indiana & United States Constitutions. Unlike habitual offender proceedings, Ind. Code 35-50-2-14(d) places the responsibility to determine if a person has prior applicable sexual offense on the Tr. Ct. rather than the jury. Relying on Seay v. State, 698 N.E.2d 732 (Ind. 1998), D argued that statute is unconstitutional under Article I, Section 19 of Indiana Constitution, which provides, "In all criminal cases whatever, the jury shall have the right to determine the law & the facts." However, Seay suggests that under Article I, Section 19, the Legislature could structure an "automatic" sentencing enhancement scheme without a jury trial on the status determination. That is what Legislature has done in case of Repeat Sexual Offender Statute. Thus, jury determination of repeat sexual offender status is not required for enhancement.

As to claim that Ind. Code 35-50-2-14 violates U.S. Constitution, Ct. noted that statute increased D's sentence based on facts of his prior convictions for sex offenses, thus it falls outside Sixth Amendment right to trial by jury under Apprendi v. New Jersey, 530 U.S. 466 (2000). Apprendi specified that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond prescribed statutory maximum must be submitted to a jury & proved beyond a reasonable doubt. Since Apprendi was decided, there has appeared to be almost total consensus that due process & Sixth Amendment do not require a jury determination to impose a recidivist sentencing enhancement. Doctrine of res judicata provides a second justification for not requiring jury to find fact of a prior conviction. Held, transfer granted, Ct. App.' opinion at 804 N.E.2d 1246 vacated on this issue, Tr. Ct.'s repeat sexual offender finding affirmed.

TITLE: U.S. v. Bryant

INDEX NO.: E.8.d.7.

CITE: (6/13/2016), 136 S.Ct. 1954 (U.S. S.Ct. 2016)

SUBJECT: Uncounseled tribal court convictions were valid and properly used as predicate offenses

HOLDING: D's tribal-court convictions for domestic battery could be used as predicate offenses in a subsequent prosecution for Domestic Assault Within Indian Country – 18 U.S.C. § 117(a) – and subject D to a five-year sentence - even though D was not represented by counsel during the prior cases, because the Indian Civil Rights Act of 1968 provides indigent clients with a right to appointed counsel only in cases where the sentence exceeds one year. Because none of the predicate convictions resulted in sentences greater than one year, D was not denied his right to counsel in tribal court, so those convictions were valid and could be counted as predicate offenses in the instant prosecution. Held, cert. granted, Ninth Circuit opinion at 769 F.3d 671 reversed, and judgment affirmed.

TITLE: Williams v. State

INDEX NO.: E.8.d.7.

CITE: (5th Dist., 1-31-97), Ind. App., 676 N.E.2d 1074

SUBJECT: Habitual offender & auto theft enhancement

HOLDING: Enhanced sentence for auto theft as class C felony may also be enhanced under general HO statute. Here, D's auto theft sentence was enhanced to class C felony for his prior auto theft conviction & enhanced again for his HO status based in part on same prior auto theft conviction. Relying on Freeman, 658 N.E.2d 68, D argued that Tr. Ct. improperly used his prior auto theft conviction to support both enhancements, & that HO enhancement should be reversed because specific enhancement for auto theft under Ind. Code 35-43-4-2.5 should control. Ct. agreed with State's contention that auto theft enhancement serves as "gap-filler" between D's first auto theft conviction, which is not enhanced, & his third conviction, which would be enhanced by general HO statute. Ct. also concluded that auto theft enhancement statute & HO statute complement each other. Without HO statute, each additional auto theft conviction would only subject D to maximum penalty for class C felony. When read together, statutes provide for progressive scheme of punishment. Because statutes can be harmonized, both enhancement provisions may apply simultaneously. Held, judgment affirmed.

RELATED CASES: Goodman, App., 863 N.E.2d 898 (D's sentence was impermissibly doubly enhanced when Tr. Ct. erroneously based his Class C felony auto theft & habitual offender finding on same prior felony conviction; see full review at E.8.d.7).

E. SENTENCING

E.8. Bifurcated proceedings other than 30-year habitual

E.8.e Other Bifurcated Proceedings

TITLE: Armstrong v. State

INDEX NO.: E.8.e.

CITE: (11/26/2014), 22 N.E.3d 629 (Ind. Ct. App. 2014)

SUBJECT: Vagueness and proportionality challenges to criminal gang enhancement statute rejected

HOLDING: Indiana's criminal gang statute, Ind. Code § 35-50-2-15, is neither unconstitutionally vague nor disproportionate to the offense. Statute requires Tr. Ct. to enhance sentence only when court finds that State has proven beyond a reasonable doubt that D knowingly or intentionally was a member of a criminal gang while committing felony and committed the offense at the direction of or in affiliation with a criminal gang. The enhancement does not require the D to act with specific intent to further the gang's criminal goals. Here, D was found guilty for his role in the murder and attempted murder of two men he believed had killed an Indianapolis rapper. He was sentenced to 65 years for murder, 65 years for criminal gang enhancement; 30 years for kidnapping as a Class A felony; and 45 years for attempted murder. Court held that the statute fairly informs a person of ordinary intelligence of conduct which is forbidden.

Court also rejected D's argument that the statute violates the Proportionality Clause of Indiana Constitution because the punishment it imposes is excessive and grossly out of proportion to the severity of the crime. State presented sufficient evidence to support criminal gang enhancement, and given brutal nature of offenses and D's extensive criminal history, Court could not say that 175-year sentence was inappropriate. Held, judgment affirmed.

TITLE: Cooper v. State

INDEX NO.: E.8.e.

CITE: (01-11-11), 940 N.E.2d 1210 (Ind. Ct. App. 2011)

SUBJECT: Firearm enhancement - evidence sufficient

HOLDING: Evidence was sufficient to support five-year enhancement, pursuant to the firearm enhancement statute (Ind. Code § 35-50-2-11) of D's sentence for reckless homicide, even though reckless homicide required the State to prove only that D acted recklessly, while the firearm enhancement statute required the State to prove intentional or knowing conduct. The evidence showed that D bought a shotgun and shells, armed himself with the gun, and loaded it. He drove to the victim's residence and intentionally confronted him, allegedly only to "scare the sh*t out of him." However, as the two wrestled, D apparently discharged the shotgun, which caused the victim's death. From this evidence, it was reasonable for the jury to conclude that D's use of the shotgun was intentional, even if the actual killing resulted from reckless conduct. In other words, D intentionally used the shotgun and recklessly discharged it, causing the victim's death. Held, judgment affirmed.

RELATED CASES: Barnett, 24 N.E.3d 1013 (Ind. Ct. App. 2015) (as in Cooper, evidence supported finding both that D knowingly used a firearm and that he recklessly killed victim as they struggled for control of gun; D's waiver of jury trial in enhancement phase did not violate his Sixth Amendment right to jury).

TITLE: Jackson v. State
INDEX NO.: E.8.e.
CITE: (8/24/2018), 105 N.E.3d 1081 (Ind. 2018)
SUBJECT: Vacating criminal gang enhancement required resentencing on all affected counts
HOLDING: Where D's criminal gang enhancement was vacated on appeal, the trial court was required to resentence D on all counts affected by the enhancement.

D and four friends decided to rob a person they thought had marijuana. They entered the building, made their way to the apartment, and encountered about ten people. A gunfight ensued, and they fled. After filing a criminal gang enhancement, the State amended the enhancement in such a way that it no longer stated an offense. D was convicted of multiple offenses, and the jury found that the criminal gang enhancement applied to each offense. The trial court imposed a thirty-year criminal gang enhancement, which yielded an aggregate sentence of sixty years. The Court of Appeals vacated the enhancement. It said the trial court could not resentence D on the underlying offenses because the gang enhancement was not attached to a specific offense, unlike the way a habitual offender enhancement is attached to a specific underlying offense. See Coble v. State, 523 N.E.2d 228 (Ind. 1988) (vacating habitual offender enhancement allowed the trial court to resentence Coble on Count 2, the count that was enhanced by Coble's habitual offender status). On transfer, the Supreme Court said Coble was instructive but not for the exact reasons cited by the Court of Appeals. The Supreme Court said that in allowing the trial court to resentence Coble on Count 2, the Court of Appeals properly allowed the trial court to resentence Coble on the count for which punishment was reduced, or, in the words of the Supreme Court, the count for which punishment was "disturbed." Where punishment is disturbed, a trial court should have the opportunity on remand to adjust the underlying sentence upward to make it fall in line with the degree of punishment it originally believed was appropriate. And here, because the jury found the enhancement applied to all counts, the trial court should resentence D on all counts. Giving the trial court this discretion is in accord with one of the purposes of the criminal code – maximizing a sentencing court's discretion: "This title shall be construed in accordance with its general purposes, to . . . give judges maximum discretion to impose sentences based on a consideration of all the circumstances related to the offense[.]" Ind. Code § 35-32-1-1(7). Finally, though the trial court must resentence D, it may impose the same sentence it originally pronounced for each felony, or, of course, it may impose any sentence allowed by statute. See e.g., Alabama v. Smith, 490 U.S. 794, 798-803 (1989). Held, transfer granted, Court of Appeals opinion summarily affirmed on matters not concerning resentencing, and remanded for resentencing.

Note: Though the Court said that resentencing was required, it did not make clear if a full-blown sentencing was required in all cases, especially in a case where a trial court intends to keep in place the original sentences on the underlying convictions.

TITLE: Lumbley v. State

INDEX NO.: E.8.e.

CITE: (4/6/2017), 74 N.E.3d 234 (Ind. Ct. App. 2017)

SUBJECT: Sentence enhancements for use of a firearm can be run consecutively

HOLDING: Tr. Ct. did not abuse its discretion by enhancing Defendant's two separate criminal confinement convictions (of two separate victims on separate days) under Indiana's firearm enhancement statute and ordering that they be served consecutively. *Citing Breaston v. State*, 907 N.E.2d 992 (Ind. 2009), Defendant argued that sentencing enhancements for use of a firearm cannot be run consecutively, just as habitual offender enhancements cannot. But the firearm enhancements “do not have the special and distinct dimensions of habitual offender enhancements and are similar to the finding of aggravating circumstances for separate offenses.” Further, the addition of Ind. Code § 35-50-2-11(i) in 2015, which prevents the imposition of consecutive sentences when a single episode of conduct is present, provides further support for the conclusion that the Legislature intended for enhancements to support consecutive sentences. Held, judgment affirmed.

RELATED CASES: *Breaston*, 907 N.E.2d 992 (Ind. 2009) (sentence enhancements for use of a firearm can be run consecutively unless a single episode of criminal conduct is present); *Young*, 57 N.E.3d 857 (Ind. Ct. App. 2015) (because there is no statutory authorization for stacking general and specialized habitual offender enhancements, Ct. remanded with instructions to run the habitual and repeat sexual offender enhancements concurrently).

TITLE: Parker v. State

INDEX NO.: E.8.e.

CITE: (1st Dist., 8-31-01), Ind. App., 754 N.E.2d 614

SUBJECT: Constitutionality of firearm enhancement statute

HOLDING: Tr. Ct. did not err in enhancing D's 40-year sentence for Class A felony robbery an additional five years pursuant to Ind. Code 35-50-2-11(b)(1). Statute provides for five-year sentence enhancement based on D's use of handgun in commission of felony that results in death or serious bodily injury. D argued that he was denied due process when Tr. Ct. enhanced his sentence for use of handgun during course of robbery, & that sentencing statute is unconstitutional. Other than fact of prior conviction, any fact that increases penalty for crime beyond prescribed statutory maximum must be submitted to jury & proved beyond reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466 (2000). There is distinction between facts that constitute elements of crime, which must be charged & proven beyond reasonable doubt, & mere "sentencing factors," which need not be charged or supported by jury verdict. Jones v. United States, 526 U.S. 227 (2000). Application of Indiana statute under which D's sentence was enhanced did not offend due process under Jones & Apprendi standard. Charge that D used handgun during robbery was submitted to jury, & to reach its verdict jury must have determined beyond reasonable doubt that State proved he did. Held, no error.

TITLE: State v. Vande Brake

INDEX NO.: E.8.e.

CITE: (08-04-20), Ind., 150 N.E.3d 595

SUBJECT: State waived its discretion to seek a firearm enhancement by failing to act to pursue it or object when the trial court dismissed it

HOLDING: After filing a "use of firearm" sentence enhancement against Defendant, the State failed to raise the issue at any of the nine pretrial conferences, inform the court the CCS omitted listing it as a charged offense, propose any preliminary or final jury instructions relating to the enhancement, alert the court to the need for a bifurcated jury trial at any time before the court excused the jury, or object to the dismissal of the enhancement while the jury remained in the building. Under these circumstance, the Indiana Supreme Court found clear waiver of the discretion to seek a firearm enhancement and found the State failed to meet its burden to show the trial court's implied finding of waiver and subsequent *sua sponte* dismissal of the enhancement were contrary to law.

E. SENTENCING

E.9. Habitual offender (Ind. Code 35-50-2-8)

TITLE: Campbell v. State
INDEX NO.: E.9.
CITE: (12-21-2020), Ind. Ct. App., 161 N.E.3d 371
SUBJECT: Belated habitual offender charge requires State to affirmatively demonstrate good cause - ongoing plea negotiations
HOLDING: Trial court abused its discretion in allowing the belated filing of a habitual offender enhancement one business day before trial without requiring or making any finding of good cause for the tardiness.

Defendant was charged with unlawful possession of a firearm by a serious violent felon (SVF), auto theft, three counts of resisting law enforcement, possession of marijuana and two counts of leaving the scene of an accident. In May, the State filed a Notice of Intent to File Habitual Offender Enhancement, notifying Defendant it intended to file a habitual offender sentencing enhancement if good faith plea negotiations were unsuccessful. Nine months later, on the eve of trial, the State filed the Habitual Offender Enhancement. The State argued the belated filing was due to ongoing plea negotiations and that it waited until the last minute to file the Habitual Offender Enhancement to give Defendant the opportunity to accept a plea offer. The trial court found good cause and allowed for the late filing. Trial counsel objected and moved for a continuance, which was granted. In finding an abuse of discretion in allowing the late habitual offender enhancement, the Court of Appeals found the State's tendering of the same plea offer several times and then asking Defendant if he wanted to make a counteroffer is not a bona fide ongoing plea negotiation. Judge Brown, concurring in part and dissenting on this issue, found that because the intent to file the habitual offender enhancement was filed nine months prior to the charge being filed and then the trial did not occur until four months after the charge was filed, the trial court did not abuse its discretion in allowing the State to file the enhancement.

The Court also found sufficient evidence to support the charge of unlawful possession of a firearm by a SVF because the State was required to prove only that Defendant knowingly possessed a firearm after being convicted of a serious violent felony and did not need to prove the Defendant knew he was a serious violent felon. In Rehaif v. United States, 139 S. Ct. 2191(2019), the U.S. Supreme Court held that under two federal statutes which prohibit an individual from possessing firearms, the government had to prove the defendant knew he belonged to a category that barred him from possessing a firearm and that he knew he possessed a firearm. Distinguishing Rehaif, the Court of Appeals found that Indiana's statute SVF statute is different from the federal statute and does not require the State to prove that Defendant knew he was a serious violent felon when he unlawfully possessed a firearm having a prior conviction for a serious violent felony.

TITLE: Johnican v. State

INDEX NO.: E.9.

CITE: (1st Dist., 3-3-04), Ind. App., 804 N.E.2d 211

SUBJECT: Habitual offender (HO) - good cause for late filing, but improperly attached to possession of cocaine conviction

HOLDING: Tr. Ct. violated Ind. Code 35-50-2-8(b) by attaching D's HO enhancement to his conviction for possession of cocaine, an offense which is not eligible for enhancement. Statute prohibits general HO enhancement of drug offense under Ind. Code 16-42-19 or Ind. Code 35-48-4 where the underlying offense is not delineated in Ind. Code 35-50-2-2(b)(4) & the D has not accrued two or more unrelated dealing convictions. Possession of cocaine is an offense under Ind. Code 35-48-4-6, & is not an offense listed under Ind. Code 35-50-2-2(b)(4). Moreover, D did not have any dealing convictions, let alone more than one. Given confusing manner in which Ind. Code 35-50-2-8(b) is drafted, it is understandable how Tr. Ct. could have attached habitual to an offense that was not eligible for enhancement. Nevertheless, enhancement in this case contravenes statute & cannot stand. Held, remanded to attach HO enhancement to either of D's Class D felony convictions.

RELATED CASES: White, 963 N.E.2d 511 (Ind. 2012) (suggesting that where the State fails to present in a motion or hearing any facts justifying a finding of good cause, it is an abuse of discretion to allow the late HO amendment; however, D failed to preserve issue for appeal by not objecting and requesting a continuance).

TITLE: Lewis v. State
INDEX NO.: E.9.
CITE: (3rd Dist., 12-31-03), Ind. App., 800 N.E.2d 996
SUBJECT: Sentence for habitual offender (HO) affirmed - no weighing of aggravators & mitigators
HOLDING: Ct. had previously remanded to Tr. Ct. for a new sentencing order after determining that an unlawful possession of a firearm by a serious violent felon conviction could receive an HO enhancement. See Lewis v. State, 769 N.E.2d 243 (Ind. Ct. App.2002). On remand, Tr. Ct. sentenced D to 30 years as an HO enhancement to a 20-year sentence to his serious violent felon conviction, a Class B felony. Affirming D's 30-year HO enhancement, Ct. concluded that both State & D improperly analyzed sentence in relation to weighing aggravators & mitigators, as these factors are not relevant to a sentence enhancement. Rather, the HO enhancement is within the Tr. Ct.'s discretion as authorized by Ind. Code 35-50-2-8(e), which allows for an enhancement of the underlying offense from the presumptive sentence to three times that sentence. In this case, that would be 10-30 years. Thus, D's 30-year enhancement was within Tr. Ct.'s discretion. Held, judgment affirmed.

TITLE: Logan v. United States

INDEX NO.: E.9.

CITE: 552 U.S. 23, 128 S.Ct. 457, 169 L.Ed.2d 432 (2007) 12/04/2007

SUBJECT: Retained rights not "restored" rights under Armed Career Criminal Act

HOLDING: Unanimous Court affirmed finding that D properly had his sentence for being a felon convicted of possessing a firearm increased for having three convictions for "violent felonies" under the Armed Career Criminal Act of 1984 (ACCA), which mandates a 15 year minimum sentence in such instances. Congress defined the term "violent felony" to include specified crimes "punishable by imprisonment for a term exceeding one year," 18 U.S.C. ' 924(e)(2)(B), but also provided that a state-law misdemeanor may qualify as a "violent felony" if the offense is punishable by a term of more than two years, ' 921(a)(20)(B). Congress amended that section in 1986 to exclude from qualification for enhanced sentencing "any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored." The district court sentenced D to 15 years because of three state misdemeanor battery convictions, each punishable by a 3-year maximum sentence, and none of them revoking any of D's civil rights. D challenged his sentence on basis that civil rights retained should be treated the same as those under the "civil rights restored" exemption. Court disagreed noting the ordinary meaning of "restored" does not include retention of something never lost and ' 921(a)(20) provides no more expansive definition. Court further rejected D's argument that a literal reading of the statute could yield harsh, disproportionate and absurd results whereas more serious offenders with rights restored may escape heightened punishment. D's argument overlooks ' 921(a)(20)'s "unless" clause, under which an offender gains no exemption from ACCA's application through a restoration of civil rights if the dispensation "expressly provides that the [offender] may not ship, transport, possess, or receive firearms." The resolution D proposes would correct one potential anomaly while creating others. Court was unwilling to recast the statute in Congress' stead. Court also noted that ' 921(a)(33)(B)(ii) rebutted D's absurdity argument, noting that section explicitly distinguished between "restored" and "retained," thereby making it more than conceivable that the legislature meant to do the same in ' 921(a)(20).

TITLE: Owens v. State

INDEX NO.: E.9.

CITE: (03-28-23), 206 N.E.3d 1187 (Ind. Ct. App.)

SUBJECT: Habitual offender amendment must be filed no less than 30 days before beginning of trial as opposed to particular trial setting

HOLDING: Indiana Code § 35-34-1-5(e) requires that a charging amendment for habitual offender enhancement must be made at least 30 days “before the commencement of trial,” whenever that may occur. Here, a habitual offender enhancement that was filed 21 days before a trial that was eventually rescheduled for 18 months later was not untimely, thus the State was not required to show good cause for its allegedly belated filing of the amendment. Relying on plain language of the statute, the Court of Appeals rejected Defendant's argument that the phrase “before the commencement of trial” meant the trial date on the books when the habitual offender enhancement was filed. If the legislature intended the deadline to be measured from the “trial date” in place when the State files its amendment, it would have chosen that language. Accordingly, the trial court did not err in denying Defendant's motion to dismiss the habitual offender enhancement.

TITLE: State v. McFarland

INDEX NO.: E.9.

CITE: (10-10-19), 134 N.E.3d 1027 (Ind. Ct. App.)

SUBJECT: Trial court properly denied State's motion to amend habitual offender charging information three days before trial

HOLDING: The State moved to amend the habitual offender charging information just three calendar days, and two business hours, before a Monday trial and the trial court denied its motion. On interlocutory appeal, the Court of Appeals affirmed the trial court's denial. The State filed the proposed amendment because one of the prior convictions alleged in the original information was actually a misdemeanor and the State wanted to replace it with a different prior felony conviction. The Court of Appeals held that the State's proposed amendment was one of substance, not form, and that allowing the amendment would have prejudiced Defendant. The court reviewed the denial of the State's motion to amend without regard to whether a continuance might have alleviated the prejudice and noted the late filing did not provide adequate notice to Defendant and also deprived him of his defense that one of the two convictions was not a valid predicate offense. Further, the court noted that allowing the amendment would have left his defense counsel "scrambling to fashion a new defense within a matter of hours" and forcing his attorney to modify his defense on the fly would have implicated his Sixth Amendment right to effective assistance of counsel. Finally, the trial court was in a better position to judge how the last-minute amendment would prejudice Defendant's substantial rights.

TITLE: United States v. Rodriguez

INDEX NO.: E.9.

CITE: 128 S.Ct. 1783, 170 L.Ed.2d 719 (2007) 05/19/2008

SUBJECT: State recidivist enhancement is "maximum term of imprisonment" under ACCA

HOLDING: Majority held the maximum prison term to which a state offender was exposed under a recidivist sentencing provision constitutes the "maximum term of imprisonment . . . prescribed by law" for the state conviction when it is offered as a predicate for an enhanced sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e), stating it was relying on the plain language of the ACCA. D was convicted in federal court of being a felon in possession of a firearm. The ACCA requires a 15-year minimum prison term for that offense if a D has three prior convictions for violent felonies or serious drug offenses, with a "serious drug offense" including state drug trafficking crimes "for which a maximum term of imprisonment of ten years or more is prescribed by law." D had prior convictions for delivery of a controlled substance with the maximum term of imprisonment for first-time offenders being five years, but the government argued the convictions qualified as ACCA predicates because D faced up to 10 years under a state recidivist statute. The district court characterized this as a separate statute for ACCA purposes. Majority found that the district court's reading was at odds with how "maximum term of imprisonment" is customarily understood by participants in the criminal justice system, with it not being convinced that the term "offense" generally is understood to describe the elements constituting the crime. Majority also found that a D's status as a recidivist bears on whether an offense was a "serious" one. Court further was unconvinced by contention that a D should not be punished under federal law for being treated as a recidivist under state law. Souter, J., filed a dissent joined by Stevens and Ginsburg, JJ., finding the ACCA provision ambiguous and would apply the rule of lenity.

TITLE: Williams v. State

INDEX NO.: E.9.

CITE: (9-22-00), Ind., 735 N.E.2d 785

SUBJECT: Late addition of habitual offender (HO) charge - D must move for continuance to preserve issue

HOLDING: Where Tr. Ct. permits late filing of HO charge, D must move for continuance in order to preserve propriety of Tr. Ct.'s order for appeal, even if D is seeking speedy trial. Daniel, 526 N.E.2d 1157; Haymaker, 667 N.E.2d 1113. D can seek more time to prepare for habitual question & still proceed on schedule for speedy trial of main charge. Ct. disapproved of Attebury, App., 703 N.E.2d 175, which held that D did not waive late HO filing issue by failing to move for continuance.

Generally, amendment of information to include HO charge under Ind. Code 35-50-2-8 must be made no later than ten days after omnibus date. Upon showing of good cause, however, Tr. Ct. may permit filing of HO charge at any time before commencement of trial. Here, Tr. Ct. found good cause to permit late HO filing because State was conducting plea negotiations with D up until date HO information was filed. D waived issue of late addition of HO charge by not asking for continuance. Held, judgment affirmed.

RELATED CASES: White, 963 N.E.2d 511 (Ind. 2012) (suggesting that where the State fails to present in a motion or hearing any facts justifying a finding of good cause, it is an abuse of discretion to allow the late HO amendment; however, D failed to preserve issue for appeal by not objecting and requesting a continuance); Johnican, App., 804 N.E.2d 211 (good cause for belated filing affirmed where plea negotiations continued up to filing of enhancement); Land, App., 802 N.E.2d 45 (despite defense counsel's contentions that no serious plea negotiations occurred, Ct. found State's missing the deadline by six months was justified due to ongoing plea negotiations & fact that D was unable to show how he was prejudiced by the delay in filing); Falls, App., 797 N.E.2d 316 (D did not waive his challenge by failing to file a motion for a continuance because no trial date had been set when habitual was filed); Hooper, App., 779 N.E.2d 596 (Tr. Ct. erred by allowing late filing of an HO enhancement after omnibus date; State did not show good cause for late filing); Watson, App., 776 N.E.2d 914 (Tr. Ct. acted within its discretion in finding that State had good cause to allow belated HO amendment, where State was unaware of D's additional felony charge to support HO allegation until after statutory deadline); Attebury, App., 703 N.E.2d 175, disapproved on other grounds by Williams ("good cause" is not defined in statute, but it must require something more than lack of prejudice).

E. SENTENCING
E.9. Habitual offender (Ind. Code 35-50-2-8)
E.9.a. In general

TITLE: Abron v. State

INDEX NO.: E.9.a.

CITE: (2d Dist. 05/19/92), Ind. App., 591 N.E.2d 634

SUBJECT: Habitual Offender (HO) enhancement appropriate where all of prior felonies are Class D

HOLDING: HO enhancement under Ind. Code 35-50-2-8(h) may be sustained where any of the 3 convictions involved, i.e., a prior or present conviction, is greater than Class D felony. At trial, jury found D to be HO, but judge did not enhance D's sentence, apparently concluding that statute required at least one of prior alleged felonies to be greater than Class D. D's instant conviction was Class B felony, & his priors, the latest being in 1986, were Class D felonies. Ct. App. found that because present offense was greater than Class D, it was error for Tr. Ct. to set aside HO finding, and that subsection "e" of HO statute required Tr. Ct. to enhance sentence by at least 20 years. In sentencing D for instant offense, Tr. Ct. had enhanced sentence to maximum, *citing* his prior record as aggravator. Although Tr. Ct. cited other aggravators & D had additional prior convictions, Ct. found that it could not say if maximum sentence would have been imposed by trial judge if HO enhancement had also been imposed. Therefore, case was remanded for reinstitution of HO enhancement & resentencing.

RELATED CASES: Cain, App., 599 N.E.2d 625 (where at least one of prior felonies is class D., Tr. Ct. does not have to impose full 30-year enhancement, Ind. Code 35-50-2-8(e))

TITLE: Baxter v. State

INDEX NO.: E.9.a.

CITE: (3rd Dist., 12-15-97), Ind. App., 689 N.E.2d 1254

SUBJECT: Habitual offender instruction on definition of prior unrelated felony

HOLDING: Tr. Ct. committed fundamental error by failing to instruct jury on definition of prior unrelated felony. Failure to instruct jury on prior unrelated felony is fundamental error unless evidence shows proper sequence of convictions so jury could not have found that sequence was other than proper. Here, because State failed to show when second offense was committed, evidence did not show prior sequence of convictions. Thus, Tr. Ct. committed fundamental error. Held, denial of post-conviction relief reversed; Garrard, J., dissenting.

RELATED CASES: Mitchell, App., 712 N.E.2d 1050 (evidence at trial clearly established proper sequence).

TITLE: Boykin v. State
INDEX NO.: E.9.a.
CITE: (2nd Dist., 12-10-98), Ind. App., 702 N.E.2d 1105
SUBJECT: Effect of vacating habitual offender (HO) conviction
HOLDING: Once HO conviction is vacated, sentence for underlying conviction has been altered, & therefore it must also be vacated. Roe, App., 598 N.E.2d 586, *trans. denied* (criticized on other grounds by 652 N.E.2d 550, 551-552). Here, D's conviction for auto theft, which was conviction underlying his HO conviction, was altered when his HO conviction was vacated. Thus, auto theft conviction had to be vacated after post-conviction Ct. vacated HO conviction. However, remainder of D's plea agreement remained in effect, as post-conviction Ct. did not alter convictions for resisting law enforcement or robbery. Held, affirmed in part & reversed in part with instructions to vacate conviction & sentence for auto theft.

TITLE: Brown v. State

INDEX NO.: E.9.a.

CITE: (9/21/83), Ind., 453 N.E.2d 254

SUBJECT: Habitual - threat of to induce guilty plea

HOLDING: State's use of threat to proceed with habitual charges against D was a "justifiable exploitation of legitimate bargaining leverage" to induce D to accept plea agreement; thus, Tr. Ct. did not err in denying D's PCR petition alleging plea was involuntarily made. Bordenkircher v. Hayes, (1978), 434 U.S. 357, 98 S. Ct. 663, 54 L.Ed.2d 604; Norris, 394 N.E.2d 144; McMahan, 382 N.E.2d 154; Howard, 377 N.E.2d 628; Davis, App., 418 N.E.2d 256. Here, D was originally charged with 4 counts of burglary & one count each of rape & criminal deviate conduct. D rejected state's offer to recommend concurrent terms of 8 years. State then filed 2 habitual counts. D pled guilty as charged & accepted 6 concurrent terms of 15 years in exchange for dismissal of the 2 habitual counts. Only if a threatened habitual charge lacks probable cause would it void guilty plea. Holmes, 398 N.E.2d 1279; Davis. Probable cause supported 2 habituels in this case. Held, denial of PCR affirmed.

TITLE: Cox v. State

INDEX NO.: E.9.a.

CITE: (7/7/2015), 38 N.E.3d 702 (Ind. Ct. App. 2015)

SUBJECT: Amelioration not available for habitual enhancement

HOLDING: D was not entitled to more lenient habitual offender enhancement under the doctrine of amelioration. D was charged with dealing cocaine before July 1, 2014. He was found guilty as charged and pled guilty to being a habitual offender. At his sentencing hearing, held in November of 2014, the Tr. Ct. enhanced his sentence by ten years, applying the pre-July 1, 2014 habitual offender statute. On appeal, D argued that under the doctrine of amelioration, his sentence should have been enhanced under the more lenient new habitual offender statute. However, because the savings clause in Ind. Code 1-1-5.5-21 provides that the doctrine of amelioration does not apply to crimes committed before July 1, 2014, D was not entitled to having his sentenced enhanced under the new habitual offender statute. Held, judgment affirmed.

TITLE: Gibson v. State

INDEX NO.: E.9.a.

CITE: (1st Dist., 2-21-96), Ind. App., 661 N.E.2d 865

SUBJECT: Habitual offender (HO) - proceeding after dismissal order reversed on interlocutory appeal

HOLDING: Tr. Ct. is authorized to proceed with HO charge after dismissal of charge has been reversed on interlocutory appeal. Relying on Ind. Code 33-1-6-1 & Ind. Trial Rule 59, D argued that in his case, so much time had elapsed between date of his original sentence & date of enhancement that Tr. Ct. was without authority to act. Ct. noted that appeal taken by State does not stay, or affect operation of, judgment in favor of D until judgment is reversed. Ind. Code 35-38-4-4. Reversal of Tr. Ct.'s order dismissing HO charge restored State & D to position they held prior to order, that is, with viable HO allegation before them. Brown v. State, 458 N.E.2d 245 (Ind. Ct. App. 1983). When Tr. Ct. again began to address matters related to HO count, it acted well within 60 or 90 days which D claimed it must have acted. Further, HO statute does not preclude different jury from determining HO question. State v. McMillan, 274 Ind. 167, 409 N.E.2d 612 (1980). Ct. also held that evidence was sufficient to support D's status as HO, where deputy clerk of Ct. initialed but did not "sign" documentary evidence of his prior unrelated convictions. Initials of deputies provided proper attestation of copies of documents as required by T.R. 44(A)(1). Underhill v. State, 428 N.E.2d 759 (Ind. 1981). Thus, extrinsic evidence of authenticity, as condition to admissibility of documents, was not required. Ind. Evid. Rule 902(1). D was not entitled to know identity of person who certified documents, because admission of documents did not infringe upon D's right to cross-examine clerk, & documents authenticated themselves & were not inadmissible hearsay. Barnett v. State, 429 N.E.2d 625 (Ind. 1981). Tr. Ct. properly admitted this evidence as official records under T.R. 44(A)(1). Held, judgment affirmed.

TITLE: Grant v. State

INDEX NO.: E.9.a.

CITE: (2nd Dist., 07-30-07), Ind. App., 870 N.E.2d 1049

SUBJECT: Habitual offender (HO) - evidence sufficient

HOLDING: During HO phase of D's trial, State presented detailed evidence of D's fingerprinting in 1979 & the establishment & use of "gallery numbers." It presented evidence of identification of D's thumbprint in present case & in arrest reports for 1983 felony & 1984 felony, all under D's unique gallery number. That same gallery number appeared on the chronological case summary for both prior cases. With this evidence linking D to the prior felonies, a reasonable fact finder could well have concluded beyond a reasonable doubt that he was the same person convicted of the two prior unrelated felonies as required by Ind. Code 35-50-2-8(a). In so holding, Ct. distinguished United States v. Allen, 383 F.3d 644 (7th Cir. 2004). Held, judgment affirmed.

TITLE: Greer v. State

INDEX NO.: E.9.a.

CITE: (5-2-97), Ind., 680 N.E.2d 526

SUBJECT: Post-appeal transfer of habitual offender (HO) enhancement from vacated to remaining conviction

HOLDING: When D appeals from judgment imposing multiple felony convictions & obtains reversal of conviction enhanced by HO finding, State may reposition HO enhancement to remaining conviction. McCormick, 317 N.E.2d 428. HO finding does not constitute separate crime nor result in separate sentence, but rather results in sentence enhancement imposed upon conviction of subsequent felony. Pinkston, 436 N.E.2d 306. In event of simultaneous multiple felony convictions & finding of HO status, Tr. Cts. must impose resulting penalty enhancement upon only one of convictions & must specify conviction to be so enhanced. Plummer, 485 N.E.2d 1367. However, in case of HO proceeding following multiple convictions, jury finding of HO status is not linked to any particular conviction. Ind. Code 35-50-2-8. Process for charging & determining HO status following trial resulting in multiple felony convictions is independent of each particular felony conviction & applies equally to all such convictions. Holding in Coble, 523 N.E.2d 228, does not prohibit Tr. Ct. on remand from revising sentence for surviving felony conviction to reflect HO enhancement. Held, sentence & judgment of Tr. Ct. affirmed.

RELATED CASES: Tipton, App., 765 N.E.2d 187 (Tr. Ct. properly repositioned habitual enhancement from vacated felony count to another felony; Greer does not expressly prohibit such repositioning); Hendrix, 759 N.E.2d 1045 (Tr. Ct. erred in its conclusion that HO enhancement had to be attached to most severe felony of which D was convicted).

TITLE: Grundy v. State

INDEX NO.: E.9.a.

CITE: (6/30/2015), 38 N.E.3d 675 (Ind. Ct. App. 2015)

SUBJECT: Habitual offender revisions do not apply retroactively

HOLDING: The July 1, 2014, revisions to the habitual offender statute, Ind. Code § 35-50-2-8, do not apply retroactively to offenses committed prior to the effective date of new criminal code. If D had been sentenced according to the revised statute, he would have received a sentence totaling four years less than he received. He argued a person cannot have the status of being a habitual offender unless and until he has been convicted of the underlying felony, which occurred after the effective date of the criminal code revisions. Although habitual offender status is not a separate crime, nevertheless that status is inextricably attached to the date of the underlying crime. See Baurer v. State, 875 N.E.2d 744 (Ind. Ct. App. 2007). Thus, Tr. Ct. properly enhanced D's sentence pursuant to the habitual offender statute in effect prior to July 1, 2014. Held, judgment affirmed.

TITLE: Hendrix v. State

INDEX NO.: E.9.a.

CITE: (12-20-01), Ind., 759 N.E.2d 1045

SUBJECT: Prosecutor's discretion to charge habitual offender or habitual substance offender

HOLDING: When D commits three felony substance abuse convictions & meets requirements of both habitual offender (HO) statute & habitual substance offender (HSO) statute, prosecutor has discretion to seek the harsher HO enhancement rather than HSO enhancement. Ct. rejected argument that legislature intended all substance abuse offenders to be charged & punished more leniently, under HSO statute. Where two criminal statutes overlap such that both are appropriate under circumstances, prosecutor has discretion to charge under either statute. Skinner v. State, 736 N.E.2d 1222. This principle applies in habitual offender context as well.

However, in this case, Tr. Ct. erred in its conclusion that HO enhancement had to be attached to most severe felony of which D was convicted. Where HO proceeding follows multiple felony convictions, jury finding of HO status is not linked to any particular conviction. Greer v. State, 680 N.E.2d 526. Tr. Ct. therefore has discretion to choose which sentence to enhance. Winn v. State, 748 N.E.2d 352. Held, judgment affirmed in part & remanded for re-sentencing & for Tr. Ct. to enhance either Class B felony or Class A felony conviction.

TITLE: Hernandez v. State
INDEX NO.: E.9.a.
CITE: (9/24/82), Ind., 439 N.E.2d 625
SUBJECT: Habitual - enhancement not separate sentence; specificity of finding
HOLDING: If convicted of a crime & found to be a habitual offender, D is not sentenced separately for being a habitual criminal. Rather, 30 years are added to instant crime. Were this not so, habitual would be unconstitutional (violation of double jeopardy, cruel & unusual punishment). Here, Tr. Ct. sentenced D to 2 years for forgery, 30 years for habitual. *Sua sponte*, Ind. S. Ct. remands to Tr. Ct. with instructions to correct judgment & issue corrected commitment to DOC.

RELATED CASES: Baker, 562 N.E.2d 726 (Tr. Ct. erred in failing to specify which of three separate primary felonies was enhanced by thirty years & this was error); Webster, App., 628 N.E.2d 1212 (It was error to enhance all three instant convictions with HO, as it should have attached to only one underlying offense, but because sentences were ordered to be served concurrently, no remand was necessary); Collier, 498 N.E.2d 1219 (if D is convicted of multiple felonies & Ct. or jury then determines D to be habitual offender, Tr. Ct. must specify which underlying felony is being enhanced by habitual offender finding, citing Edwards, 479 N.E.2d 541).

TITLE: Hollowell v. State

INDEX NO.: E.9.a.

CITE: (8-20-01), Ind., 753 N.E.2d 612

SUBJECT: Use of prior conviction's case chronology in habitual offender stage proper despite stipulation

HOLDING: D was not unfairly prejudiced during habitual offender stage when Tr. Ct. admitted chronological case summary from prior conviction. Prior to habitual phase, D stipulated to two predicate felonies charged by State in habitual offender count, i.e., theft & battery. Notwithstanding stipulation, State submitted evidence regarding D's prior convictions, including information that D had been charged initially with attempted murder. Ct. rejected D's argument that case chronology was unnecessary because he stipulated to prior convictions & chronology was unduly prejudicial. So long as done consistent with applicable rules of evidence, evidence of two predicate felonies in face of stipulation is admissible during habitual offender stage of trial. Facts regarding predicate convictions are relevant to jury's decision whether or not to find D to be habitual offender. Seay v. State, 698 N.E.2d 732 (Ind. 1998). Further, Ct. found no prejudice from inclusion of case chronology, because D & State both clearly & repeatedly indicated to jury that D's prior conviction was for battery, not attempted murder. Thus, there was no likelihood that jury thought that one of predicate offenses was attempted murder. Held, judgment affirmed; Rucker & Dickson, JJ., dissenting on this issue, noted that any consideration of mercy in this case was very likely eliminated by erroneous & prejudicial information contained in case chronology.

TITLE: Johnson v. State
INDEX NO.: E.9.a.
CITE: (06/17/92), Ind., 593 N.E.2d 1181
SUBJECT: Habitual Offender (HO) enhancement - definition of "all of the felonies" in savings clause
HOLDING: Where enhanced underlying felony was committed after 9/1/85, savings clause in enacting legislation for D felony HO statute, Ind. Code 35-50-2-7.1, does not apply, & D could not be sentenced under regular Ind. Code 35-50-2-8 HO statute; granting transfer & reversing decision in Johnson, (1992), App., 585 N.E.2d 1352. D's prior D felonies were committed before 9/85, but underlying D felony was committed in 4/90. Both enhanced felony & prior felonies must have been committed prior to 9/1/85, for D to be sentenced under regular HO enhancement. Ct. found this conclusion supported both by Jones, (1991), App., 569 N.E.2d 975, & Moredock, (1987), Ind., 514 N.E.2d 1247 (where Ct. concluded "all" as used in Ind. Code 35-50-2-8(h) included both underlying & enhanced felonies). Because D's enhanced felony was committed in 1990, savings clause does not apply, & he should have been sentenced under D felony HO statute, not Ind. Code 35-50-2-8.

TITLE: Johnson v. State
INDEX NO.: E.9.a.
CITE: (12/21/2017), 87 N.E.3d 471 (Ind. 2018)
SUBJECT: Habitual offender - all lower-level must meet 10-year requirement
HOLDING: The 2015 version of Habitual Offender Statute (Ind. Code § 35-50-2-8(d)) provided that a person convicted of a felony offense is a habitual offender if the State proves beyond a reasonable doubt that the person has been convicted of three (3) prior unrelated felonies, and if the person is alleged to have committed a prior unrelated level 5/6 or class C/D felony, not more than ten (10) years must have elapsed between the time the person was released from imprisonment, probation, or parole (whichever is latest) and the time the person committed the current offense. Supreme Court held that the unambiguous plain language of the 2015 statute, which has since been amended, requires each prior unrelated lower-level felony used for habitual purposes to meet the 10-year requirement. Thus, the statute required an offender to have been released from all lower-level felonies within 10 years to establish the habitual offender enhancement.

The 2017 amended statute *clarified* the statute to the contrary, and now requires the 10-year timeframe "for at least one (1) of the three prior unrelated felonies" required to support a habitual offender enhancement. Held, transfer granted, Court of Appeals' opinion at 75 N.E.3d 549 vacated, judgment overruling D's objection to habitual counts reversed and remanded for examination in light of this opinion.

TITLE: Lampitok v. State

INDEX NO.: E.9.a.

CITE: (5th Dist., 11-16-04), Ind. App., 817 N.E.2d 630

SUBJECT: Directed verdict on habitual offender (HO) charge affirmed - drug-related conviction in another jurisdiction

HOLDING: Tr. Ct. did not err in granting D's motion for a directed verdict on HO charge, because D's 1995 conviction in Illinois for delivery of a controlled substance & criminal drug conspiracy does not count as a "prior unrelated felony conviction" under Ind. Code 35-50-2-8(d)(3)(A). Statute provides that a conviction does not count as a prior unrelated felony conviction if it is a drug related offense under Ind. Code 35-48-4. Ct. agreed with D that the Illinois delivery & drug conspiracy conviction is clearly a drug related offense that falls within the scope of Ind. Code 35-48-4, thus subsection (d)(3)(A) applies. D's Illinois conviction, if committed in Indiana, would have fallen under Ind. Code 35-38-4, & Legislature did not intend to treat Indiana drug offenders differently from out-of-state offenders. Because the other two subsections of Ind. Code 35-50-2-8(d)(3) apply (i.e., offense is not listed in Ind. Code 35-50-2-2(b)(4) & total number of unrelated convictions for dealing in controlled substances does not exceed one), D's 1995 conviction does not count as a prior unrelated felony conviction. Held, motion for directed verdict affirmed.

TITLE: Mayo v. State

INDEX NO.: E.9.a.

CITE: (6-12-97), Ind., 681 N.E.2d 689

SUBJECT: Habitual offender (HO) - prior unrelated convictions

HOLDING: To prove HO status, State need only prove that D was twice convicted & sentenced for two prior unrelated felonies, where commission of second was after sentencing for first offense, & where current underlying offense was committed after sentencing for second offense. Webster, 628 N.E.2d 121. Here, D argued that two convictions were intertwined, & therefore not unrelated felonies, because his second conviction was for escape made while serving sentence for first prior felony, & because sentence for second felony was ordered to run retroactively from date of first felony. In rejecting D's construction of Ind. Code 35-50-2-8, Ct. noted that all statute requires is that second felony be committed after sentencing for first felony conviction. D in this case was convicted, sentenced, & was serving his time for first felony conviction when he committed second offense, & thus it meets requirement of two prior unrelated felonies. Held, judgment affirmed; Shepard, C.J., concurring.

TITLE: Merritt v. State

INDEX NO.: E.9.a.

CITE: (2nd Dist., 4-19-96), Ind. App., 663 N.E.2d 1215

SUBJECT: Habitual offender (HO) - statement supporting enhancement not required

HOLDING: Determination of appropriate HO enhancement within range set forth in Ind. Code 35-50-2-8 is left to Tr. Ct.'s discretion. HO statutes do not impose requirement that pronouncement of HO enhancement must be accompanied by statement setting forth aggravating & mitigating circumstances, regardless of whether Tr. Ct. imposes maximum allowable enhancement. Held, no error in imposing maximum HO enhancement.

TITLE: Peoples v. State

INDEX NO.: E.9.a.

CITE: (06-29-10), 929 N.E.2d 750 (Ind. 2010)

SUBJECT: Habitual offender - eligible with more than one drug conviction

HOLDING: A D's instant dealing offense is to be counted in calculating the total number of unrelated felony convictions an individual has for drug dealing. In 2001, the Legislature amended the habitual offender statute to add that: "the state may not seek to have a person sentenced as a habitual offender for a felony offense under this section if . . . the total number of unrelated convictions that the person has for dealing . . . does not exceed one." Ind. Code 35-50-2-8(b). The Legislature also added: "a conviction does not count for purposes of this section as a prior unrelated felony conviction if . . . the total number of unrelated convictions that the person has for dealing . . . does not exceed one." Ind. Code 35-30-2-8(d).

Here, D was charged with dealing cocaine and possession of cocaine, and alleged to be an habitual offender based on two prior felony convictions- one for forgery and the other for dealing cocaine. D argued that in order to be a habitual offender he had to have more than one prior unrelated dealing conviction; whereas, the State argued D only had to have more than one dealing conviction, which includes the instant charge, if convicted. Although subsection (d) uses the word "prior" unrelated felony conviction, subsection (b) does not. The two subsections work in concert to assure that all offenders who have accumulated three felony convictions, at least one of which is a felony drug conviction, are treated alike-regardless of the order in which the convictions were accumulated. Thus, the State is not prohibited from filing habitual offender charges with respect to a D who, if convicted on the underlying charges, will have accumulated two unrelated felony drug convictions by the time the habitual offender proceedings commence. While a single felony drug conviction is not enough to qualify a person for habitual offender status, a second such conviction is. Held, judgment affirmed and Court of Appeals' opinion at 912 N.E.2d 398 vacated.

RELATED CASES: Harris, 981 N.E.2d 610 (Ind. Ct. App. 2013) (insufficient evidence D was habitual offender because D's 1997 Illinois conviction for Manufacture/Delivery of Controlled Substance could not be counted as a predicate conviction because Illinois abstract of judgment is "silent as to which drug [D] manufactured"); Seeley, 936 N.E.2d 863 (Ind. Ct. App. 2010) (D's four prior felony convictions were insufficient as a matter of law to support HO finding because total number of D's unrelated convictions for dealing crimes specified in Ind. Code 35-50-2-8(b)(3)(C) does not exceed one).

TITLE: Robey v. State

INDEX NO.: E.9.a.

CITE: (4/25/2014), 7 N.E.3d 371 (2014)

SUBJECT: Habitual offender - lack of factual basis cannot be raised on appeal

HOLDING: Even when it is clear on the face of the record that the D did not have the prerequisite prior felonies to support the habitual offender enhancement to which he pled guilty, the D cannot raise the issue on appeal. One of the things a D gives up by pleading guilty is the right to a direct appeal. Thus, a D cannot challenge on appeal a plea to a habitual offender enhancement, even for the lack of a factual basis. Tumulty v. State, 666 N.E.2d 384 (Ind. 1996). Here, after being found guilty of child molesting in a jury trial, D pled guilty to being a HO. Although it is clear from the record that one of the alleged prior unrelated felonies is a drug crime which is excluded from the definition of "prior unrelated felony," the court cannot vacate the HO enhancement on appeal. D must file a petition for post-conviction relief. Held, judgment affirmed.

TITLE: Rowold v. State

INDEX NO.: E.9.a.

CITE: (1st Dist., 03-08-94), Ind. App., 629 N.E.2d 1285

SUBJECT: Procedure for correction of Habitual Offender (HO) sentence & amelioration

HOLDING: Where D was improperly sentenced under Ind. Code 35-50-2-8, rather than D felony HO (Ind. Code 35-50-2-7.1), proper procedure is to remand to Tr. Ct. to correct & modify existing sentence, rather than for resentencing. D was sentenced to 3 years for criminal recklessness, & sentence was enhanced by 10 years because of 2 prior federal convictions. Ct. determined that federal offenses should be treated as D felonies & therefore D's sentence was erroneously enhanced under big HO.

In determining procedure to deal with error, Ct. noted that erroneously imposed sentence is not void; rather Tr. Ct. must correct it, Gipson, 495 N.E.2d 722. Length of time between original sentence & correction doesn't affect power to correct. On July 1, 1993, D felony HO was eliminated & Ct. discussed application of Doctrine of Amelioration to HO situations with apparent approval, but found it would not apply to D because Tr. Ct. was merely correcting or modifying existing sentence, rather than resentencing D. D felony HO was in effect both when crime was committed & D was sentenced, & legislature did not specify amendment would have retroactive application.

Ds who are sentenced prior to effective date of ameliorative statutes cannot take advantage of ameliorative provisions absent specific legislative intent, Terrell, App., 390 N.E.2d 208. Ct. noted, however, that if D's crime were committed prior to enactment of ameliorative legislation, but he was sentenced after enactment, he would be eligible for application of legislation, Id.

RELATED CASES: Weatherford, App., 654 N.E.2d 899 (no error in sentencing D to life in prison under old HO statute, although conviction & sentencing occurred after enactment of ameliorative HO statute; see separate card, this section).

TITLE: Sears v. State

INDEX NO.: E.9.a.

CITE: (12/20/83), Ind., 457 N.E.2d 192

SUBJECT: Habitual - eligibility for misdemeanor sentencing

HOLDING: Tr. Ct. did not err in failing to determine status of offense of perjury (Class D felony or Class A misdemeanor) prior to habitual proceeding. Here, D *cites* Collins, 415 N.E.2d 46 in which Ind. S. Ct. wrote it is "better practice" for Tr. Ct. to determine whether it will enter judgment for Class A misdemeanor rather than Class D felony before habitual proceeding. Ct. finds there is no error for failure to follow "better practice." Funk, 427 N.E.2d 1081. Held, no error.

TITLE: Seay v. State

INDEX NO.: E.9.a.

CITE: (7-8-98), Ind., 698 N.E.2d 732

SUBJECT: Habitual offender - role of jury; nullification

HOLDING: Tr. Ct. committed error, but not fundamental error, when it instructed jury during habitual offender phase that jury was judge of only facts, & that it was restricted to determining facts only & not law. In all criminal cases whatever, jury shall have right to determine law & facts. Ind. Const. Art. I, § 19. Article I, § 19 does not apply in penalty determinations. However, determining habitual offender penalty is clearly different from determining habitual offender status. Here, Ct. held that in habitual offender proceeding, jury has right to determine law & facts. Jury is permitted to render verdict that D is not habitual offender even if it finds that State has proven beyond reasonable doubt that D has accumulated two prior unrelated felonies. In so holding, Ct. *overruled Jones*, 449 N.E.2d 1060, to extent that it can be interpreted to mean that art. I, § 19 does not apply to status determination in habitual offender proceedings, & adopted principles enunciated by Justice Dickson in *Mers*, 496 N.E.2d 75, *Hensley*, 497 N.E.2d 1053 (Dickson, J., dissenting), & *Duff*, 508 N.E.2d 17. Held, transfer granted, Ct. App.' opinion at 673 N.E.2d 475 adopted, conviction affirmed.

RELATED CASES: *Harris*, 187 N.E.3d 287 (Ind. Ct. App. 2022) (no error in prohibiting defendant from testifying about circumstances of prior crimes in habitual offender phase; see full review at E.9.e.77); *Walden*, 895 N.E.2d 1182 (Tr. Ct. does not have to instruct jury regarding jury nullification beyond telling jury that (1) they "may" find D a habitual offender if State proved case beyond a reasonable doubt and (2) that "under the Constitution of Indiana you have the right to determine both the law and the facts. The Court's instructions are your best source in determining the law."; majority also noted that article I, section 19 of Indiana Constitution was unnecessary to *Seay* decision); *Womack*, App., 738 N.E.2d 320 (same jury nullification law applies to enhancement phase of marijuana as class D felony; verdict form which only gave jury two options: D is guilty of possession as class A misdemeanor if find D does not have prior conviction or D is guilty of class D felony if find he has prior conviction, violated Art. I, §19); *Hancock*, App., 737 N.E.2d 791 (Tr. Ct. did not err when it refused to read D's tendered jury instruction during habitual phase of trial which would have informed jury of its power to nullify under Art. I, § 19 of Ind. Const.; see full review at D.9.g.2.o); *Johnson*, App., 717 N.E.2d 887 (where jury was instructed at end of guilt phase one day prior to HO phase that they were triers of law and facts & counsel argued this during closing of HO phase, fact that judge incorrectly instructed jury was not reversible error); *Parker*, 698 N.E.2d 737 (reversible error when D objected to instruction which violated Ind. Const., Art. I, §19).

TITLE: Stanek v. State

INDEX NO.: E.9.a.

CITE: (11-17-92), Ind., 603 N.E.2d 152

SUBJECT: No Habitual Offender (HO) enhancement of operating after suspended for life as Habitual Traffic Violator (life HTV)

HOLDING: Ind. S. Ct. granted transfer & reversed Stanek App., 587 N.E.2d 736, & held that enhancement of offense of life HTV under Ind. Code 9-12-3-2 (now at Ind. Code 9-30-10) by HO finding was precluded, because life HTV was itself HO statute. D was convicted of life HTV, class C felony, & was found to be HO. He received 4-year sentence on life HTV, enhanced by 20 years for HO status.

Ct. noted that Ind. Code 9-12-3 (now Ind. Code 9-30-10) was entitled "Habitual Violators of Traffic Laws," & that structure of statute first provides for suspension for up to 10 years for being HTV, then makes it class D felony to drive while suspended for that reason, & calls for forfeiture of privileges for life. Statute then makes operating while life HTV, class C felony. Ct. found legislature's intent was to make Article 12 (now 10), HO statute, because it provides increasingly serious penalties for violations of HTV laws, ranging from administrative suspension to class C felony conviction. Ct. acknowledged that Ind. Code 35-50-2-8 allows State to seek HO enhancement for "any felony," but held that conviction under Article 12 (now 10) could not be subject to further enhancement under HO statute, because Article 12 is discreet, separate, independent HO statute. Held, transfer granted, conviction affirmed, but HO determination reversed & remanded for resentencing, Givan, J., DISSENTING. **Note:** Principles of this decision might apply with equal force to any other arguably "habitual offender," i.e., progressive punishment statutes.

RELATED CASES: Tuell, 118 N.E.3d 33 (Ind. Ct. App. 2019) (plain language of I.C. 35-50-2-8(e) explicitly authorizes level 5 felony to operating a motor vehicle after lifetime license forfeiture to be enhanced again under habitual offender statute; see full review at K.9.c.3); Parrett, App., 800 N.E.2d 620 (though part of a plea agreement, Tr. Ct. imposed an illegal sentence on D when it enhanced his sentence for operating vehicle after driving privileges are forfeited for life under HO statute); Wood, App., 734 N.E.2d 296 (D may not be subjected to enhanced sentence under general habitual offender statute as result of his conviction for operating vehicle after lifetime suspension; Haymaker, 667 N.E.2d 1113 (HTV conviction can be used as predictive offense to support HO enhancement); Freeman, Ind., 658 N.E.2d 68 (State may not enhance OWI conviction under both class D felony OWI statute & also under HSO statute).

TITLE: Weatherford v. State

INDEX NO.: E.9.a.

CITE: (2nd Dist., 8-25-95), Ind. App., 654 N.E.2d 899

SUBJECT: Doctrine of amelioration not applied to HO provisions

HOLDING: Where in enacting new HO statute, legislature did not expressly state that former punishment was too severe, Tr. Ct. did not err in sentencing D to life imprisonment under old HO statute. Offense was committed in 07-75, but conviction & subsequent sentencing occurred after enactment of new HO statute which provided for lesser sentence. D argued that Tr. Ct.'s sentence under old statute constituted vindictive justice under Ind. Constitution, Art. I, 18, notwithstanding legislative intent through savings clause for new HO statute to apply prospectively. Ct. applied general rule that law in effect when crime was committed controls sentencing. Rowald v. State, (1994), Ind. App., 629 N.E.2d 1285. Doctrine of amelioration does not apply where, as here, legislature in specific savings clause expressly states intention that crimes committed before effective date of ameliorative amendment should be prosecuted under prior law. Vicory v. State, (1980), 400 N.E.2d 1380. Held, denial of motion to correct erroneous sentence affirmed.

TITLE: Weiss v. State

INDEX NO.: E.9.a.

CITE: (3rd Dist., 04-03-09), 903 N.E.2d 557 (Ind. Ct. App. 2009)

SUBJECT: Habitual offender (HO) - possession with intent to deliver is dealing offense

HOLDING: Ind. Code 35-50-2-8(d) provides that a conviction for dealing or possession of an illegal drug does not count for habitual offender purposes if that crime was not classified as a "crime of violence" under Ind. Code 35-50-2-2(b)(4) and D has only one or no convictions for illegal drug dealing. Here, D had a 1992 conviction for possession of methamphetamine with intent to sell and 1988 conviction for possession of meth, which D argued are not "dealing" convictions within meaning of Ind. Code 35-50-2-8(d)(3)(c). Court held that although subsection (d)(3)(c) ostensibly refers to "dealing" offenses, it also lists specific statutes that make no distinction in terms of criminal liability between actual dealing and possession with intent to deliver. Therefore, subsection (d)(3)(c) is not limited to a list of certain drug-related offenses involving actual dealing only, but includes offenses enumerated in each of the statutory provisions listed within the subsection, specifically Ind. Code 16-42-19-27, and 35-48-1 through 4. Thus, D's 1992 and 1988 convictions were properly counted as prior unrelated felony convictions to support his habitual offender admission. Held, denial of post-conviction relief affirmed.

TITLE: Woods v. State

INDEX NO.: E.9.a.

CITE: (3rd Dist., 8-21-95), Ind. App., 654 N.E.2d 1153

SUBJECT: HO - evidence insufficient

HOLDING: Evidence presented during HO phase of D's bench trial was insufficient to support enhancement of convictions for dealing in cocaine. State's exhibit regarding 1970 burglary did not contain sufficient supporting evidence to identify D as being same D as named in documents. In present case, D's race was listed as "b." (black), & his date of birth as June 28, 1940. However, description of D in exhibit regarding 1970 crime provides "m/c/27" (male/Caucasian/27 years of age). D, an African-American male, would have been 30 years old in 1970, not 27. Held, affirmed in part, reversed in part.

E. SENTENCING
E.9. Habitual offender (Ind. Code 35-50-2-8)
E.9.b. Pleadings

TITLE: Anderson v. State
INDEX NO.: E.9.b.
CITE: (8-31-82), Ind., 438 N.E.2d 558
SUBJECT: Habitual offender pleadings - failure to advise D of charge
HOLDING: Tr. Ct. erred in denying D's motion to dismiss habitual offender charge, because State's request for sentencing as habitual offender was not sworn to, & pleading merely charged that D had accumulated two or more prior unrelated felony convictions & did not advise D of what he was charged with & did not enable him to prepare his defense. When first habitual offender pleading fails to charge offense with sufficient factual allegations, State cannot, after arraignment, amend pleading for purposes of curing that failure. Held, judgment affirmed as modified; DeBruler, J., concurring in opinion but would remand for new trial on habitual offender count.

TITLE: Boarman v. State

INDEX NO.: E.9.b.

CITE: (6/23/87), Ind., 509 N.E.2d 177

SUBJECT: Habitual - pleadings; surplusage

HOLDING: Ct. rejects D's contention that charging more than 2 prior unrelated felony convictions is permissible only if special verdict form is used indicating which 2 felonies jury relied on. Here, D relies on Hudson, 443 N.E.2d 384 & Miller, 417 N.E.2d 339. In Miller, D was charged with 4 prior unrelated felonies. On appeal, Ct. found 2 of the 4 were not prior unrelated felonies. Ct. questioned prosecutorial wisdom of charging surplus felonies without utilizing special verdict form, arguing that if one prior felony was set aside, general verdict would not specify which 2 felonies jury relied upon in making habitual offender determination. In Hudson, Ct. noted any error with respect to proof of alleged prior convictions necessitated retrial of entire habitual offender charge. It is not impermissible to use general verdict if surplus prior convictions are alleged, it is merely unwise to do so. Held, no error. Dickson CONCURS IN RESULT without opinion.

TITLE: Donahoo v. State

INDEX NO.: E.9.b.

CITE: (10-4-94), Ind., 640 N.E.2d 1031

SUBJECT: Habitual Offender (HO) inclusion of surplusage

HOLDING: Tr. Ct. did not err in admitting entire record of prior conviction to support D's status as HO. Ct. first noted that exhibits could not have prejudiced trial on instant charge, because evidence was introduced during bifurcated habitual phase of trial. To sustain its burden of proving two prior unrelated convictions for HO status, State introduced evidence of prior burglary conviction & prior rape conviction. The rape exhibit further showed that as part of charging instrument in that cause, appellant also was charged with both oral & anal intercourse with victim. Ct. rejected D's argument that admission of documents were prejudicial to him, concluding that inclusion of extra two counts was merely surplusage & that, as held in McManus v. State, Ind., 433 N.E.2d 755, proof of crime charged is admissible even if that evidence also tends to prove accused committed uncharged crime.

TITLE: Duff v. State
INDEX NO.: E.9.b.
CITE: (5/28/87), Ind., 508 N.E.2d 17
SUBJECT: Habitual - surplusage
HOLDING: 2-2 opinion affirming D's conviction. AR 15(F). Givan, joined by Pivarnik, contends allegation of third conviction was mere surplusage (St. Mociers, 459 N.E.2d 26; Hall, 405 N.E.2d 530), even though third offense was not a prior unrelated felony conviction. Although Tr. Ct. had at first *overruled* D's objection to third felony, at end of State's evidence, Tr. Ct. granted D's motion to strike & remove third felony from State's charge. Dickson, in separate opinion, contends additional prior felonies which do not qualify under statute cannot be considered "mere surplusage." DeBruler DISSENTS & would reverse on other grounds. Shepard not participating.

TITLE: Haymaker v. State

INDEX NO.: E.9.b.

CITE: (9/22/88), Ind., 528 N.E.2d 83

SUBJECT: Habitual offender (HO) -- pleadings

HOLDING: State properly allowed to amend HO information to reflect modification of prior burglary conviction, absent showing of prejudice. Cause number of prior conviction remained unchanged, so D could not allege that amendment to theft conviction was surprise for which he could not have prepared or that identity of convictions used for HO purposes were unknown to him. Held, judgment affirmed.

RELATED CASES: Dixon, 524 N.E.2d 2 (HO count does not allege separate crime or change theory of case & is therefore permissible amendment to information after arraignment & plea on principal offense so long as D has adequate time to prepare defense); Denton, 496 N.E.2d 576 (Tr. Ct. granted State's oral motion to file amended HO count; amended affidavit filed under same cause number as original proceeding; amended count alleged four prior unrelated felony convictions, one of which was not alleged in original count; amended affidavit in no way changed either theory of charge as originally stated or identity of offense charged; D not prejudiced by amendment).

TITLE: Hudson v. State

INDEX NO.: E.9.b.

CITE: (1/20/83), Ind., 443 N.E.2d 834

SUBJECT: Habitual - amendment

HOLDING: State may amend information to correct erroneous date of sentencing of underlying felony during habitual proceeding. Here, information alleged D was convicted 11/29/73 & sentenced 12/17/73. Commitment order was dated 12/17/72 in 1973 term of Ct. Another exhibit showed DOC received D on 1/8/74. D contends Tr. Ct. erred (1) in admitting exhibit bearing dates that conflicted with dates on charging information (because actual date could have been any date, even one 10 years or more before date current felony committed, thus making D eligible for reduced sentence under Ind. Code 35-50-2-8(3)) & (2) in permitting state to amend date of prior sentencing alleged on information (amendment was one of substance rather than form & altered defenses available to him). Ct. finds no merit to first argument & finds amendment was insignificant & did not prejudice D. Held, no error.

RELATED CASES: Smith, 490 N.E.2d 300 (Crim L 1203.28; D did not request or show need for time to respond to amendment of habitual offender charge during trial (amendment substituted prior unrelated felony for one he admitted during his testimony in guilt phase), therefore, he failed to show prejudiced from amendment; Shepard DISSENTS, finding amendment "inherently prejudicial"); Wright, 467 N.E.2d 22 (cause numbers remained unchanged - amendments dealt with name of crime & date of guilty plea; held, no error).

TITLE: Sears v. State

INDEX NO.: E.9.b.

CITE: (11/29/83), Ind., 456 N.E.2d 390

SUBJECT: Habitual - pleadings; arraignment

HOLDING: After reversing conviction on other grounds (improper venue), Ind. S. Ct. states prosecutor erred by failing to include habitual offender charge on separate sheet in amended information & by failing to arraign D on that charge. Habitual offender allegations must be charged in same manner as criminal offense. Anderson, 439 N.E.2d 558; Griffin, 439 N.E.2d 160; Lawrence, 286 N.E.2d 830. Here, prosecutor filed "Affidavit of Prior Felony Convictions." D was never arraigned on affidavit. Habitual neither appeared as 4th count of amended information (filed several months later) nor was attached as a separate page. D is entitled to more. Griffin at 165. Held, conviction reversed on other grounds.

RELATED CASES: Edwards, 479 N.E.2d 541 (Crim L 1163(1), 1166(3); absent prejudice, failure to arraign on habitual is not reversible error; D had notice & failed to show harm; held, habitual affirmed); Wright, 467 N.E.2d 22 (Ct. distinguishes Griffin - there D objected to failure to arraign by filing motion to dismiss & by renewing objection throughout proceedings, here, D did not object to failure to arraign & thus waived any error; held, conviction affirmed).

TITLE: Stanley v. State

INDEX NO.: E.9.b.

CITE: (12/15/88), Ind., 531 N.E.2d 484

SUBJECT: Habitual - amendment during trial

HOLDING: Addition of habitual count during trial was not error. D alleges he was not given due process notice that he was charged as habitual offender. D was charged with burglary, & during trial, information containing habitual offender count was filed. D did not object. General rule is that information may be amended at any time before, during, or after trial as long as amendment does not prejudice substantial rights of accused. Hegg, 514 N.E.2d 1061; Cheney, 486 N.E.2d 508. Held, filing of habitual count during trial did not deny D due process. Dickson, J., DISSENTS.

TITLE: State v. Hicks

INDEX NO.: E.9.b.

CITE: (9/30/83), Ind., 453 N.E.2d 1014

SUBJECT: Habitual - pleadings; time of filing

HOLDING: Tr. Ct. erred in granting D's motion to dismiss habitual count, filed after Tr. Ct. accepted D's guilty plea to burglary, where D had notice state intended to file habitual. Lewis, App., 337 N.E.2d 516. Here, Ct. rejects D's contentions that it is without jurisdiction to hear state's appeal & that state has no right to appeal. State is not foreclosed from seeking sentence enhancement simply because allegation is not made in original charging instrument; state may file habitual allegation as amendment to original charge. See Barnett, 429 N.E.2d 625 (filed on day of trial); Dorton, 419 N.E.2d 1289; Gilmore, 415 N.E.2d 70. Ct. finds because Tr. judge was unaware state would file habitual, his failure to advise D of "any possible sentence enhancement" (Ind. Code 35-4.1-1-3(d)) does not necessarily render D's guilty plea involuntary, although voluntariness is suspect. Held, remanded with instructions to vacate grant of D's motion to dismiss, to grant state's motion to amend & to fully advise D of effect of habitual on sentence for underlying felony, allowing D to withdraw plea if he so moves. DISSENT by DeBruler contends opinion violates double jeopardy (Ind.Const. Art. I, 14) by bringing D, who has partially served his sentence, back into Ct. & giving him a new & greater sentence. Ct. cannot increase sentence after D has begun to serve it (Ex parte Lange v. US (1874), 18 Wall. 163) except where D applies for review of his sentence (Ledgerwood, (1892), 134 Ind. 81) or where sentence itself is illegal (Vawter, 279 N.E.2d 805).

RELATED CASES: Perrault, 490 N.E.2d 322 (Crim L 1203.7, 1203.28; amendment of charge to add habitual (24 days before omnibus) did not change theory of case; D failed to request continuance; held, no reversible error).

E. SENTENCING
E.9. Habitual offender (Ind. Code 35-50-2-8)
E.9.c. Evidence (see, also K.13)

TITLE: Abdullah v. State

INDEX NO.: E.9.c.

CITE: (5th Dist.; 05-25-06), Ind. App., 847 N.E.2d 1031

SUBJECT: Unsigned abstract insufficient to prove statuses of serious violent felon & habitual offender

HOLDING: Where a certified, but unsigned, abstract of judgment is the only evidence before the Ct. introduced to show that an offender has a prior conviction for purposes of proving his statuses as a serious violent felon & as an habitual offender, the evidence is insufficient to prove the D was a serious violent felon, or an habitual offender. Indiana Trial Rule 58 requires that an abstract of judgment include a judicial signature in order to be considered a final record of a Tr. Ct.'s ruling. Here, in order to establish D's status as both a serious violent felon & habitual offender, State submitted certified copies of an abstract of judgment, charging documents, probable cause affidavits & arrest records to prove that D had been convicted of robbery in 1993. The abstract of judgment was the only document which suggested the D was convicted of robbery, & not just charged with robbery. Although certified, the abstract was not signed by the judge. Thus, there was insufficient evidence to support D's conviction of unlawful possession of a firearm as a serious violent felon & his habitual offender enhancement. Held, conviction reversed.

RELATED CASES: Dexter, 991 N.E.2d 171 (Ind. Ct. App. 2013) (certified transcript from D's guilty-plea and sentencing hearing in lieu of a signed judgment of conviction was sufficient to prove one of his underlying felony convictions); Dexter, 959 N.E. 2d 235 (Ind. 2012) (An unsigned judgment is insufficient to prove beyond a reasonable doubt the fact of a prior conviction for HO purposes; Nor did the "Rules of Probation", PSI from a subsequent offense or probation officer's testimony constitute proof beyond a reasonable doubt of the prior conviction); Woods, 939 N.E.2d 676 (Ind. Ct. App. 2010) (although unsigned judgment was insufficient to prove D's prior unrelated felony of escape, evidence of D's guilty plea to a second prior unrelated felony and to HO status based, in part, on the felony of escape was sufficient to prove the escape conviction was a prior unrelated felony; D admitted that the escape was a prior unrelated felony).

TITLE: Andrews v. State
INDEX NO.: E.9.c.
CITE: (1/18/89), Ind., 532 N.E.2d 1159
SUBJECT: Habitual - certified records; mutilation, interlineation, erasure
HOLDING: Admission of certified copies of records of conviction during habitual phase where name & number of another person had been whited out, & D's name typed over it, was proper, on basis of State's representation that exhibits were in this form when received from Illinois Ct. which issued judgments in question. Rule excluding papers because of unexplained alteration does not apply to official documents not in custody of party to be hurt or benefited by them. 32 C.J.S. 646. No Illinois official appeared at trial. Affirmed.

TITLE: Brackens v. State
INDEX NO.: E.9.c.
CITE: (7/1/85), Ind., 480 N.E.2d 536
SUBJECT: Habitual - Ashton v. Anderson crimes admissible at guilt phase to impeach
HOLDING: Lawrence, 286 N.E.2d 830, read in light of later cases, does not preclude prosecutor from using prior felonies to impeach D (also charged with habitual) who testifies in his own defense & thereby puts his/her credibility in issue at guilt phase. Here, prosecutor used theft & armed robbery convictions to impeach D. Such crimes are admissible under Ashton v. Anderson, 279 N.E.2d 210 & its progeny. Held, no error.

TITLE: Brown v. State

INDEX NO.: E.9.c.

CITE: (2/27/87), Ind., 504 N.E.2d 557

SUBJECT: Habitual - evidence; details of prior convictions

HOLDING: Tr. Ct. did not err in admitting state's Exhibit A during habitual offender phase. Here, D contends state should have redacted portion of exhibit showing age of rape victim to be 83 years. Relevant information connected with prior unrelated felony convictions generally is not considered to be prejudicial to D. Maisonet, 448 N.E.2d 1052. Ct. finds mere fact victim's age appeared on information did not prejudice D. Held, no error.

TITLE: Coker v. State

INDEX NO.: E.9.c.

CITE: (10/31/83), Ind., 455 N.E.2d 319

SUBJECT: Habitual - evidence; identity

HOLDING: Tr. Ct. did not err in admitting certified copy of felony conviction judgment & commitment which contained only D's name. Here, D contends document must bear picture & fingerprints to be admissible. Documents containing name of D are admissible so long as other supporting evidence identifies D as same person named in document. Estep, 394 N.E.2d 111; Smith, 181 N.E.2d 520. A picture or fingerprints are sufficient to identify D (Rhyne, 446 N.E.2d 970; Norris, 394 N.E.2d 144), but other evidence may also serve to identify D. Circumstantial evidence of identity is sufficient. Estep; Ellis, 250 N.E.2d 364. Question of D's prior convictions is for jury's determination. Estep; Jones 369 N.E.2d 418. A Ct. reporter testified she heard D admit 3 felony convictions in another trial (transcript of D's statement admitted). D admitted all 3 felony convictions. Held, no error.

RELATED CASES: Payne, 2018 Ind. App. LEXIS 78 (Ind. Ct. App. 2018) (certified record matching D's name and birth date insufficient to prove identity; see full review at K.10.d), Oster, 992 N.E.2d 871 (Ind. Ct. App. 2013) (names listed on certified documents of prior convictions were sufficiently similar to support inference that they refer to the same person; moreover, parole officer who supervised D and was familiar with his criminal history testified that D was same person named in documents); Gentry, App., 835 N.E.2d 569 (although state used a prosecutor who was not involved in earlier conviction to introduce evidence of D's past felonies, D's date of birth & social security number were established & these matched those listed for D on the charging informations for the previous convictions); Patton, 501 N.E.2d 436 (fact exhibit submitted by State failed to establish direct connection between DOC record & Ct. records goes to weight rather than admissibility; question of identity of D was factual matter to be determined by Tr. Ct.; held, evidence sufficient to sustain habitual); Reed, 491 N.E.2d 182 (evidence of D's social security number & birthday was sufficient to prove identity); Feliciano, 467 N.E.2d 748 (D's unique name, admission he had lived on street named in PSI & heart-shaped tattoo on his forehead were sufficient to support inference D was same person who committed prior felonies).

TITLE: Davis v. State

INDEX NO.: E.9.c.

CITE: (5/27/86), Ind., 493 N.E.2d 167

SUBJECT: Habitual - evidence; certified (C) records required; parole evidence insufficient

HOLDING: State is required to present C records of prior convictions alleged but is allowed considerable latitude in manner of certification sufficient to make such records admissible. See Brackens, 480 N.E.2d 536 (discussion of TR 44(A)(1); paperclipping vs. stapling documents in exhibit); Carter, 479 N.E.2d 1290 (certification & microfilm issues). Here, over D's objection, Tr. Ct. admitted chart of fingerprints, photographs, signature, & other information identifying D's previous convictions. Sole foundation supporting their admissibility was testimony of police officer that he obtained documents from state police. Documents were not C nor was their authenticity attested to by officer/deputy having legal custody of them. Without proper authentication, records are not admissible. Eldridge, 361 N.E.2d 155. In Morgan, 440 N.E.2d 1087 & Washington, 441 N.E.2d 1355, Ct. reversed habitual offender determination supported only by parole evidence of prior convictions (testimony of Ds' former attorneys/prosecutors held insufficient to establish habitual). Ct. rejects state's contention that testimony of previous police officers, parole officer & judge provided "overwhelming" proof of D's 2 prior unrelated felony convictions. Held, cause remanded for retrial on habitual.

RELATED CASES: Carter, 479 N.E.2d 1290 (OK convictions proven by certified copy of original records maintained by OK Dept. of Corrections & by C copies of microfilmed copies of information, judgment, commitment & docket sheet retained by clerk of Tr. Ct.); Earls, 489 N.E.2d 516 (Crim L 1203.17; evidence was sufficient where C records were introduced in addition to testimony of officers that D was person charged/convicted/sentenced).

TITLE: Davis v. State
INDEX NO.: E.9.c.
CITE: (5/27/86) Ind., 493 N.E.2d 167
SUBJECT: Habitual - evidence; prejudice
HOLDING: Tr. Ct. did not err in admitting evidence of 2 past convictions of person bearing D's name but born on different date. Error was discovered during trial & jury was informed that these 2 convictions did not pertain to D. Mistake was corrected in timely manner & D was not prejudiced; therefore, reversal on this issue is not required. Wagner, 474 N.E.2d 476; Murray, 442 N.E.2d 1012. Held, habitual reversed on other grounds.

RELATED CASES: Woodward, 187 N.E.3d 311 (Ind. Ct. App. 2022) (Insufficient evidence of identity for prior felony in SVF conviction; see full review at K.9.d); Spencer, App., 660 N.E.2d 359 (evidence sufficient to prove D's 2 unrelated felony convictions. Ct. records were properly admitted into evidence).

TITLE: Denton v. State

INDEX NO.: E.9.c.

CITE: (8/22/86), Ind., 496 N.E.2d 576

SUBJECT: Habitual - evidence; proof of unalleged prior convictions

HOLDING: Tr. Ct. did not err in admitting Exhibit No. 7 (indictment) during D's habitual offender trial. Here, D contends indictment alleged 3 additional counts against him not included in amended habitual offender charge. Evidence relative to proof of prior conviction alleged is admissible even if that evidence also tends to prove an unalleged prior conviction. Golden, 485 N.E.2d 51. Ct. finds likelihood of any improper inferences was minimized by admission of Exhibit No. 8, certified copy of commitment for offense in question showing that 2 of the 4 counts were dismissed. Held, no error.

RELATED CASES: Elmore, App., 688 N.E.2d 213 (no reversible error in admitting exhibits which indicated that D was charged with other felonies).

TITLE: Donnersbach v. State
INDEX NO.: E.9.c.
CITE: (2/17/83), Ind., 444 N.E.2d 1184
SUBJECT: Habitual - evidence; testimony of former counsel
HOLDING: Former attorney may testify at habitual offender phase to confirm contents of documents which are public records & to identify D as the one to whom documents pertain. Here, D contended that the same policy considerations which preclude one's former defense counsel from prosecuting him on an habitual offender charge (State ex rel. Meyers v. Tippecanoe County Ct., 432 N.E.2d 1377) apply to prohibit former defense counsel from testifying during habitual phase. Ct. rejects argument & finds former counsel's testimony revealed nothing confidential. Held, no error.

TITLE: Galmore v. State

INDEX NO.: E.9.c.

CITE: (8/24/84), Ind., 467 N.E.2d 1173

SUBJECT: Habitual - evidence; felony or misdemeanor; foreign convictions

HOLDING: Tr. Ct. did not err in overruling D's motion for directed verdict made at close of state's evidence in habitual phase. Here, D contends because state did not prove his prior IL convictions (for burglary & voluntary manslaughter) were felonies in that state, prima facie case was not established. Classification of crimes as felonies or misdemeanors in other states is irrelevant in determining habitual criminal statute in IN. Whether offense is felony is matter of law predetermined by legislature & not question of fact for jury. Smith, 432 N.E.2d 1363; Griffin, 415 N.E.2d 60; Collins, 415 N.E.2d 46. IN habitual offender statute clearly defines "prior felony conviction" as "conviction in any jurisdiction at any time, with respect to which the convicted person might have been imprisoned for more than one (1) year..." Ind. Code 35-50-2-1. Ct. finds sufficient proof. Held, no error.

RELATED CASES: Hornbostel, App., 757 N.E.2d 170 (State provided Tr. Ct. with sufficient evidence to prove that D's Florida convictions were felonies); Shelton, 490 N.E.2d 738 (Tr. Ct. did not err in instructing jury that offenses alleged in HO were felonies, *citing Griffin*, 415 N.E.2d 60; here, Tr. Ct. judicially noticed that convictions qualified as felonies); Blatz, 486 N.E.2d 990 (remanded to determine whether theft conviction is felony or misdemeanor); Jones, 485 N.E.2d 627 (Ct. reverses HO where WI burglary conviction was not shown to be felony; no evidence indicates D could have been imprisoned for more than one year; Prentice DISSENTS as to retrial of HO; Pivarnik, joined by Givan, DISSENTS, arguing D's 2-year probation supports conclusion WI conviction was felony); Harmer, 455 N.E.2d 1139 (foreign convictions are admissible in habitual offender proceedings, *citing Collins & Kelly* (1933) 204 Ind. 612).

TITLE: Gardner v. State
INDEX NO.: E.9.c.
CITE: (10-18-94, 1st Dist.), Ind. App., 641 N.E.2d 641
SUBJECT: Evidence sufficient to support habitual offender (HO) finding
HOLDING: In affirming jury's HO finding, Ct. rejected D's argument that indictment showing offense occurred on or about a date is not sufficient to establish commission date beyond reasonable doubt. Collateral attack on validity of previous conviction is not available to D on habitual criminal charge, Goliday v. State, Ind., 526 N.E.2d 1174. Ct. also rejected D's argument that he is not same individual who was convicted of offense relied on to support habitual finding, despite omission of one of D's middle initials in indictment & final judgment, & despite probation officer's testimony that D had tattoo on right shoulder when in fact D has no tattoo on shoulder.

TITLE: Goodwin v. State
INDEX NO.: E.9.c.
CITE: (9/7/82), Ind., 439 N.E.2d 595
SUBJECT: Habitual - evidence
HOLDING: Variance between allegation & evidence of prior convictions, if not material, is not error so long as D is not misled. Lewellen, 358 N.E.2d 115. Here, variances in date conviction entered & in wording of conviction not reversible error. Held, no error.

TITLE: Graham v. State

INDEX NO.: E.9.c.

CITE: (11/29/82), Ind., 441 N.E.2d 1348

SUBJECT: Habitual - evidence; certifying authenticity

HOLDING: It is not necessary that prison officials themselves testify to establish authenticity of prison documents representing prior incarcerations. Ind. Code 34-1-17-7, Ind. Code 34-1-18-7; Barnett, 429 N.E.2d 625; Gilmore, 415 N.E.2d 70; Collins, 415 N.E.2d 46. Here, D objected to admissibility of exhibits (documents concerning 3 prior convictions in KY & IN for robbery & second-degree burglary). Ct. examines procedure followed in introduction of exhibits & finds no error. Held, burglary conviction & habitual enhancement of sentence affirmed.

RELATED CASES: Powers, 499 N.E.2d 192 (Crim 44; where certification makes references to document included, but not separately certified, document is properly admitted, *citing* Thomas, 471 N.E.2d 677); Russell, 487 N.E.2d 136 (seal of DOC satisfies rule); Jones, 482 N.E.2d 243 (records certified by keeper before notary public complies with TR 44(A)(1)); Prentice, 474 N.E.2d 496 (while TR 44(A)(1) permits proof that attesting officer is legal custodian of records, rule does not require such proof, *citing* Collins); Mayes, 467 N.E.2d 1189 (TR 44 provides method of certification alternative to Ind. Code 34-1-18-7, *citing* Hernandez, 439 N.E.2d 625; certification by clerk of Ct. complies with TR 44).

TITLE: Graham v. State

INDEX NO.: E.9.c.

CITE: (11/29/82), Ind., 441 N.E.2d 1348

SUBJECT: Habitual - evidence; chain of custody

HOLDING: Chain of custody requirements do not apply to certified copies of public records.

Duncan, 409 N.E.2d 597. Here, D challenged admissibility of documents concerning prior convictions because chain of custody was not proven. Held, burglary conviction & habitual enhancement affirmed.

TITLE: Graham v. State
INDEX NO.: E.9.c.
CITE: (11/29/82), Ind., 441 N.E.2d 1348
SUBJECT: Habitual - evidence; police identification card
HOLDING: A police identification card may be admitted through officer's testimony where officer was present when all information (photograph, fingerprints) on card was obtained & officer was subject to CX as to its authenticity. Anderson, 426 N.E.2d 674. Held, sentence (burglary, 5 years, enhanced by 30 years for habitual offender status) affirmed.

TITLE: Harper v. State

INDEX NO.: E.9.c.

CITE: (2/22/85), Ind., 474 N.E.2d 508

SUBJECT: Habitual - evidence; proof of pardon/overtaken conviction

HOLDING: Habitual offender finding was not contrary to law where D failed to prove he had been pardoned or that prior convictions had been set aside. D has burden of proof as to such matters. Havens, 429 N.E.2d 618; Williams, 424 N.E.2d 1017. Here, Ct. rejects D's contention that lack of knowledge by state's witnesses as to whether D had been pardoned or his previous convictions set aside meets this burden. Held, habitual affirmed.

TITLE: Hazzard v. State

INDEX NO.: E.9.c.

CITE: (11-22-94), Ind., 642 N.E.2d 1368

SUBJECT: Habitual - jury's exposure to DOC transcripts

HOLDING: Tr. Ct. did not err in denying D's motion for mistrial when, during HO phase of trial, jury was exposed to his DOC criminal transcripts. State offered & Tr. Ct. admitted into evidence certified copies of transcripts, & as prosecution witnesses gave supporting testimony, D objected. After Tr. Ct. excused jury & held hearing on this evidence, D moved for mistrial. Tr. Ct. denied motion, ordered erroneously admitted evidence stricken from record, & admonished jury to disregard transcripts & part of related testimony. While admission of this evidence was serious error, Ct. rejected D's argument that jury's exposure to this information resulted in substantial prejudice against him & placed him in great peril. Trial judge's curative measures were presumptively valid, & D failed to meet his burden of specifying prejudice & showing that no action other than grant of mistrial could have remedied error. Held, convictions affirmed.

TITLE: Hensley v. State

INDEX NO.: E.9.c.

CITE: (5/10/83), Ind., 448 N.E.2d 665

SUBJECT: Habitual - evidence; prior misdemeanor convictions used to rebut D's character evidence

HOLDING: Tr. Ct. did not err in allowing state to cross-examine D regarding prior non-felony convictions during habitual portion of trial where D admitted 2 prior felony convictions, but stated he would not be able to provide for his children if imprisoned. Here, D alleged admission of prior non-felony convictions for burglary & criminal conversion on CX severely prejudiced him. Ct. holds once D opens door, state may offer evidence of specific misconduct to rebut evidence presented by D. Bond, 403 N.E.2d 812; Lineback, 296 N.E.2d 788. D offered testimony that he supported his family & should be shown leniency because of their dependency on him. Prior non-felony convictions were admitted to rebut D's inference that he was a dependable family man. Held, no error.

TITLE: Hudson v. State

INDEX NO.: E.9.c.

CITE: (1/20/83), Ind., 443 N.E.2d 834

SUBJECT: Habitual - evidence; records

HOLDING: Tr. Ct. did not err in admitting photocopy of docket sheet reflecting guilty plea to escape charge & sentence imposed following plea. Here, D contends docket sheet is not an order book entry & consequently is not "best evidence." Ct. finds best evidence rule precludes extrinsic evidence of content of document when document itself is unavailable. Rule does not dictate probative force of alternative evidence. Docket entry introduced to prove its own content, not to prove content of order book entry. Photocopy of docket sheet deemed superfluous, as order book entry was also admitted. Held, no error in admission of exhibit.

TITLE: Jones v. State

INDEX NO.: E.9.c.

CITE: (11/9/77), Ind., 418 N.E.2d 369

SUBJECT: Habitual offender (HO) -- evidence; thumbprints

HOLDING: D convicted of second-degree burglary & theft & of being HO. D challenged admission of index cards containing his thumbprints, claiming that these documents do not qualify either as public documents or under business records exception to hearsay rule. Ct. held that thumbprints were admissible under business records exception to hearsay rule. Held, conviction affirmed & remanded with instructions to correct sentence.

RELATED CASES: Landers, 464 N.E.2d 912 (copy of police arrest report containing information about D & thumbprint obtained as result of arrest for robbery which resulted in theft conviction admissible under business records exception; fingerprint expert testified to match); Mickens, 439 N.E.2d 591 (no error in admitting into evidence photocopies of fingerprints to prove HO charge because certified copies comported with requirements of Ind. R. Tr. P. 44, which relates to proof of official records).

TITLE: McCovens v. State

INDEX NO.: E.9.c.

CITE: (6/9/89), Ind., 539 N.E.2d 26

SUBJECT: Habitual offender (HO) -- State's burden of proof

HOLDING: To sustain sentence enhancement as HO under Ind. Code 35-50-2-8, State must prove that D had been twice convicted & twice sentenced for felonies, that commission of second offense was subsequent to his having been sentenced upon first, & that commission of principal offense upon which enhanced punishment is being sought was subsequent to his having been sentenced upon second conviction. Youngblood, 515 N.E.2d 522. Here, D was convicted of burglary, enhanced by finding that he was HO, & of resisting law enforcement. D appealed & argued that State failed to establish commission dates of his prior convictions. Ct. held that rational inference could be made that because D's prior convictions span nearly twenty years, they were committed in sequence mandated by statute. However, such inferences are not sufficient to support imposition of habitual offender status. Therefore, D's habitual offender status had to be set aside. Held, conviction affirmed, HO finding set aside; DeBruler, J., concurring & dissenting.

RELATED CASES: Bryant, App., 760 N.E.2d 1141 (D's HO enhancement was improper where prior offenses did not occur in required sequence); McManomy, App., 751 N.E.2d 291 (State presented no evidence regarding date that either offense was committed; State failed to prove that second felony was committed after date of sentencing of first); Weatherford, 619 N.E.2d 915 (on post-conviction relief aimed at HO finding, D must demonstrate that he was not HO; D may not prevail simply by putting State to its proof as though case were being tried or appealed in first instance).

TITLE: Mickens v. State
INDEX NO.: E.9.c.
CITE: (9/3/82), Ind., 439 N.E.2d 591
SUBJECT: Habitual - evidence; photocopies of commitment papers
HOLDING: Photocopies of original commitment papers certified by keeper of records as true & correct copies are admissible under TR 44 as authentic reproductions. Here, D argues that photocopies were admitted without a proper foundation & that he had no opportunity to "cross-examine" photocopies. Ct. *cites* TR 44 & fact D had opportunity to probe accuracy of reproduction by subpoenaing keeper of records (but did not take it) to support holding that Tr. Ct. did not err in admitting photocopies. Held, no error.

TITLE: Payne v. State

INDEX NO.: E.9.c.

CITE: (2nd Dist., 12-8-95), Ind. App., 658 N.E.2d 635

SUBJECT: Habitual offender (HO) - admission of arrest records

HOLDING: Tr. Ct. did not err during HO phase of trial in admitting certified copies of arrest records into evidence. Witness testified that he was supervisor of fingerprint unit & one of persons responsible for keeping criminal arrest records for police department. Finding no foundational deficiency in exhibits, Ct. held documents were properly qualified as business records exception to hearsay. Arrest records were part of records under witness's custody, & witness testified that police department kept records in normal course of business at or near time of transactions reflected upon record occurred. Unavailability element should not be considered significant element of business records exception, especially in absence of evidence suggesting record is not authentic. Knuckles v. State (1990), Ind. App., 549 N.E.2d 85. Held, no error.

TITLE: Pointer v. State

INDEX NO.: E.9.c.

CITE: (11/14/86), Ind., 499 N.E.2d 1087

SUBJECT: Habitual - evidence; PSI reports

HOLDING: PSI reports are irrelevant to any issues presented in habitual offender trial; therefore, it is improper evidence to submit to jury. Owens, 427 N.E.2d 880; Robinson, App., 389 N.E.2d 371; Ind. Code 35-38-1-13. Here, Ct. finds submission of PSI reports to jury in this case does not present reversible error. There was overwhelming evidence other than PSI reports that D committed 2 prior unrelated felonies. D fails to demonstrate any prejudice from erroneous admission of these reports. Admission of PSI reports was merely surplusage because reports were irrelevant to any issue before jury. Held, conviction affirmed.

RELATED CASES: Northern, 489 N.E.2d 520 (Crim L 1203.17; admission of PSI reports was not of such prejudicial value as to merit reversal).

TITLE: Sullivan v. State

INDEX NO.: E.9.c.

CITE: (1st Dist. 1/21/88), Ind. App., 517 N.E.2d 1251

SUBJECT: Habitual - evidence; identity

HOLDING: Evidence was insufficient to establish D's identity as person who was previously convicted of driving while intoxicated (DWI). During habitual phase of trial, state offered 2 documents into evidence: docket sheet showing DWI conviction on 10/4/84 for person with D's name, & BMV record for person with slightly different first name showing conviction for DWI on 10/29/84. Latter document listed date of birth (DOB). State did not present any other evidence. Documents relating to conviction for one with same name as D may be offered to prove prior convictions, but supporting evidence is necessary to identify D as same person named in documents. [Citations omitted.] State argues it presented such evidence during case-in-chief, when alcohol influence report with same DOB was admitted. Source of information linking documents with D must be identifiable. Trice, 490 N.E.2d 757 (explaining Kelly, 185 N.E. 453). Here, record does not show source of DOB on alcohol influence record. Further, record does not indicate that DOB on alcohol influence record was brought to jury's attention. Manner of presentation provides no assurance that jury received essential connecting evidence to use in deliberations on enhancement. Held, conviction as Class D felony vacated, with instructions to re-sentence.

TITLE: Taylor v. State

INDEX NO.: E.9.c.

CITE: (10/19/84), Ind., 468 N.E.2d 1378

SUBJECT: Habitual - evidence; incorporation

HOLDING: Tr. Ct. did not err in preventing D from referring, during final argument in habitual phase, to plea agreement of co-D & to fact co-D was not tried as habitual offender. Here, D argues prosecutor's incorporation of evidence introduced during trial of underlying offense allowed such argument. Incorporation of evidence from underlying felony trial is actually an incorporation of relevant evidence, not all evidence. Ct. finds plea agreement irrelevant to issues before jury in habitual phase. Held, no error.

RELATED CASES: Trice, 490 N.E.2d 757 (Ct. refuses to *overrule* Smith, 181 N.E.2d 520 habitual reversed based on similar evidence); Ct. distinguishes Smith by finding D testified at guilt phase that he had committed prior felonies); Land, 470 N.E.2d 697 (use at habitual phase of D's admission made during guilt phase of 2 crimes did not violate D's privilege against self-incrimination; prosecutor also introduced certified records reflecting conviction); Gillie, 465 N.E.2d 1380 (introduction at habitual proceeding of D's testimony from guilt proceeding, admitting prior convictions, was not error; other competent/unrefuted evidence was also admitted).

E. SENTENCING

E.9. Habitual offender (Ind. Code 35-50-2-8)

E.9.d. Trial/bifurcation

TITLE: Broshears v. State

INDEX NO.: E.9.d.

CITE: (1st Dist., 12-10-92), Ind. App., 604 N.E.2d 639

SUBJECT: Special Habitual Offender (HO) verdict form

HOLDING: It is error for Tr. Ct. to deny D's request for special verdict form for HO proceedings where more than two prior convictions are alleged, & D could be subject to either regular or Class D HO enhancement, depending upon which prior convictions jury relies on. D was convicted of Class D criminal recklessness, & prior felonies alleged in HO proceedings included 3 thefts occurring prior to revision of criminal code (1 of which was HO ineligible), 2 class D felonies, & 1 class C felony. His request for special verdict form was denied, he was found to be regular HO, & sentence was enhanced by 20 years.

Ct. discussed history of HO enhancements, & noted problems in application, especially those caused by alleging surplus prior felonies. Although proof of more than two prior convictions is mere surplusage, if general verdict form is used, & one or more of priors is ineligible, remand is required because it is impossible to know which felonies jury relied on. Nash, 545 N.E.2d 566. In D's case, one of prior convictions alleged was inappropriate, because it was related to another, & it was also possible that jury relied only on D felonies & erroneously found him to be regular HO. Therefore, denial of his request for special verdict was error, & such verdicts should be allowed in these instances.

Ct. noted that special verdict forms are allowed in comparative fault cases, Ind. Code 34-4-33-6, & found same rationale should apply to HO proceedings when situations like D's arise. Best type of form would be one which identifies all prior unrelated felonies alleged & for which evidence was produced, & requires jury explicitly declare whether it relied on each individual listed conviction in making HO determination. Ct. constructed sample form to be used in D's case & set it forth verbatim in opinion. Ct. also explained what should be done in constructing form. Held, remanded for reconsideration of HO determination.

RELATED CASES: Broshears, 609 N.E.2d 1 (if State decided to pursue HO charge on retrial, D was entitled to special verdict forms if he asked for them & if it was possible he could be subject to either big or little enhancement, depending on which prior convictions jury relied).

TITLE: Carter v. State

INDEX NO.: E.9.d.

CITE: (4/7/87), Ind., 505 N.E.2d 798

SUBJECT: Habitual - original jury

HOLDING: Tr. Ct. did not err by impaneling new jury to hear habitual offender count. Here, Ct.'s calendar necessitated continuance of trial on habitual offender count. D did not object to dismissal of original jury nor to impaneling of new jury. Impaneling of new jury to hear habitual offender phase is proper when necessity requires it. Kalady, 462 N.E.2d 1299 (Tr. judge properly ordered PSI & hearing where D was eligible for alternate misdemeanor treatment; Tr. Ct. entered conviction for Class D felony & then reconvened original jury to hear habitual offender charge; however, necessity required impaneling new jury because some jurors had seen publicity & could not be impartial toward D). Funk, 427 N.E.2d 1081 (D properly retried on habitual count in front of new jury after mistrial was declared in first proceeding). State v. McMillan, 409 N.E.2d 612 (jury deadlocked; new jury proper on retrial). In Kalady, Ct. held that because trial on habitual offender charge involves issue of fact separate from issues involved in trial on underlying felony, new jury is qualified to make determinations necessary for finding re habitual criminal status, *citing* Funk & McMillan. Held, no error.

RELATED CASES: Pitts, 439 N.E.2d 1140 (Crim L 1202(4); where D was granted retrial on habitual count because of improper testimony re communications between probation officer & D, there was no error in denying D's motion to reconvene original jury to hear retrial).

TITLE: Denton v. State

INDEX NO.: E.9.d.

CITE: (8/22/86), Ind., 496 N.E.2d 576

SUBJECT: Habitual offender - preliminary instruction on retrial

HOLDING: Tr. Ct. did not error in giving preliminary instruction (set forth in opinion) cautioning jury not to speculate about underlying conviction or why they were being asked to determine whether D was a habitual offender. Here, prior conviction supporting habitual had been set aside & D was retried on amended habitual offender count. Ct. finds no harm in giving preliminary instruction. Without such instruction, it would be unclear to jury why proceedings were taking place. Held, no abuse of discretion.

TITLE: Dixon v. State

INDEX NO.: E.9.d.

CITE: (11/20/84), Ind., 470 N.E.2d 728

SUBJECT: Habitual - instruction

HOLDING: D waived any error by failing to object to instruction setting forth elements of habitual offender status. Here, D alleges that instruction was improper because of mandatory language: "If state has proven each of the allegations of the charge beyond a reasonable doubt, you must find D guilty of being a habitual offender." Ct. notes instruction (set forth in opinion) is similar to one approved in Maisonet, 448 N.E.2d 1052. Imperative word phrased in alternative does not bind jury to one course of action. Held, no error.

TITLE: Feliciano v. State

INDEX NO.: E.9.d.

CITE: (9/6/84), Ind., 467 N.E.2d 748

SUBJECT: Habitual - deliberations; bailiff need not be re-sworn

HOLDING: Tr. Ct. did not err in failing to have bailiff sworn prior to jury beginning deliberations on habitual offender allegation. Here, bailiff was sworn before commencement of deliberations on murder charge. Habitual deliberations began 3 hours later. D contends failure to re-swear bailiff depreciated jury's view of role in second hearing. Ind. Code 35-37-2-6 requires Tr. Ct. to swear bailiff. Statute does not require re-swearing. D has shown no harm. Held, no error.

TITLE: Marsillett v. State
INDEX NO.: E.9.d.
CITE: (7/22/86), Ind., 495 N.E.2d 699
SUBJECT: Habitual - PSI before habitual phase?
HOLDING: Tr. Ct. did not err by proceeding to habitual offender phase without first ordering & reviewing presentence report & imposing sentence on present offense. Here, D contends Tr. judge should have determined whether to enter judgment for Class D felony or Class A misdemeanor before commencing recidivist proceedings. Neither alternate misdemeanor sentence statute (Ind. Code 35-50-2-7(b)) or case law (Funk, 427 N.E.2d 1081) require such practice, although Ct. has indicated it is "better practice" for Tr. Ct. to determine whether to withhold judgment for Class D felony & enter judgment for Class A misdemeanor after considering presentence report & arguments of counsel but prior to habitual offender proceedings. Collins, 415 N.E.2d 46. Held, habitual offender affirmed.

TITLE: Newland v. State
INDEX NO.: E.9.d.
CITE: (2/17/84), Ind., 459 N.E.2d 384
SUBJECT: Habitual - trial; 6-member jury
HOLDING: Where D was tried by 6-member jury on Class D felony, trial on habitual by same 6-member jury was not error. Here, D contends he was denied due process; that 12-member jury is required to make habitual offender finding because penalty involved is equivalent to presumptive penalty for Class A felony conviction. Six-member juries are constitutional (Williams v. FL (1970), 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446). Tr. Ct. followed applicable statutes (6-member jury in Class D felony cases; Ind. Code 35-50-2-8(c): "If [D] was convicted of the felony in a jury trial, the jury shall reconvene for the sentencing hearing"). Held, no error.
RELATED CASES: Dyer, 460 N.E.2d 511.

TITLE: Ross v. State

INDEX NO.: E.9.d.

CITE: (12/9/82), Ind., 442 N.E.2d 981

SUBJECT: Habitual - bifurcation; second voir dire

HOLDING: D, charged with habitual offender, does not have a constitutional right to conduct further voir dire examination before commencement of second phase of trial. Impartiality requirement (Ind. Const. Art. I, Section 13) does not apply directly to sentencing hearings. Here, D's motion based upon Ind.Const. Art. I, Section 13 to conduct further voir dire of jury before habitual phase was denied. Held, no error.

RELATED CASES: Sears, 457 N.E.2d 192; Short, 443 N.E.2d 298 at 304.

TITLE: Stone v. State

INDEX NO.: E.9.d.

CITE: (3d Dist. 09/28/92), Ind. App., 599 N.E.2d 617

SUBJECT: Habitual Offender (HO) determination by bench where guilty plea involved

HOLDING: Where D entered guilty plea to underlying felony charge, it was error for Tr. Ct. to convene jury to hear evidence on HO enhancement. Ind. Code 35-50-2-8(c) provides that "[i]f the trial was to the Ct. or the judgment was entered on a guilty plea, the Ct. alone shall conduct the sentencing hearing under Ind. Code 35-38-1-3." This provision clearly requires that HO determinations be made in same manner as determination on underlying conviction, i.e., jury-jury or Ct.-Ct. **Note:** Ct. noted in footnote that as general rule, D may not pursue direct appeal from guilty plea unless sentencing errors are only issue, but to preserve judicial resources and economy, Ct. addressed appeal on merits rather than requiring filing of PCR petition.

TITLE: Wright v. State
INDEX NO.: E.9.d.
CITE: (8/24/84), Ind., 467 N.E.2d 22
SUBJECT: Habitual - new jury panel not required
HOLDING: Tr. Ct. did not err in denying D's request for new jury panel for habitual offender portion of trial. Dorton, 419 N.E.2d 1289; Shepler, 412 N.E.2d 62. Here, D asks Ct. to reconsider Dorton & Shepler in light of Powers, 431 N.E.2d 799. Ct. finds Powers does not change previous holdings. D was not entitled to new jury. Held, no error.

E. SENTENCING

E.9. Habitual offender (Ind. Code 35-50-2-8)

E.9.e. Constitutional issues

TITLE: Best v. State

INDEX NO.: E.9.e.

CITE: (02/15/91), Ind., 566 N.E.2d 1027

SUBJECT: Habitual Offender (HO) sentencing, excessive enhancement

HOLDING: Given modest nature of D's present offense, Ind. Const., Art. I, Sec. 16, limits HO enhancement to 10 years. D was convicted of operating motor vehicle while driving privileges are forfeited for life, Class C felony; operating vehicle while intoxicated as Class D felony; & was also determined to be HO. D was sentenced to 5 years on Class C felony, 2 years on Class D felony, & sentence was enhanced by 20 years as HO, for total sentence of 27 years. Pursuant to Taylor, 511 N.E.2d 1036, & Mills, 512 N.E.2d 846, S.Ct. considered both "nature" & gravity of present felony & "nature" of prior offenses. Ct. noted that present offense was ordinarily Class A misdemeanor but was Class D felony because of prior conviction. Ct. also noted that Tr. Ct. had followed Ind. Code 35-50-2-8(e) & reduced HO enhancement by 10 years because one of prior felonies was Class D, but did not take option to reduce by another 10 years because primary offense was also Class D felony. Ct. then concluded that present offense was not particularly aggravated. As to nature of prior offenses, Ct. noted that D had long history of non-violent alcohol related offenses, thefts & burglaries, totaling 18 convictions, & determined that D's case was distinguishable from Clark, 561 N.E.2d 758 (see card at E.11.c) where entire HO enhancement was considered disproportionate to offense. When considering modest nature of present offense, however, Ct. found full 20-year enhancement given by Tr. Ct. was disproportionate under Ind. Const. Held, remanded to Tr. Ct. with directions to reduce total sentence to 17 years. J.J. Givan & Krahulik dissenting.

RELATED CASES: Manley, App., 656 N.E.2d 277 (30-year HO enhancement of carrying handgun without license sentence did not violate Article I, 16 of Ind. Constitution); Wilson, 583 N.E.2d 742 (see card at E.11.c).

E. SENTENCING

E.9. Habitual offender (Ind. Code 35-50-2-8)

E.9.e.1. Cruel and unusual (8th Amend.; Ind. Const. Art. I, 16)

TITLE: Higgins v. State

INDEX NO.: E.9.e.1.

CITE: (10-26-92), Ind., 601 N.E.2d 342

SUBJECT: Guilty but Mentally Ill (GBMI) Verdict may be Enhanced by Habitual Offender (HO)

HOLDING: It was not violation of Eighth Amend. to enhance D's sentence to 60 years because of HO determination, after finding him GBMI. D was prosecuted for attempted murder, raised insanity defense, and jury found him GBMI. His 30-year sentence was then enhanced by 30 years because he was also determined to be HO. Ct. rejected D's argument that because he was found GBMI, jury was not required to determine whether he appreciated or understood consequences of his conduct, and therefore was in no position to determine whether he should be found HO. Statutes do not require ability to understand consequences of criminal conduct, and there was no evidence that D was suffering from mental disease so severe as to preclude appreciation of wrongfulness of conduct under Ind. Code 35-41-3-6 at time of commission of previous offenses. Held, sentence affirmed, DeBruler, J., DISSENTING.

TITLE: Taylor v. State

INDEX NO.: E.9.e.1.

CITE: (8/26/87), Ind., 511 N.E.2d 1036

SUBJECT: Habitual - cruel & unusual as applied

HOLDING: Thirty-year habitual offender enhancement of 2-year sentence for theft of \$50 does not constitute cruel & unusual punishment as applied to this D. D argues 32-year sentence is disproportionate to nature of primary crime & his 2 prior convictions (receiving stolen property & larceny - \$70 worth of tapes) because they were nonviolent felonies. 8th Amend. requires proportionate punishment, Solem v. Helm, (1983), 463 U.S. 277, 103 S. Ct. 3001, 77 L.Ed.2d 637, but extensive analysis is required only in cases involving life sentences without parole. US v. Rhodes, (CA4 1985), 779 F.2d 1019. Ind. Const. requires 2-part analysis: (1) nature & gravity of present felony; & (2) nature of prior offenses. While present offense is nonviolent, underlying presumptive sentence reflects this & is proportionate. Prior offenses were also nonviolent. However, each offense was committed within a year of D's release from prison. Ct. relies on shortness of time between offenses in holding sentence not disproportionate.

RELATED CASES: Yurina, 474 N.E.2d 93 (sentence affirmed where prior felony used to aggravate both sentence & to prove habitual status); Woods, 471 N.E.2d 691 (sentence affirmed where prior felony was used to elevate offense to Class D felony as well as to prove habitual status; Ct. reviews case pursuant to reasoning in Solem v. Helm; Howard, 467 N.E.2d 1 (life sentence for habitual upheld; Ct. rejects D's contention that sentence violates 8th Amend as construed by U.S. S.Ct. in Solem v. Helm); Choate, 462 N.E.2d 1043 (habitual phase instruction based on Ind. Const. Art. 1, Section 18 (reformation) is improper; reformation is for legislature, not juries, to consider).

E. SENTENCING

E.9. Habitual offender (Ind. Code 35-50-2-8)

E.9.e.2. Equal protection (14th Amend.; Ind.Const. Art. 1, 23)

TITLE: Jones v. State

INDEX NO.: E.9.e.2.

CITE: (6/14/83), Ind., 449 N.E.2d 1060

SUBJECT: Habitual - equal protection

HOLDING: Tr. Ct. did not err in denying D's request for discovery of name, address, race & gender of everyone charged with a felony in Monroe County from 1/75 to 1/81 & who could have been charged under habitual offender statute where state informed Ct. that request was burdensome (no filing system for prior criminal records of 1,800 persons charged with felonies during time period) & state did provide list of persons actually charged with habitual during 6-year span. Here, list submitted by prosecutor shows D was first black person to be charged with habitual in Monroe County; thus, Tr. Ct. could have concluded that information on those persons eligible, but not charged with habitual, would not aid D's claim of unequal enforcement. Based on questionable materiality of information sought & burden that compelling such discovery would place on state, denial of request was not clear error. See Williams, 417 N.E.2d 328.

E. SENTENCING
E.9. Habitual offender (Ind. Code 35-50-2-8)
E.9.e.3. Separation of powers

TITLE: Jones v. State
INDEX NO.: E.9.e.3.
CITE: (6/14/83), Ind., 449 N.E.2d 1060
SUBJECT: Sentencing -- habitual offender (HO) statute; separation of powers
HOLDING: On appeal of HO finding, D argued that habitual statute is unconstitutional because it violates separation of powers clause by allowing prosecutor discretion to charge someone as habitual offender. Ct. noted that it has rejected this argument consistently. Havens, 429 N.E.2d 618; Collins, 415 N.E.2d 46; Eaton, 408 N.E.2d 1281. Held, conviction & sentence affirmed.

E. SENTENCING

E.9. Habitual offender (Ind. Code 35-50-2-8)

E.9.e.5. Double jeopardy (5th Amend.; Ind. Const. Art. 1, 14) (retrial of habitual, see E.9.g.3)

TITLE: Kelly v. State
INDEX NO.: E.9.e.5.
CITE: (8/29/83), Ind., 452 N.E.2d 907
SUBJECT: Habitual - double jeopardy; multiple habitual charges
HOLDING: Here, prosecutor attached a habitual charge to each of 2 separate causes (child-molesting; incest committed against 2 daughters). In a consolidated trial, D was convicted of all counts, including 2 habitual counts (same underlying felonies used for both). Sentences on the 2 cause numbers were to run concurrently. D filed a BMCE arguing 2 habitual convictions violated double jeopardy since they were based upon same underlying felonies. Tr. Ct. vacated one habitual in response to D's BMCE. D now asserts Tr. Ct. erred in not vacating sentence on remaining habitual count. Ct. begins by stating original sentence was proper as an enhancement of 2 separate crimes involving 2 separate victims. Prior convictions used to establish fact of habitual criminality at one trial can be used again after a subsequent felony conviction. Baker, 425 N.E.2d 98 (D acquitted of habitual in prior action). Ct. holds because habitual sentence properly could have been applied to both cause numbers, remaining habitual count must be affirmed. Ct. notes "we will not disturb [trial] Ct.'s ruling on MCE which vacated sentence on second habitual offender count as all sentences in second cause number are to be served concurrently to those on first cause number, anyway." Held, no error.

RELATED CASES: Calloway, 500 N.E.2d 1196 (Crim L 273.1(2); prosecutor properly threatened to request that multiple habituals (on 2 separate charges) run consecutively, *citing Kelly*); Denton, 496 N.E.2d 576 (use of prior convictions at more than one habitual offender proceeding does not constitute double jeopardy).

TITLE: Mers v. State

INDEX NO.: E.9.e.5.

CITE: (8/8/86), Ind., 496 N.E.2d 75

SUBJECT: Habitual - double jeopardy; retrial following acquittal

HOLDING: Double jeopardy does not bar habitual offender finding where same underlying felonies were used in prior habitual charge of which D was acquitted. Durham, 464 N.E.2d 321; Dixon, 437 N.E.2d 1318; Harris, 427 N.E.2d 658; Baker, 425 N.E.2d 98. Ct. emphasizes habitual offender statute merely authorizes enhancement of sentence & does not create separate crime. In Durham, Ct. compared habitual status to age & sex, of which no one can be acquitted. In Baker v. Duckworth (CA7 1985), 752 F.2d 302, the 7th Cir. rejected both general double jeopardy & collateral estoppel arguments, emphasizing that jury's finding that D was not HO does not "acquit" him so as to bar use of same priors in second habitual offender proceeding. Ind. S.Ct. granted transfer in Durham to consider effect of Bullington v. MO (1981), 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (retrial of death penalty), but found "significant differences" exist between death penalty & habitual determination which distinguish Bullington from Durham. Held, no error in denial of D's motion to dismiss habitual offender count.

RELATED CASES: Mayo, 681 N.E.2d 689 (repeated use of same conviction to impose subsequent HO enhancements does not violate DJ); Williams, 430 N.E.2d 759 (same rationale applies whether prior convictions are used once or repeatedly).

TITLE: State v. Hicks
INDEX NO.: E.9.e.5.
CITE: (9/30/83), Ind., 453 N.E.2d 1014
SUBJECT: Habitual - double jeopardy; filing after guilty plea accepted
HOLDING: Tr. Ct. erred in granting D's motion to dismiss habitual count, filed after Tr. Ct. accepted D's guilty plea to burglary, where D had notice state intended to file habitual. Lewis, App., 337 N.E.2d 516. Here, Ct. rejects D's contentions that it is without jurisdiction to hear state's appeal & that state has no right to appeal. State is not foreclosed from seeking sentence enhancement simply because allegation is not made in original charging instrument; state may file habitual allegation as amendment to original charge. See Barnett, 429 N.E.2d 625; Dorton, 419 N.E.2d 1289; Gilmore, 415 N.E.2d 70. Ct. finds because Tr. judge was unaware state would file habitual, his failure to advise D of "any possible sentence enhancement" (Ind. Code 35-4.1-1-3(d)) does not necessarily render D's guilty plea involuntary, although voluntariness is suspect. Held, remanded with instructions to vacate grant of D's motion to dismiss, to grant state's motion to amend & to fully advise D of effect of habitual on sentence for underlying felony, allowing D to withdraw plea if he so moves. DISSENT by DeBruler contends opinion violates double jeopardy (Ind.Const. Art. I, Section 14) by bringing D, who has partially served his sentence, back into Ct. & giving him a new & greater sentence. Ct. cannot increase sentence after D has begun to serve it (Ex parte Lange v. US (1874), 18 Wall. 163) except where D applies for review of his sentence (Ledgerwood (1892), 134 Ind. 81) or where sentence itself is illegal (Vawter, 279 N.E.2d 805).

TITLE: State v. Morgan

INDEX NO.: E.9.e.5.

CITE: (5/4/84), Ind., 462 N.E.2d 1029

SUBJECT: Habitual - double jeopardy; lifetime status

HOLDING: Tr. Ct. erred in dismissing habitual status allegation in re-trial of habitual phase (initial habitual finding reversed because established by parol evidence, 440 N.E.2d 1087). Habitual determination is a status, not a separate criminal offense. Jones, 449 N.E.2d 1060. Double jeopardy "in no way applies" to the habitual determination. The status "continues throughout the remainder of that person's life. There is no prohibition for a second enhanced sentence at some future time, based upon the same criminal record that gave rise to an enhanced sentence on a previous occasion." Held, remanded with instructions to proceed with habitual determination. Prentice DISSENTS without opinion. DeBruler CONCURS IN RESULT.

RELATED CASES: Elmore, Ind., 657 N.E.2d 1216 (use of prior offenses to both enhance D's sentence for current conviction & to support additional charge as HO does not violate double jeopardy).

TITLE: Thomas v. State

INDEX NO.: E.9.e.5.

CITE: (4th Dist., 8-15-97), Ind. App., 684 N.E.2d 222

SUBJECT: Double jeopardy - habitual offender & handgun enhancement

HOLDING: Prior robbery conviction can be used to support conviction for carrying handgun without license as class C felony & as prior unrelated felony conviction under habitual offender statute. D cannot be charged under two habitual offender statutes based on same offense. Freeman, 658 N.E.2d 68; Devore, 657 N.E.2d 740. Here, D was not charged under two habitual offender statutes, but was charged with habitual offender enhancement & carrying handgun without license as Class C felony. Class C felony handgun offense is separate crime from carrying handgun without license as Class A misdemeanor. Elevation from Class A misdemeanor to Class C felony for prior robbery conviction is not enhancement as contemplated in habitual offender statute, & does not render application of habitual offender statute in any way duplicative. Thus, State was not barred from using robbery conviction as underlying felony to support habitual offender charge. Held, judgment affirmed.

TITLE: Turpin v. State

INDEX NO.: E.9.e.5.

CITE: (4/8/86), Ind., 490 N.E.2d 1109

SUBJECT: Habitual - double jeopardy; retrial

HOLDING: Tr. Ct. did not err by denying D permission to present double jeopardy defense to jury.

In D's first appeal, Ct. remanded for retrial on habitual offender issue, based upon employment of unlawful procedures, rather than failure of proof. D's double jeopardy claim had been rejected when his prior petition for rehearing was denied. "That ruling was final & binding upon Tr. Ct. on remand." Held, no error.

TITLE: Woods v. State
INDEX NO.: E.9.e.5.
CITE: (12/13/84), Ind., 471 N.E.2d 691
SUBJECT: Same conviction can be used to elevate offense & prove habitual
HOLDING: Tr. Ct. did not err in permitting same prior felony (1968 armed robbery conviction) to be used to both elevate possession of handgun from Class A misdemeanor to Class D felony & prove habitual offender status. Here, D *cites* KY cases supporting his double jeopardy (DJ) argument, but Ct. finds this "is not the law in." In both statutes (Ind. Code 35-23-4.1-18(c) [now Ind. Code 35-47-2-1] & Ind. Code 35-50-2-8), D's prior conduct places him in a different status. That status is not an additional crime; it merely permits Tr. Ct. to enhance penalty. Such enhanced penalty does not constitute DJ. Hanks, 76 N.E.2d 702; Hamilton v. State ex rel. Van Natta, App., 323 N.E.2d 659. Held, no error.

RELATED CASES: Golden, App., 862 N.E.2d 1212 (Ct. rejected D's argument that same prior sex convictions would result in an improper double enhancement of a sentence for a new sex offense & under repeat sexual offender statute); Ross, 729 N.E.2d 113 (Ct. used rules of statutory construction to hold that legislature did not intend double enhancement); Jones, 600 N.E.2d 544 (sentence is not manifestly unreasonable because same prior criminal history is used to both aggravate sentence and form basis for HO enhancement.)

E. SENTENCING

E.9. Habitual offender (Ind. Code 35-50-2-8)

E.9.e.6. Due process (5th and 145h Amend.; Ind. Const. Art. 1, 12)

TITLE: Leach v. State

INDEX NO.: E.9.e.6.

CITE: (8-21-98), Ind., 699 N.E.2d 641

SUBJECT: Reference to habitual offender (HO) charge - due process violation

HOLDING: By informing prospective jurors prior to voir dire that D was also charged with being habitual offender, Tr. Ct. denied D due process of law. D's prior habitual criminal history should not have been referenced because it was not directly relevant to issue in guilt phase of case. Although Tr. Ct.'s comments were clearly improper & prejudicial, evidence of guilt was so overwhelming that error was harmless beyond reasonable doubt. Woodford, 544 N.E.2d 1355. Held, conviction affirmed.

TITLE: Reed v. State
INDEX NO.: E.9.e.6.
CITE: (8/10/82), Ind., 438 N.E.2d 704
SUBJECT: Habitual - due process
HOLDING: D's due process rights are not violated by State's filing of habitual offender charge, despite fact that D is thereafter compelled to choose between testifying in own behalf (becoming subject to cross-exam that could expose him as habitual offender & influence jury in its deliberations on habitual offender count) & not testifying. Ct. distinguishes Doyle v. OH (1976), 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (it is fundamentally unfair & a violation of due process to allow an arrested person's silence to be used to impeach an explanation subsequently offered at trial) & declines D's invitation to *overrule* Jamieson, 377 N.E.2d 404, Griffin, 415 N.E.2d 60, Gilmore, 415 N.E.2d 70 & Williams, 419 N.E.2d 134. Held, no violation of 5th Amend.

E. SENTENCING

E.9. Habitual offender (Ind. Code 35-50-2-8)

E.9.e.7. Jury nullification (Ind. Const. Art. 1, 19; see also D.9.g.2.o)

TITLE: Flake v. State

INDEX NO.: E.9.e.7.

CITE: (5-14-02), Ind. App., 767 N.E.2d 1004

SUBJECT: Habitual offender jury instruction - jury's right to determine law & facts

HOLDING: Habitual offender jury instruction did not prevent jury from exercising its constitutional discretion in determining law & facts. Where jury finds facts of prerequisite prior felony conviction to be uncontroverted, jury still has unquestioned right to refuse to find D to be habitual offender. Seay v. State, 698 N.E.2d 732 (Ind. 1998). However, an erroneous instruction will not amount to reversible error if accompanied by another instruction informing jury that it is judge of law & facts. Parker v. State, 698 N.E.2d 737 (Ind. 1998). Here, jury was instructed that if State proved elements beyond reasonable doubt, then State proved D was habitual offender. Although instruction was clearly erroneous, it was accompanied by another instruction which stated that jury has right to determine both law & facts & that instructions of Ct. are best source in determining law. Accordingly, there was no reversible error. Held, judgment affirmed.

TITLE: Harris v. State

INDEX NO.: E.9.e.7.

CITE: (4/21/22), Ind. Ct. App., 187 N.E.3d 287

SUBJECT: No error in prohibiting defendant from testifying about circumstances of prior crimes in habitual offender phase.

HOLDING: The defendant in a habitual-offender proceeding wanted to testify about the circumstances surrounding his convictions in hopes of persuading the jury to reject the habitual charge, but the trial court would not allow it. Citing two Indiana Supreme Court cases, Seay v. State, 698 N.E.2d 732 (Ind. 1998), and Hollowell v. State, 753 N.E.2d 612 (Ind. 2001), the defendant argued this violated Article 1, Section 19 of the Indiana Constitution. But the Court of Appeals concluded that after those cases were decided, the legislature amended the habitual-offender statute to provide that the role of the jury in a habitual-offender proceeding is limited to determining whether the defendant has been convicted of the prior felonies. The amendment provided in part: "The role of the jury is to determine whether the defendant has been convicted of the unrelated felonies. The state or defendant may not conduct any additional interrogation or questioning of the jury during the habitual offender part of the trial." I.C. 35-50-2-8(h) (2014). The Court found that this amendment eliminated the broader role recognized in Seay, as well as the discretion inherent in that role. Therefore, the jury is no longer "entitled to make a determination of habitual offender status as a matter of law independent of its factual determinations regarding prior unrelated felonies" under Seay. The Court held that because the jury's only role under the current habitual offender statute is to determine whether the defendant has the requisite prior convictions, the trial court did not err by barring the defendant's testimony about the circumstances surrounding his convictions. Further, the jury's right to determine the law and the facts under Article 1, Section 19 applies during habitual-offender proceedings only because the legislature has provided for a jury role in those proceedings. The legislature could eliminate the jury's role entirely without violating Article 1, Section 19. The Court also noted that trial courts should give instructions and verdict forms that recognize the jury's limited role as provided in the current statute: determining whether the defendant has the requisite prior convictions.

TITLE: Jones v. State

INDEX NO.: E.9.e.7.

CITE: (6/14/83), Ind., 449 N.E.2d 1060

SUBJECT: Habitual - jury nullification

HOLDING: Habitual offender statute does not unconstitutionally take away jury's right to determine law as well as facts (in violation of Ind.Const. Art. 1, Section 19); jury has no responsibility to assess penalties under current criminal code. Harrington, 421 N.E.2d 1113; Bailey, 412 N.E.2d 56. Here, D contends habitual statute mandates that jury return habitual finding upon proof of 2 prior unrelated felony convictions & therefore restricts jury's right to determine law. Ct. rejects D's contention, noting habitual statute is means of sentencing rather than determination of law necessary to reach verdict. Held, no error.

RELATED CASES: Seay, 698 N.E.2d 732 (Jones *overruled* to extent it can be interpreted to mean that Art. 1, § 19 does not apply to status determination in habitual offender proceedings); Goodwin, 439 N.E.2d 595.

TITLE: Seay v. State

INDEX NO.: E.9.e.7.

CITE: (7-8-98), Ind., 698 N.E.2d 732

SUBJECT: Habitual offender - jury nullification; instructions

HOLDING: Tr. Ct. committed error, but not fundamental error, when it instructed jury during habitual offender phase that jury was judge of only facts, & that it was restricted to determining facts only & not law. In all criminal cases whatever, jury shall have right to determine law & facts. Ind. Const. Art. I, § 19. Article I, § 19 does not apply in penalty determinations. However, determining habitual offender penalty is clearly different from determining habitual offender status. Here, Ct. held that in habitual offender proceeding, jury has right to determine law & facts. Jury is permitted to render verdict that D is not habitual offender even if it finds that State has proven beyond reasonable doubt that D has accumulated two prior unrelated felonies. In so holding, Ct. *overruled Jones*, 449 N.E.2d 1060, to extent that it can be interpreted to mean that art. I, § 19 does not apply to status determination in habitual offender proceedings, & adopted principles enunciated by Justice Dickson in *Mers*, 496 N.E.2d 75, *Hensley*, 497 N.E.2d 1053 (Dickson, J., dissenting), & *Duff*, 508 N.E.2d 17. Held, transfer granted, Ct. App.' opinion at 673 N.E.2d 475 adopted, conviction affirmed.

RELATED CASES: *Sample*, 932 N.E.2d 1230 (Ind. 2010) (it was reversible error to instruct the jury during a habitual phase that if it found the State had proven the prior felonies, then it "must" find the D a habitual offender; although the jury was instruction that they were given the right to decide both the law and the facts of the case, they were also instructed that they were to apply the law as they actually found it to be and not to disregard it for any reason, and the final instructions are the best source in determining what the law is; thus, error was not cured); *Womack*, App., 738 N.E.2d 320 (same jury nullification law applies to enhancement phase of marijuana as class D felony; verdict form which only gave jury two options: D is guilty of possession as class A misdemeanor if find D does not have prior conviction or D is guilty of class D felony if find he has prior conviction, violated Art. I, §19); *Hancock*, App., 737 N.E.2d 791 (Tr. Ct. did not err when it refused to read D's tendered jury instruction during habitual phase of trial which would have informed jury of its power to nullify under Art. I, § 19 of Ind. Const.; *see* full review at D.9.g.2.o); *Johnson*, App., 717 N.E.2d 887 (where jury was instructed at end of guilt phase one day prior to HO phase that they were triers of law and facts & counsel argued this during closing of HO phase, fact that judge incorrectly instructed jury was not reversible error); *Parker*, 698 N.E.2d 737 (reversible error when D objected to instruction which violated Ind. Const., Art. I, §19).

TITLE: Walden v. State

INDEX NO.: E.9.e.7.

CITE: (10-20-08), Ind., 895 N.E.2d 1182

SUBJECT: Jury nullification - instructions in HO phase

HOLDING: Tr. Ct. did not abuse its discretion by refusing to read D's proposed jury instruction on nullification. Ind. Code 35-37-2-2(5) requires Tr. Ct. to instruct a jury that it has the right to determine the facts and the law in a criminal case. This statutory language tracks article I, section 19 of the Indiana Constitution. Thus, a jury is entitled to make a status determination "irrespective of the uncontroverted proof of prior felonies. Seay v. State, 698 N.E.2d 732, 737 (Ind. 1998). Here, Tr. Ct. refused to give D's tendered jury instruction which read: "Even where the jury finds the facts of the prerequisite prior felony convictions to be uncontroverted, the jury still has the unquestioned right to refuse to find the D to be a habitual offender at law." Rather, the court instructed that: "Under the Constitution of Indiana you have the right to determine both the law and the facts. The Court's instructions are your best source in determining the law." Tr. Ct. also instructed that the jury "may find the D to be an habitual offender" if the State has proven its case beyond a reasonable doubt. Because D's tendered instruction is almost verbatim from Seay, it is a correct statement of the law. While Tr. Ct. could have given the proposed instruction, Tr. Ct. is not obligated to issue an invitation to the jury to disregard prior convictions in addition to informing the jury of its ability to determine the law and the facts. The Seay holding was based on the statutory requirement to instruct and not the constitution. Thus, the instructions given by Tr. Ct. were adequate. Held, transfer granted, judgment affirmed with respect to proposed jury instruction No. 1 and summarily affirmed as to all other issues raised on appeal but not addressed in this opinion. Rucker, J., dissenting and suggesting that the following instruction be given in guilt phase of trials: "Even where the jury finds that the State has proven the statutory elements of the offense beyond a reasonable doubt, the jury still has the unquestioned right to determine whether in this case returning a verdict of guilty promotes fairness and the ends of justice." Dickson, J., dissenting on basis that the jury was not meaningfully instructed regarding its right to find in favor of a criminal D despite substantial contrary evidence, a historic right of American juries and one additionally preserved in Section 19 of the Indiana Bill of Rights.

TITLE: Walker v. State

INDEX NO.: E.9.e.7.

CITE: (2/24/83), Ind., 445 N.E.2d 571

SUBJECT: Habitual - jury nullification; instruction

HOLDING: D's tendered instruction conveying to jury belief that it had power of nullification was an incorrect statement of law & was properly refused by Tr. Ct. Here, D tendered an instruction in habitual offender proceeding that essentially told jury if they determined that the mandatory punishment was excessive under Ind.Const. Art. I, Section 18 (reformation), & 8th Amend & Ind.Const. Art. I, Section 16 (cruel & unusual punishment), they should consider this finding in rendering a verdict. The Tr. Ct. instructed jury that the Ind. Const. made them judges of law & fact; jury determines law but this did not mean that jury can make, repeal, disregard or ignore existing law. Ct. finds D's tendered instruction was an incorrect statement of law & thus properly refused. Held, no error.

E. SENTENCING

E.9. Habitual offender (Ind. Code 35-50-2-8)

E.9.e.8. Vindictive/reformation (Ind. Const. Art. 1, 18)

TITLE: Coble v. State

INDEX NO.: E.9.e.8.

CITE: (4/3/85), Ind., 476 N.E.2d 102

SUBJECT: Habitual - reformation

HOLDING: Habitual offender statute does not violate Ind. Const. Art.1, Section 18. Funk, 427 N.E.2d 1081; Wise, 400 N.E.2d 114; Norris, 394 N.E.2d 144. Here, D contends 30-year sentence added to 2 concurrent 2-year terms for burglary is not based on reformation & thus violates Section 18. D further contends statute is indiscriminately applied to him, punishing him for having disease of alcoholism. Ct. finds D's sentence is not manifestly unjust. Held, no error.

RELATED CASES: Weatherford, App., 654 N.E.2d 899 (Ct. rejected D's argument that sentencing under old HO statute constituted vindictive justice under Art. I, 18, where specific savings clause expressly stated intention for ameliorative HO amendment to apply prospectively).

E. SENTENCING

E.9. Habitual offender (Ind. Code 35-50-2-8)

E.9.e.9. Other

TITLE: Lunsford v. State
INDEX NO.: E.9.e.9.
CITE: (5th Dist., 09-01-94), Ind. App., 640 N.E.2d 59
SUBJECT: Doctrine of amelioration not applied to habitual offender (HO) provisions
HOLDING: Where HO enhancement was applied to underlying B felony conviction, D was not entitled to application of HO statute as amended effective 07-1-93. D was convicted of battery & robbery, both resulting in bodily injury. Offense occurred in November 1992, & D was sentenced on July 12, 1993, with HO enhancement of 30 years pursuant to statute in effect in November 1992. HO statute's amendment that changed 30-year enhancement to scheme where enhancement would be in range from presumptive sentence for underlying felony to three times presumptive sentence. D's enhancement under new statute would have been 10-30 years. Ct. discussed Doctrine of Amelioration, noting need to determine legislative intent. Doctrine allows Ds sentenced after statutory amendment to receive benefit of reduced sentences, even if offenses were committed prior to amendment, if it is clear statute was intended to be ameliorative. Here, Ct. found no clear expression of legislative intent that statute be applied retroactively, or that purpose of amendment was to lessen severity of penalty. Therefore, Ct. looked to general savings clause, Ind. Code 1-1-5-1, & determined old HO statute should be applied to D. Ct. also found that because maximum enhancement D could have received under new statute was same as enhancement under old one, it was not really ameliorative amendment in his case. Held, sentence affirmed. **Note:** For in depth discussion of Doctrine of Amelioration, see Indiana Defender, 8 N.E.2d 93. Language in case can be used to argue for ameliorative application where C & D felonies are involved. See Bell card at V.6 (ameliorative provisions of new HO statute re: class C & D felonies applied to D).

TITLE: Polk v. State
INDEX NO.: E.9.e.9.
CITE: (2nd Dist., 3-4-03), Ind. App., 783 N.E.2d 1253
SUBJECT: Habitual offender (HO) - based solely on underlying convictions of minors in adult courts
HOLDING: In challenging his HO enhancement, D argued that public policy should prevent an HO determination where predicate offenses occurred while D was a minor. State argued that HO statute, Ind. Code 35-50-2-8, exempts use of certain convictions; thus, by failing to exclude felony convictions of minors in adult courts, legislature did not intend such exemptions. Court agreed, noting that it does not second-guess criteria established by legislature for imposition of HO penalties, nor is it Court's prerogative to interfere with discretionary power of State to invoke HO penalties. Rodgers v. State, 422 N.E.2d 1211 (Ind. 1981). Given legislature's failure to enact legislation addressing this subject, Court could not say that HO determination in this case violated public policy. Held, robbery conviction & HO determination affirmed, confinement & theft convictions vacated.

TITLE: Watson v. State

INDEX NO.: E.9.e.9.

CITE: 155 N.E.3d 609

SUBJECT: CR 4(C) inapplicable to retrial of habitual offender (HO) determinations - constitutional speedy trial violation found

HOLDING: One-year time limitation to bring a defendant to trial under Criminal Rule 4(C) does not apply to persons being held for habitual offender rehearings, Defendant's constitutional right to a speedy trial in this case was violated by the nearly six and a half years of delay. After securing post-conviction relief that vacated the 30-year habitual offender enhancement, retrial was continued on motions from Defendant, the State and the trial court, while two judicial recusals further delayed the proceedings. Defendant also wrote four letters to trial court demanding to be brought to trial when his first attorney was unresponsive to his inquiries and not filing documents with the court to expedite the process. The Court found that all four of the factors outlined in Barker v. Wingo, 407 U.S. 514 (1970), weighed in favor of finding a violation of Defendant's constitutional right to speedy trial. Six-plus years of delay to try Defendant on a habitual-offender allegation is uncommonly long; the government was responsible for a majority of that delay; Defendant appropriately asserted his right to a speedy trial and has shown prejudice resulting from the extraordinary delay. Held, transfer granted, Court of Appeals opinion at 135 N.E.3d 982 vacated, habitual offender enhancement vacated. **NOTE:** In a footnote, Court appears to send a strong signal that defendants should argue Article 1, Section 12 is more protective than the Sixth Amendment under Barker v. Wingo. The Court implied that the Indiana constitutional analysis for speedy trial claims is different from the federal analysis in that Article 1, Section 12 is a "directive" rather than a "right." Thus, a defendant need not assert his right to a speedy trial in making a claim under the Indiana Constitution because "the speedy trial demand is effectively made for him."

E. SENTENCING
E.9. Habitual offender (Ind. Code 35-50-2-8)
E.9.f. Collateral estoppel / res judicata

TITLE: Shumate v. State

INDEX NO.: E.9.f.

CITE: (5th Dist.; 10-27-99), Ind. App., 718 N.E.2d 1133

SUBJECT: Probation revocation - barred by res judicata

HOLDING: Res judicata, but not double jeopardy, barred second probation revocation following reversal of first revocation due to insufficient evidence. Second probation revocation hearing, based on same alleged violation that resulted in revocation of probation that was later set aside, does not violate prohibition against double jeopardy. Childers, App., 656 N.E.2d 514. However, res judicata bars re-litigation of claim after final judgment has been rendered, when subsequent action involves same claim between same parties. In order to prove relitigation is barred by res judicata, four elements must be satisfied: (1) former judgment must have been rendered by Ct. of competent jurisdiction; (2) former judgment must have been rendered on merits; (3) matter now in issue was or could have been determined in prior action; & (4) controversy adjudicated in former action must have been between same parties to present suit or their privies. Here, appellate Ct. decision reversing probation revocation due to insufficient evidence was judgment on merits for purposes of res judicata. Thus, any further proceedings relating to revocation of D's probation, based on same violation of probation at issue in first revocation proceeding, were barred by res judicata. Held, judgment reversed.

RELATED CASES: Dexter, 991 N.E.2d 171 (Ind. Ct. App. 2013) (even if four-pronged test from Shumate applies, Indiana Supreme Court's decision reversing D's habitual-offender enhancement was not a final judgment on the merits, thus State was not barred from retrying him under doctrine of res judicata).

E. SENTENCING

E.9. Habitual offender (Ind. Code 35-50-2-8)

E.9.g. Challenge to Prior Conviction

TITLE: Collins v. State

INDEX NO.: E.9.g.

CITE: (7/1/87), Ind., 509 N.E.2d 827

SUBJECT: Habitual offender (HO) -- D cannot attack illegal sentence that benefitted him

HOLDING: D was convicted of theft & found to be habitual offender. Habitual offender finding was predicated in part upon D's prior conviction, following guilty plea, for voluntary manslaughter. In that case, D was sentenced in accordance with plea agreement which provided credit for time served & suspended remaining time. D argued that because suspension was illegal because of age misrepresentation, voluntary manslaughter conviction should be set aside, & he should be allowed to withdraw his guilty plea. Ct. disagreed & noted that D may not enter plea agreement calling for illegal sentence, benefit from that sentence, & then later complain that it was illegal sentence. Twyman, 459 N.E.2d 705. Held, conviction affirmed & cause remanded on other grounds for correction of sentencing order.

RELATED CASES: Lee, Ind., 816 N.E.2d 35; Williams, 42 N.E.3d 107 (Ind. Ct. App. 2015) (D could not claim plea was not knowing, intelligent, and voluntary because counsel allegedly was wrong to tell him he was eligible for HSO enhancement because D received substantial benefit from plea deal).

TITLE: Lawrence v. State
INDEX NO.: E.9.g.
CITE: (7/2/84), Ind., 464 N.E.2d 1291
SUBJECT: Habitual offender (HO) -- challenging previous convictions; waiver
HOLDING: On direct appeal of conviction & HO finding, D claimed that HO finding had to be vacated because three of four prior convictions were void in that records of convictions failed to show D waived his right to counsel. However, no objection was made on this ground at trial. Ct. held that because this issue was not raised at trial, issue was waived. Held, conviction & sentence affirmed.

E. SENTENCING
E.9. Habitual offender (Ind. Code 35-50-2-8)
E.9.g.1. During habitual trial

TITLE: Armour v. State
INDEX NO.: E.9.g.1.
CITE: (7/3/85), Ind., 479 N.E.2d 1294
SUBJECT: Habitual - collateral attack on prior convictions
HOLDING: Where record of prior convictions presented by prosecution contains ambiguities apparent on the record, D cannot substantiate invalidity of predicate felony conviction during habitual proceedings. Here, D argued judges in prior proceedings did not have authority to act & that such jurisdictional defects allowed him to challenge those convictions during habitual offender proceedings. In both instances, sitting judge, as well as special judge or judge pro tem signed documents relating to D's convictions. Ct. finds ambiguities apparent from record require additional information for their resolution & at best do not raise presumption of jurisdictional invalidity. Held, habitual offender conviction affirmed.

TITLE: Edwards v. State

INDEX NO.: E.9.g.1.

CITE: (6/28/85), Ind., 479 N.E.2d 541

SUBJECT: Habitual - collateral attack on prior convictions

HOLDING: Generally, alleged invalidity of predicate felony convictions (PFC) may not be challenged during habitual offender proceedings if prior final judgments are regular on their face. Jones, 425 N.E.2d 82; Morris, 406 N.E.2d 1187. D must attempt to set aside PFC through direct appeal/PCR. However, where PFC is constitutionally invalid, D may challenge it during trial on habitual. PFC is deemed constitutionally invalid only if: (1) Tr. Ct. records, on their face, raise presumption of constitutional infirmity; & (2) apparent infirmity undermines both integrity & reliability of determination of guilt. Where PFC is based upon guilty plea, infirmity must affect admission of guilt. Here, record does not affirmatively show advisement re self-incrimination/confrontation, thus presumption of constitutional infirmity is raised. Stone, 437 N.E.2d 76; Haynes, App., 436 N.E.2d 874. However, Boykin violation affects only waiver part of guilty plea & does not undermine integrity/reliability of guilt determination. Showing that D was not represented by counsel or knowingly/intelligently waived such representation would satisfy second criterion. Morgan, 440 N.E.2d 1087; Hall, 405 N.E.2d 530. Habitual offender statute also allows D to assert defense if: (1) PFC has been set aside or (2) D has been pardoned. Ind. Code 35-50-2-8(b). Held, habitual affirmed.

RELATED CASES: Lawrence, 464 N.E.2d 1291 (if D does not object to validity of PFC at trial on habitual, issue is waived/not fundamental error; **NOTE:** unpublished order of U.S. Dist. Ct., No. Dist. of IN, granted D habeas relief, finding (1) cause for failure to object (ruling state precedent - Dossett, App., 368 N.E.2d 259, later *overruled*) & (2) D's counsel ineffective for failing to object (ruling US precedent - Burgett v. TX (1967), 389 U.S. 109, 88 S.Ct. 258); habeas order available from IPDC); Morgan (right to existing Tr. Ct. records of PFC).

TITLE: Maffett v. State

INDEX NO.: E.9.g.1.

CITE: (4-29-02), Ind. App., 766 N.E.2d 765

SUBJECT: Habitual offender - challenging prior out-of-state conviction

HOLDING: Tr. Ct. did not err when it allowed evidence of D's Kentucky conviction to support habitual offender finding. D argued that Kentucky conviction was invalid because he was not advised of right to confront & cross-examine witnesses nor of his right against self-incrimination when he pled guilty. Although habitual offender hearing is not proper forum for contesting validity of prior convictions, it is proper where conviction is constitutionally invalid. Edwards v. State, 479 N.E.2d 541 (Ind. 1985). Because D was represented by counsel in Kentucky, conviction was not constitutionally invalid. D argued that because Kentucky would no longer allow him to challenge conviction because sentence had already been served, Indiana Ct. should review conviction to insure that habitual offender finding is based on valid convictions. Because D did not file direct appeal or post-conviction relief of Kentucky conviction & because Indiana has interest in finality of judgments from other jurisdictions, Indiana Ct. was not proper forum to attack Kentucky conviction. Held, judgment affirmed. Brook, C.J., concurring.

TITLE: Rowold v. State

INDEX NO.: E.9.g.1.

CITE: (3/8/94), Ind. App., 629 N.E.2d 1285

SUBJECT: Habitual offender (HO); challenge to prior conviction during trial

HOLDING: To be sentenced as big habitual offender under Ind. Code 35-50-2-8, State has to prove beyond reasonable doubt that one of D's previous convictions was class A, B, or C felony. D may not be sentenced as HO under this section if all felonies relied upon are class D felonies. Here, D was convicted of criminal recklessness & his sentence was enhanced based upon prior federal felony convictions. D claimed that Tr. Ct. improperly enhanced his sentence by ten years for being HO under Ind. Code 35-50-2-8. Ct. held that under Ind. Code 35-50-2-1, both of D's previous convictions are considered class D felonies for HO purposes, because they are convictions from Ct. other than Indiana Ct. for which D could have been sentenced to more than one year. Because D's two federal felony convictions are considered class D felonies for HO purposes, State did not prove D was big HO, & thus, Tr. Ct. improperly enhanced D's sentence by ten years under Ind. Code 35-50-2-8. Held, conviction affirmed in part, reversed in part, & remanded for correction of D's sentence.

E. SENTENCING

E.9. Habitual offender (Ind. Code 35-50-2-8)

E.9.g.3. Effect of successful challenge

TITLE: Coble v. State

INDEX NO: E.9.g.3.

CITE: (12/12/86), Ind., 500 N.E.2d 1221

SUBJECT: Habitual - effect of successful challenge

HOLDING: Where 1 of 2 underlying felony convictions used to support habitual offender (HO) determination has been set aside, D's HO status & resulting sentence enhancement cannot stand. Here, Ct. rejects state's contention that sentence imposed after habitual finding is sentence for new crime, enhanced sentence to more severely penalize persons who are undeterred from criminal activity despite their prior convictions. Ct. finds statute clearly precludes use of vacated conviction as support for HO determination. Since statute would preclude use of prior convictions set aside after commission of third felony but before habitual offender trial, it is consistent with rational/plain language of statute that habitual offender sentence enhancement also cannot be based upon prior convictions set aside after habitual offender determination. Held, denial of motion to correct erroneous sentence set aside & cause remanded for resentencing. Shepard DISSENTS without opinion.

RELATED CASES: Jones, App., 819 N.E.2d 877 (Ct. affirmed vacation of HO conviction to which D had pleaded guilty, where D subsequently had one of underlying convictions to HO determination set aside); Tipton, App., 765 N.E.2d 187 (Tr. Ct. properly repositioned habitual enhancement from vacated felony count to another felony); Greer, 680 N.E.2d 526 (Coble does not prohibit Tr. Ct. on remand from revising sentence for surviving felony conviction to reflect HO enhancement); Coble, 523 N.E.2d 228 (on remand from vacation of D's habitual enhancement, Tr. Ct. has authority to resentence only on count to which habitual was attached); Timmons, 534 N.E.2d 234 (Tr. Ct. originally attached habitual to all counts; on remand Tr. Ct. has authority to resentence on all counts).

TITLE: Jaramillo v. State

INDEX NO.: E.9.g.3.

CITE: (03-11-05), Ind., 823 N.E.2d 1187

SUBJECT: Double jeopardy - retrial of habitual following reversal for insufficiency

HOLDING: In light of Monge v. California, 524 U.S. 721 (1988), Double Jeopardy Clause of U.S.

Constitution does not bar retrial of a habitual offender enhancement set aside on appeal for insufficient evidence. Notwithstanding Apprendi v. New Jersey, 530 U.S. 466 (2000), which largely adopted dissenting opinion in Monge that prior offense enhancement constitutes an element of an offense, Ct. held that Monge is good law & permits State to retry D because: 1) Apprendi discusses Monge without suggesting that it is no longer good law; 2) last year Ct. cited Monge for proposition that the Double Jeopardy Clause does not preclude retrial on a prior conviction used to support recidivist enhancement. Dretke v. Haley, 124 S.Ct. 1847 (2004). Given that Apprendi exempts from its reach the fact of a prior conviction, it makes sense that Monge, involving as it does a fact of a prior conviction, would be distinguishable from Apprendi. In holding that State may re-prosecute habitual offender enhancement after conviction therefore has been reversed on appeal for insufficient evidence, Ct. *overruled* Perkins v. State, 542 N.E.2d 549 (Ind. 1989) & other cases. Held, transfer granted, Ct. App.' opinion at 803 N.E.2d 243 vacated but summarily affirmed as to restitution issue, remanded to Tr. Ct.

RELATED CASES: Nunley, 995 N.E.2d 718 (Ind. Ct. App. 2013) (Jaramillo does not apply to reversals of habitual offender allegations wrongfully amended under Ind. Code 35-34-1-5); Moore, App., 769 N.E.2d 1141 (Ind. DJ clause does not bar retrial of habitual offender charge when it as earlier reversed on basis of insufficient evidence).

TITLE: Moore v. State
INDEX NO.: E.9.g.3.
CITE: (3rd Dist., 6-4-02), Ind. App., 769 N.E.2d 1141
SUBJECT: Double jeopardy - retrial of habitual following reversal for insufficiency
HOLDING: Article I, section 14 of Indiana Constitution does not bar retrial of habitual offender charge when it was earlier reversed on basis of insufficient evidence. Federal double jeopardy clause does not apply to noncapital sentencing proceedings. Monge v. California, 524 U.S. 721 (1998). Double jeopardy clause protects person from suffering second prosecution for same offense after acquittal; a second prosecution for same offense after conviction; & multiple punishment for same offense. Wilcox v. State, 748 N.E.2d 906 (Ind. Ct. App. 2001).

Despite the evidentiary protections that apply to habitual offender proceedings, habitual offender enhancements are not punishments; rather, they are sentencing tools enabling Tr. Ct. to impose an appropriate sentence for current conviction. Osborne v. State, 754 N.E.2d 916 (Ind. 2001). Because a habitual offender determination is not an "offense" within traditional understanding of the word, Indiana double jeopardy clause does not bar retrial of habitual offender proceedings even where initial habitual offender determination is reversed due to insufficient evidence. Accordingly, Tr. Ct. did not err in denying D's motion to dismiss habitual offender charge. Held, judgment affirmed.

RELATED CASES: Jaramillo, 823 N.E.2d 1187 (DJ does not bar retrial of HO enhancement set aside on appeal for insufficient evidence; see full review, this section).

TITLE: Spivey v. State

INDEX NO.: E.9.g.3.

CITE: (2nd Dist., 08-23-94), Ind. App., 638 N.E.2d 1308

SUBJECT: Habitual Offender (HO), One of three priors vacated

HOLDING: Post-conviction Ct. erred in failing to vacate HO enhancement where HO determination was by general verdict & one of three prior convictions relied on for enhancement was subsequently vacated. Ct. rejected State's argument, based on Eldridge v. State, Ind., 498 N.E.2d 12, that because it had alleged & proved three prior convictions, vacation of one of convictions did not require vacation of enhancement because two prior convictions still remained & D did not object at trial to general verdict. Ct. noted that while Eldridge did seem to support State's argument, subsequent case law indicated that where State alleged & proved more than two prior convictions & general verdict form was used; if one of convictions was subsequently vacated on constitutional grounds, HO enhancement must be vacated because it was impossible to know which convictions jury relied on. See, e.g., Boarman v. State, Ind., 509 N.E.2d 177; Nash v. State, Ind., 545 N.E.2d 566; Waye v. State, Ind., 583 N.E.2d 733; & Miller v. State, Ind., 417 N.E.2d 339. Ct. found that Ds are not required to insist at trial that jury designate which prior felonies are being used for enhancement to preserve issue if one of prior convictions is later vacated. While State may prove more than two prior convictions when seeking enhancement, practice carries danger that any surplus felonies may require vacation of enhancement if any convictions are found improper & general verdict form was used. Ct., in footnote, noted with approval procedure for special verdict form used in Broshears v. State, Ind. App., 604 N.E.2d 639. Held, HO enhancement reversed.

RELATED CASES: Parks, App., 921 N.E.2d 826 (it was not necessary for verdict form to show that jury found that State proved proper sequence of convictions).

TITLE: Tipton v. State
INDEX NO.: E.9.g.3.
CITE: (3-22-02), Ind. App., 765 N.E.2d 187
SUBJECT: Repositioning of habitual offender (HO) enhancement proper upon vacation & re- entry of felony conviction
HOLDING: D was convicted of criminal confinement (Count I), resisting (Count II), & criminal recklessness (Count III), with HO enhancement attached to Count II. Conviction on Count III was ultimately vacated & Count II was reduced from Class C felony to Class D felony. Post-conviction Ct. then attached HO enhancement to Count I. D argued that repositioning of HO enhancement from vacated felony count to another felony was improper. Ct. found facts in case analogous to those in Greer v. State, 680 N.E.2d 526 (Ind. 1997), where Supreme Ct. held that in case of HO proceeding following multiple convictions, jury finding of HO status is not linked to any particular conviction. While Greer did not expressly permit repositioning of enhancement upon vacation & re-entry of felony conviction for same count, neither did it expressly prohibit such repositioning. Further, nothing in Greer specifically limits repositioning to cases where it is necessary due to reversal of underlying conviction on direct appeal. Held, judgment affirmed; Riley, J., dissenting.

E. SENTENCING

E.9. Habitual offender (Ind. Code 35-50-2-8)

E.9.h. Prior convictions (unrelated) (Ind. Code 35-50-2-8(d)) (see, also F.1.a)

TITLE: Baxter v. State

INDEX NO.: E.9.h.

CITE: (3rd Dist., 12-15-97), Ind. App., 689 N.E.2d 1254

SUBJECT: Failure to instruct on definition of prior unrelated felony - fundamental error

HOLDING: Tr. Ct. committed fundamental error by failing to instruct jury on definition of prior unrelated felony. Failure to instruct jury on prior unrelated felony is fundamental error unless evidence shows proper sequence of convictions so jury could not have found that sequence was other than proper. Here, because State failed to show when second offense was committed, evidence did not show prior sequence of convictions. Thus, Tr. Ct. committed fundamental error. Held, denial of post-conviction relief reversed; Garrard, J., dissenting.

TITLE: Beach v. State

INDEX NO.: E.9.h.

CITE: (8/6/86), Ind., 496 N.E.2d 43

SUBJECT: Habitual - prior convictions; unrelated

HOLDING: Ct. rejects D's contention that 2 prior offenses are "related" because second of predicate offenses became a felony only because of first predicate felony. IL appellate Ct. has interpreted state's statutory phrase "any felony" to include only conduct which in its unenhanced state constitutes a felony. People v. Grayson (Ill. App. 1983), 456 N.E.2d 664; People v. Spearman (Ill.App. 1982), 438 N.E.2d 1320. D contends legislative intent of IN statute is similarly manifested by use of word unrelated. Ct. notes foreign state's classification of offense as felony or misdemeanor is not relevant for purposes of establishing prior felony conviction when determining habitual criminal status in IN. [Citations omitted.] Ct. finds phrase "unrelated felony" in IN's habitual offender statute means predicate felony is not part of res gestae of principle offense (Erickson, 438 N.E.2d 269), & that second predicate felony was committed after conviction of first predicate felony (Connell, 470 N.E.2d 701). Held, underlying convictions were sufficient to justify habitual offender enhancement.

RELATED CASES: Yeagley, 467 N.E.2d 730 (Crim L 1203.20; Tr. Ct. properly re-fused D's tendered instruction defining what constituted a "related" prior felony conviction where definition was incorrect).

TITLE: Bryant v. State

INDEX NO.: E.9.h.

CITE: (1-15-02), Ind. App., 760 N.E.2d 1141

SUBJECT: Habitual offender (HO) enhancement - improper sequence of prior offenses

HOLDING: D's HO enhancement was improper where prior offenses did not occur in required sequence. Evidence demonstrated that D: 1) committed first felony offense in 1979; 2) then committed, was convicted, & sentenced for second felony offense in 1985; & 3) was subsequently convicted & sentenced in 1986 for 1979 felony offense because that conviction had been vacated earlier in 1986. D correctly contended that offenses were not in correct sequence to support HO determination. Distinguishing Brown v. State, 712 N.E.2d 503 (Ind. Ct. App. 1999), Ct. concluded that D's guilty plea to habitual count had no effect in this case because D demonstrated that underlying convictions for HO enhancement were out of sequence. Further, D demonstrated that factual basis for HO determination was erroneous because fact that 1979 conviction had been vacated was not disclosed in information for habitual enhancement or at hearing at which he acknowledged sequence requirements. Held, denial of post-conviction relief reversed.

TITLE: Calvin v. State

INDEX NO.: E.9.h.

CITE: (12/21/2017), 87 N.E.3d 474 (Ind. 2017)

SUBJECT: Habitual offender - all non-Indiana felonies count as Level 6 felonies

HOLDING: Under Indiana Code § 35-50-2-1(a), the definition of a Level 6 felony includes convictions “in any other jurisdiction at any time, with respect to which the convicted person might have been imprisoned for more than one (1) year.” Thus, all non-Indiana felonies count as level 6 felonies. Further, INDIANA CODE 35-50-2-8(b) allows for a habitual offender enhancement if an offender has two prior unrelated felonies, one of which cannot be a Level 6 or Class D felony. The plain reading of those two statutes together means D's two Illinois burglary convictions cannot qualify him as a habitual offender. Court rejected the State’s invitation to invoke the absurdity doctrine, noting a “trifecta of cases dating back to 1991” that support the Court’s current reading of the habitual offender statute. See Rowold v. State, 629 N.E.2d 1285, 1287 (Ind. Ct. App. 1994); Cain v. State, 594 N.E.2d 835, 842–43 (Ind. Ct. App.), *clarified on reh’g*, 599 N.E.2d 625 (Ind. Ct. App. 1992); and Johnson v. State, 575 N.E.2d 282, 285 (Ind. Ct. App. 1991), *trans. denied*.

Additionally, invoking the absurdity doctrine would “expand criminal liability beyond the habitual-offender statutes’ long-settled plain meaning,” which would conflict with the principles of separation of powers and the narrow construction of criminal statutes. Even assuming the statutes are ambiguous, Court cannot “ignore the rule of lenity’s decree that the ambiguity ‘must be resolved against the penalty.’” Held, transfer granted, Court of Appeals' opinion at 80 N.E.3d 226 vacated, habitual enhancement reversed and remanded for retrial; Massa, J., dissenting on basis that recognizing the ambiguity in the statute would “allow for a more common-sense construction” of it. The Legislature's imprecision in drafting the statute “does not dictate this windfall for serious habitual offenders who built their records victimizing people in other states.”

NOTE: In 2018, Legislature amended IC 35-50-2-1 to provide that a level 6 felony conviction includes a conviction in another jurisdiction for which the offender might have been imprisoned for more than one year but less than 2.5 years.

TITLE: Clark v. State
INDEX NO.: E.9.h.
CITE: (07/19/85), Ind., 480 N.E.2d 554
SUBJECT: Habitual - prior convictions; sentencing/sequence issues
HOLDING: Evidence was insufficient to sustain habitual conviction where state failed to present evidence re dates of commission of priors. State must show D has been twice convicted & twice sentenced for felonies, that commission of second offense followed sentencing upon first & that commission of instant offense followed sentencing upon second conviction. Miller, 417 N.E.2d 339. Held, habitual reversed. Pivarnik CONCURS as to Miller reasoning, but DISSENTS as to sufficiency, finding proof of sequence.

RELATED CASES: Elmore, App., 688 N.E.2d 213 (fact that one out of 13 related priors was vacated was not grounds for reversal); Weatherford, 619 N.E.2d 915 (discusses burden of proof on sequencing in PCR proceedings; see card at X.1.d.); Lyons, App., 600 N.E.2d 560 (Tr. Ct.'s failure to instruct on sequencing required for definition of "two prior felonies" in habitual offender determination, did not constitute reversible error because D did not object or tender his own instruction, & evidence clearly showed sequencing was correct); Allen, App., 596 N.E.2d 280 (where state presented evidence of sentencing on one felony in October, 1983, & conviction on other felony in June, 1986, but did not present evidence of when other felony was committed, proper sequencing was absent to support HO finding); Bauer, 591 N.E.2d 564 (D was convicted & sentenced for first prior felony in 1977, & was sentenced for second prior felony on 7/28/81, but they were committed on 7/30/80, prior to sentencing on second unrelated prior offense, thus making him ineligible for habitual offender status); Brooke, 565 N.E.2d 754 (not necessary to prove precise date of second prior offense where there is testimony that it occurred after conviction & sentencing on first, vacating Brooke, App., 550 N.E.2d 89); Richards, 535 N.E.2d 549 (fact that 1 of 3 priors did not fit sequencing requirements was not grounds for reversal); Perkins, 483 N.E.2d 1379 (Crim L 1203.16, 1203.17; proof of habitual insufficient where prosecutor failed to prove Ds had been sentenced following prior unrelated felony convictions; held, habitual reversed); Yeagley, 467 N.E.2d 730 (Tr. Ct. did not err in refusing D's tendered instruction that sentences for priors must be completed prior to commission of instant offense).

TITLE: Clay v. State

INDEX NO.: E.9.h.

CITE: (10/6/82), Ind., 440 N.E.2d 466

SUBJECT: Habitual - is prior conviction felony or misdemeanor?

HOLDING: Prior conviction for which D could have been imprisoned for more than one year constitutes felony for purposes of habitual offender statute. D need not actually have been sentenced to period of more than one year. Rodgers, 422 N.E.2d 1211; Bernard, 230 N.E.2d 536; Stevenson, App., 327 N.E.2d 621. Here, D was convicted in 1973 of theft of less than \$100 & was sentenced to 360 days. Offense was a misdemeanor unless D had prior felony conviction. D had been convicted of auto theft in 1964 & sentenced to 60 days under first offender-minor statute which provided person under age 21 could be sentenced to period of less than one year for a felony conviction. Ct. finds 1964 conviction was a felony & therefore the 1973 conviction was also a felony. Held, sentence enhancement under habitual offender statute affirmed.

RELATED CASES: Welch, App., 828 N.E.2d 433 (D's third degree burglary conviction in Tennessee met definition of "felony" for purposes of habitual offender statute, because sentence imposed was three years; fact that D might have received something akin to a suspended sentence does not affect Ct.'s analysis); Hornbostel, App., 757 N.E.2d 170 (State provided Tr. Ct. with sufficient evidence to prove that D's Florida convictions were felonies); Cavendish, 496 N.E.2d 46 (Tr. Ct. erred in instructing jury that prior (TN) conviction was a felony without making proper determination of law (by citation to TN code) on the record); held habitual vacated & remanded); Donnersbach, 444 N.E.2d 1184.

TITLE: Johnson v. State

INDEX NO.: E.9.h.

CITE: (2d Dist. 07/18/91), Ind. App., 575 N.E.2d 282

SUBJECT: Habitual Offender (HO) - previous conviction prior to felony classifications

HOLDING: Theft conviction & sentence of 1 to 10 years, entered prior to 1976 classification of felonies, was similar to current 2 to 8-year sentence for Class C felony. Therefore, it was proper not to consider D's prior conviction as Class D felony, & finding of HO status, rather than Class D felony HO status, was not error. D was convicted in 1974 of theft of property valued at \$200 & given indeterminate sentence of 1 to 10 years. Other prior conviction & instant offense were both D felonies. Language of Ind. Code 35-50-2-1 defines foreign convictions where imprisonment could be for over one year as Class D felonies, but limits Ind. convictions in this category to those specifically designated as "Class D." Ct. agreed that interpretation weighed prior Ind. convictions more heavily than prior foreign convictions but found that meaning of statute was plain & unambiguous. Ct. also considered equivalency analysis discussed in Best, 566 N.E.2d 1027, & Slocumb, App., 568 N.E.2d 1068, using possible sentence D faced for prior conviction in determining its classification. Because sentence for theft over \$100 carried sentence of 1 to 10 years under prior code, Ct. found it equivalent to Class C felony, even though such theft would now be Class D felony. Because prior theft conviction was considered to be Class C felony conviction, D's sentence enhancement under regular HO statute was proper. Held, conviction & sentence affirmed, J. Shields, dissenting.

RELATED CASES: Calvin, 87 N.E.3d 474 (Ind. 2017) (Ct. rejected the State's invitation to invoke the absurdity doctrine and held that all non-Indiana felonies count as level 6 felonies; see full review, this section).

TITLE: Jones v. State

INDEX NO.: E.9.h.

CITE: (2d Dist. 04/15/91), Ind. App., 569 N.E.2d 975

SUBJECT: Class D Habitual Offender - felonies committed prior to statute enactment

HOLDING: D was properly sentenced as Class D habitual offender, even though prior felonies were committed before enactment of Ind. Code 35-50-2-7.1, because underlying felony was committed after statute was enacted. (Disagreeing with same Ct.'s prior decision in Moncrief, 525 N.E.2d 1286). D was convicted of D felony recklessness & committed in July 1988. Sentence was enhanced by finding he was Class D habitual offender, based on this conviction & 2 prior convictions from 1979 & 1982. Ct. of Appeals first looked at enactment of Class D habitual offender (DHO) enhancement, attendant modification of regular habitual offender (HO) statute in 1985, & uncodified savings clause, P.L. 328-1985, sec. 3. Ct. found that both savings clause & amendment to HO statute, Ind. Code 35-50-2-8(h), spoke of "all of the felonies relied upon for sentencing," & when read together with DHO statute, "all" refers to underlying as well as enhancing felony convictions. Therefore, DHO applies only to Ds whose underlying, as well as enhancing, felonies are all Class D, so as to make the HO & DHO statutes mutually exclusive. Ct. relied on Moredock, 514 N.E.2d 1247, wherein S.Ct. found D was eligible for HO enhancement despite sec. h of Ind. Code 35-50-2-8, because while enhancing felonies were Class D, underlying felonies were Class B, & therefore "all" of felonies relied on for sentencing were not Class D felonies. Ct. also noted that to construe statute as D argued would deny benefit of ameliorative statute to those who commit D felonies after 1985. Held, judgment affirmed, J. Hoffman dissenting as to DHO, relying on Moncrief, *supra*.

TITLE: Maffett v. State

INDEX NO.: E.9.h.

CITE: (4-29-02), Ind. App., 766 N.E.2d 765

SUBJECT: Habitual offender - challenging prior out-of-state conviction

HOLDING: Tr. Ct. did not err when it allowed evidence of D's Kentucky conviction to support habitual offender finding. D argued that Kentucky conviction was invalid because he was not advised of right to confront & cross-examine witnesses nor of his right against self-incrimination when he pled guilty. Although habitual offender hearing is not proper forum for contesting validity of prior convictions, it is proper where conviction is constitutionally invalid. Edwards v. State, 479 N.E.2d 541 (Ind. 1985). Because D was represented by counsel in Kentucky, conviction was not constitutionally invalid. D argued that because Kentucky would no longer allow him to challenge conviction because sentence had already been served, Indiana Ct. should review conviction to insure that habitual offender finding is based on valid convictions. Because D did not file direct appeal or post-conviction relief of Kentucky conviction & because Indiana has interest in finality of judgments from other jurisdictions, Indiana Ct. was not proper forum to attack Kentucky conviction. Held, judgment affirmed. Brook, C.J., concurring.

TITLE: Nash v. State

INDEX NO.: E.9.h.

CITE: (10/24/89), Ind., 545 N.E.2d 566

SUBJECT: Habitual - priors; vacated prior as 1 of 3 admitted

HOLDING: Where 1 of 3 prior felonies admitted had been vacated & jury returned general verdict of habitual offender (HO) status, retrial of habitual count is required. State alleged D to be HO, & offered evidence of 3 prior convictions, including convictions for theft & auto banditry entered same day. During jury deliberations, D pointed out that auto banditry conviction had been set aside on appeal. Jury returned general verdict finding D to be HO. State concedes on appeal that auto banditry conviction had been set aside. Generally, where more than 2 prior unrelated felony convictions are pled & proved, additional convictions are deemed to be harmless surplusage. Hudson, 443 N.E.2d 834. However, where 1 or more of surplus felonies do not meet statutory criteria & general verdict of HO is returned, retrial of HO allegation is required. Boarman, 509 N.E.2d 177; Miller, 417 N.E.2d 339. This is so because general verdict may rest upon ineligible prior alone. State argues that jury was presented with only 2 prior unrelated felony convictions, but in fact jury instructions referred to theft & auto banditry convictions as "felonies," not as single felony. Although state argues that D did not meet burden of proving at trial that prior felony had been vacated, there is no dispute that it has been, & error is fundamental. Held, reversed & remanded for resentencing.

RELATED CASES: Waye, 583 N.E.2d 733 (because jury used general verdict to return HO finding, & because one of prior convictions was mistakenly identified as felony when it was misdemeanor, finding was erroneous even though 2 proper prior felonies were proven as well).

TITLE: Owens v. State

INDEX NO.: E.9.h.

CITE: (06-29-10), 929 N.E.2d 754 (Ind. 2010)

SUBJECT: Habitual offender (HO) - conspiracy to deal is not same as dealing for purposes of prior conviction

HOLDING: A conviction for conspiracy to deal does not qualify as an unrelated conviction for habitual offender purposes because habitual offender statute (Ind. Code 35-50-2-8) does not list the offense. Further, well-settled Indiana law provides that conspiracy to commit a felony is distinct from the contemplated felony. An overt act supporting a conspiracy conviction may fall short of the possession, manufacturing, or delivery of a controlled substance necessary for the underlying offense. See Huff v. State, 443 N.E.2d 1234, 1238 (Ind. Ct. App. 1983). More generally, conspiracy was viewed as a lesser crime at common law, and most jurisdictions punish conspiracy less severely than the target offense.

Here, D was convicted of, inter alia, class A felony dealing cocaine within 1000 feet of a youth program center. His prior unrelated convictions included a 2004 conviction for conspiracy to deal and a 1995 conviction for dealing cocaine. Even though 2004 conspiracy conviction could not count as an unrelated felony conviction, the habitual adjudication and sentence were affirmed because the instant dealing conviction could be counted in calculating the total number of unrelated felony convictions. See Peoples v. State, 929 N.E.2d 750 (Ind. 2010). Held, transfer granted, Court of Appeals' opinion at 911 N.E.2d 18 vacated, judgment affirmed.

TITLE: Slocumb v. State

INDEX NO.: E.9.h.

CITE: (06/14/91), Ind., 573 N.E.2d 417

SUBJECT: Habitual Offender - prior convictions

HOLDING: Indiana Supreme Ct. granted transfer & held that where felony convictions relied on for habitual enhancement are from other states & penalties imposed are within range of Indiana Class D felonies, such felonies cannot support 30-year habitual enhancement, absent proof of higher classification, or that other state had potential for higher penalties. In Slocumb, 568 N.E.2d 1068, Ct. of Appeals had found that plain language of statute indicated that any out-of-state conviction for which sentence was greater than one year was to be considered as Class D felony & reversed habitual offender enhancement. Transfer was granted because issue presented new question of law. While reaching same conclusion as Ct. of Appeals, Supreme Ct. did so by somewhat different analysis, but did not directly contradict Ct. of Appeals' reasoning. Held, underlying conviction affirmed, habitual offender enhancement reversed.

RELATED CASES: Rowold, App., 629 N.E.2d 1285 (Tr. Ct. erred in sentencing D under Ind. Code 35-50-2-8, because prior federal convictions are to be treated as D felonies for purposes of enhancement. Prior convictions were 1980 federal conviction for mail fraud with sentence of 4 years, & 1986 federal conviction for fraudulent use of access device with sentence of 2 years. Ind. Code 35-50-2-1(a) provides in relevant part that class D felony conviction is "conviction, in any other jurisdiction at any time, with respect to which the convicted person might have been imprisoned for more than one (1) year." Ct. concluded that both prior convictions were considered D felonies for HO purposes).

TITLE: Spann v. State

INDEX NO.: E.9.h.

CITE: (3rd Dist., 6-9-97), Ind. App., 681 N.E.2d 223

SUBJECT: Habitual offender (HO) - evidence insufficient

HOLDING: Evidence was insufficient to support Tr. Ct.'s HO finding. To support HO status, State must establish that D had at least two prior unrelated felony convictions, & that (1) commission, conviction & sentencing on first offense preceded commission of second offense & that (2) commission of principal offense followed commission, conviction & sentencing on his second offense. Ind. Code 35-50-2-8; Weatherford v. State, 619 N.E.2d 915 (Ind. 1993). Here, State failed to present any evidence regarding commission dates of prior felonies. Ct. rejected State's argument that jury could have inferred from Tr. Ct.'s imposition of consecutive sentences that D committed second & third felonies before he was discharged from probation or imprisonment imposed on first felony. Docket sheet & order book entry evidencing consecutive sentence order is silent as to Tr. Ct.'s reason or statutory authority for sentence. Jury cannot infer Ct.'s reason from silence & then make further inference regarding required statutory sequence of commission dates. Held, HO determination vacated.

TITLE: Sparks v. State

INDEX NO.: E.9.h.

CITE: (5/10/89), Ind., 537 N.E.2d 1179

SUBJECT: Habitual offender -- gubernatorial pardons cannot be used by State to support habitual offender enhancement

HOLDING: D convicted of burglary while armed with deadly weapon, conspiracy to commit burglary, & attempted theft & was found to be habitual offender (HO). D appealed claiming that evidence presented was insufficient to support jury's finding he was HO. Evidence was presented which supported contention D committed three felonies & was sentenced for them. D introduced evidence of pardon he received on September 17, 1976 relating to one of convictions proved by State. Gubernatorial pardons cannot be used by State to support HO enhancement. In this case, however, since special Ct. could not determine which two out of three convictions jury relied on in finding D guilty. Held, conviction & HO status affirmed.

TITLE: Straub v. State

INDEX NO.: E.9.h.

CITE: (02/27/91), Ind., 567 N.E.2d 87

SUBJECT: Habitual offender - sufficiency of evidence, prior felony

HOLDING: D's prior Ohio conviction for carrying a concealed weapon, for which he received indeterminate suspended sentence & was placed on probation for one year, could not serve as prior felony for habitual offender enhancement because evidence was insufficient to show it was felony conviction. At trial, officer from Ohio county sheriff's department testified over D's objection, that crime carried penalty in Ohio of from one to 3 years, & on cross-exam conceded that it could have been treated as a misdemeanor. Officer also admitted that he did not know how it had been treated in D's case. State made no showing that documentary evidence to clarify situation was unavailable & did not ask Tr. Ct. to take judicial notice of Ohio statutes. There was also no showing that officer was qualified to offer testimony as to potential sentences for crimes or interpret Ohio sentencing statutes. Ct. noted that officer's testimony was parol evidence & it had previously held such evidence was insufficient to prove all elements of habitual offender enhancement absent showing of unavailable records, but did not decide whether parol evidence could ever be sufficient to prove whether prior conviction was felony. Ct. held that in this case it was insufficient. Held, underlying conviction for battery with deadly weapon affirmed, habitual offender enhancement vacated & discharge as to habitual offender ordered. See discussion on additional issue at K.1.c.

RELATED CASES: Bochner, App., 715 N.E.2d 416 (D's prior guilty plea to Missouri charge could not serve as prior unrelated felony because it resulted in suspended sentence and probation which is not final judgment under Missouri law).

TITLE: White v. State

INDEX NO.: E.9.h.

CITE: (03-20-12), 963 N.E.2d 511 (Ind. 2012)

SUBJECT: Habitual offender -sufficient evidence that priors were not juvenile adjudications

HOLDING: State presented sufficient evidence that D was an habitual offender. In order for a person to be a habitual offender, the State must prove beyond a reasonable doubt that the person had accumulated two prior unrelated felony convictions. Ind. Code 35-50-2-8(g). Here, State alleged that D was a habitual offender based, in part, on convictions for burglary and arson which D committed when he was fifteen years-old in Nebraska. In support of its allegation, State presented a certified criminal history record which stated that D was "guilty by conviction" for both offenses and that both offenses was classified as "felony." The docket also consistently referred to D as "D" and used the phrase "there is probable cause to believe D guilty as charged in said complaint." The "Felony Complaint" refers to "Burglary Class III Felony" and "Arson in the Second Degree Class III Felony." Finally, the "judgment and sentence" include imprisonment in the State Department of Correctional Services. Additional evidence that D was tried and convicted in adult court was unnecessary. Thus, State proved beyond a reasonable doubt that D had been convicted of two prior unrelated felonies, even though one set of felonies occurred when he was fifteen-years-old. Held, transfer granted, judgment affirmed and Court of Appeals' opinion at 944 N.E.2d 532 is summarily affirmed as to remaining issues, including the order vacating the receiving stolen property conviction and sentence imposed; Sullivan, J., dissenting.

E. SENTENCING

E.10 Death Penalty

TITLE: Kennedy v. Louisiana

INDEX NO.: E.10.

CITE: 554 U.S. 945, 128 S. Ct. 1, 171 L.Ed.2d 932 (2008) 10/01/2008

SUBJECT: Eighth Amendment bars death penalty for child rape

HOLDING: In 5-4 decision, Majority held the Eighth Amendment bars States from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the victim's death. The Amendment's Cruel and Unusual Punishment Clause "draws its meaning from the evolving standards of decency that mark the progress of a maturing society." The standard for extreme cruelty "itself remains the same, but its applicability must change as the basic mores of society change." Furman v. Georgia, 408 U.S. 238 (1972). Under the precept of justice that punishment is to be graduated and proportioned to the crime, informed by evolving standards, capital punishment must "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" Roper v. Simmons, 543 U.S. 551 (2005). A review of the authorities informed by contemporary norms, including the history of the death penalty for this and other non-homicide crimes, current state statutes and new enactments, and the number of executions since 1964, demonstrates a national consensus against capital punishment for the crime of child rape. Alito, J., dissented, with Roberts, C.J., and Scalia and Thomas, JJ. joining.

TITLE: Panetti v. Quarterman

INDEX NO.: E.10.

CITE: 551 U.S. 930, 127 S. Ct. 2842, 168 L.Ed.2d 662 (2007) 06/28/2007

SUBJECT: Death penalty - competence to be executed

HOLDING: Court held that Fifth Circuit Court of Appeals employed an improperly restrictive test when it considered Petitioner's claim of incompetency to be executed on the merits and did not afford a prisoner, Eighth Amendment protections. In district court, expert evidence produced by Petitioner concluded that, although he claims to understand that the State wants to execute him for murder, his delusions from mental illness show that he believes that is actually a sham and the State really wants to execute him to stop him from preaching. The Fifth Circuit held that such delusions are not relevant as long as he is aware of the State's position that he is being executed for his crime. This test ignores the possibility that even if such awareness exists, gross delusions stemming from a severe mental disorder may put that awareness in a context so far removed from reality that the punishment can serve no proper purpose. The Fifth Circuit's ruling is also inconsistent with Ford v. Wainright, 477 U.S. 399 (1986), where the Court held that the Eighth Amendment prohibits States from inflicting the death penalty upon insane prisoners. Although the Ford opinions did not set forth a precise competency standard, that Court did reach the express conclusion that the Constitution "places a substantive restriction on the State's power to take the life of an insane prisoner," because such an execution serves no retributive purpose. A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it. Court, however, declined to set down an actual test or rule governing competency determinations in part because the record was not as developed as it could be under the rejected standard used by the district court. Court also rejected State's claim that the district court lacked jurisdiction due to Petitioner's failure to raise a Ford-based incompetency claim in his first federal habeas application pursuant to 28 U.S.C. § 2254(b)(2). Court noted this would place Petitioner in the untenable position of either foregoing a Ford claim that has not ripened or raise the claim prematurely in his initial federal habeas application. Because all prisoners are at risk of deteriorations in their mental state, conscientious defense attorneys would be obliged to file unripe and often meritless Ford claims in every application. Thomas, J., filed a dissenting opinion, in which Roberts, C.J., and Scalia and Alito, JJ. joined.

RELATED CASES: Madison, 139 S. Ct. 718 (U.S. 2019) (case remanded to consider whether D's dementia leaves him so incompetent that he cannot be executed pursuant to Panetti v. Quarterman); Dunn, 138 S. Ct. 9 (U.S. 2017) (Tr. Ct. did not unreasonably apply U.S. Supreme Court precedent in concluding D was competent to be executed, even though he does not remember committing his crime, because "he recognizes that he will be put to death as punishment for the murder he was found to have committed").

TITLE: Ward v. Carter

INDEX NO.: E.10.

CITE: (2/13/2018), 90 N.E.3d 660 (Ind. 2018)

SUBJECT: DOC's change to lethal injection protocol upheld

HOLDING: The Indiana Department of Correction (DOC) can change its lethal injection protocols without going through the rule-making process governed by the Administrative Rules and Procedure Act (ARPA), because such protocols are internal procedures that do not carry the effect of law. In 2014, the DOC announced a change to a three-drug lethal cocktail for use in executions, substituting the drug Brevital for Sodium Thiopental. Ward, who has been on death row since 2007, argued that his rights under the ARPA were violated because the new three-drug cocktail was not adopted and promulgated as a substantive rule pursuant to the ARPA. The Tr. Ct. properly dismissed Ward's complaint, finding a change to the lethal injection protocol was considered an internal DOC policy, not a rule promulgation subject to the ARPA. An agency requirement has "the effect of law" when it prescribes binding standards of conduct for persons subject to agency authority, not just agency conduct. See Villegas v. Silverman, 832 N.E.2d 598, 609 (Ind. Ct. App. 2005); and Am. Trucking Ass'ns, Inc. v. City of Los Angeles, 569 U.S. 641, 649 (2013). The DOC's lethal injection protocol does not have the effect of law because it does not bind offenders' standards of conduct. Thus, the lethal injection protocol does not constitute a "rule" and is not subject to the strictures of the ARPA. Held, transfer granted, Court of Appeals' opinion at 903 n.E.3d 946 vacated, judgment dismissing Ward's complaint affirmed.

TITLE: Weisheit v. State

INDEX NO.: E.10.

CITE: (11/7/2018), 109 N.E.3d 978 (Ind. 2018)

SUBJECT: Denial of PCR affirmed in death penalty case

HOLDING: Indiana Supreme Court affirmed the denial of post-conviction relief from D's murder and arson convictions, as well as his death sentence. D claimed that he was denied effective assistance of counsel due to: 1) trial counsel's failure to fully investigate and obtain pertinent mental health records; 2) failure to call expert witnesses on D's mental health, traumatic brain injuries and future dangerousness; 3) failure to ask five jurors during voir dire if they would be willing to consider a term of years as a sentencing option; 4) failure to adequately present evidence in support of suppressing his pretrial statement; 5) failure to object to opinion testimony that the fire was intentionally set by D; and 6) cumulative errors. Despite not having the aid of Boys School records and certain witnesses, counsel was able to present a "rather complete picture" of D's mental health problems at trial. It was reasonable for counsel's strategy to focus on identifying and screening those jurors that would automatically vote for the death penalty. Wilkes v. State, 984 N.E.2d 1236 (Ind. 2013). And even assuming counsel was deficient for these errors, D failed to show a reasonable likelihood that the outcome of trial would have been different in light of the overwhelming evidence. Held, judgment affirmed. Slaughter, J., concurring in part, concluded that trial counsel's performance during the penalty phase was deficient, but that D failed to show prejudice given the heinousness of the proven statutory aggravators. Rush, C.J., dissenting in part, believes that D was prejudiced by counsel's cumulative deficiencies, which collectively undermine confidence in the legality of D's death sentence. A new penalty phase was warranted, as the jury was deprived "of enough essential information about [D's] background and mental health that his death sentence is not as reliable as the constitution requires. "Nor did they encounter any expert testimony about [D's] past adjustment to imprisonment, which might have served as a basis for a sentence less than death."

E. SENTENCING

E.10 Death Penalty

E.10.a. Life Without Possibility of Parole (LWOP)

TITLE: Bosse v. Oklahoma
INDEX NO.: E.10.a.
CITE: (10/11/2016), (U.S. Supreme Court 2016) 137 S. Ct. 1
SUBJECT: Partial prohibition of capital victim impact statements still stands
HOLDING: One of the limitations on victim impact statements set forth in Booth v. Maryland, 482 U.S. 496 (1987) still stands, the opinion of the Oklahoma Criminal Court of Appeals notwithstanding.

Booth interpreted the Eighth Amendment to prohibit victim impact statements that do not relate directly to the circumstances of the crime. It also held that the admission of the victim's family members' characterizations and opinions about the crime, the defendant, and appropriate sentence also violated the Eighth Amendment. Four years later in Payne v. Tennessee, 501 U.S. 808 (1991), the Court narrowed the scope of Booth, saying Booth was wrong to conclude that the Eighth Amendment prohibited victim impact evidence related to the personal characteristics of the victim and the emotional impact of the crimes on the victim's families. Applying Payne, the Oklahoma Criminal Court of Appeals erroneously concluded that Payne *overruled* the prohibition in Booth against characterizations of the defendant and opinions of the sentence. Held, judgment reversed.

TITLE: Helsley v. State

INDEX NO.: E.10.a.

CITE: (9/24/2015), 43 N.E.3d 225 (Ind. 2015)

SUBJECT: LWOP sentence not inappropriate

HOLDING: D's LWOP sentence was not inappropriate under Appellate Rule 7(B).

D, a Pike County EMT, killed two co-workers by firing multiple gunshots at close range, some as close as one foot away, striking each victim in the head and neck. In seeking a term of years, D cited his mental illness, difficult childhood, and lack of criminal history. At the sentencing hearing, even though D's expert testified that D was in a dissociative state at the time of the murders, the expert conceded D was at a heightened risk to be "faking all of this." The expert acknowledged this because no one else corroborated D's claims about his mental illness and difficult childhood. The Court found that D's crime was an unprovoked "cold, calculated double murder" and that his actions "did not show restraint or a lack of brutality." See Stephenson v. State, 29 N.E.3d 111, 122 (Ind. 2015). It also found D's professed bad childhood, and lack of criminal history, did not warrant a sentence revision. Held, judgment affirmed.

TITLE: Helsley v. State
INDEX NO.: E.10.a.
CITE: (9/24/2015), 43 N.E.3d 225 (Ind. 2015)
SUBJECT: Jury's weighing of aggravators & mitigators nonjusticiable
HOLDING: D murdered two co-workers, making him eligible for life without parole under the statutory aggravators listed in Ind. Code § 35-50-2-9(b)(7)-(8). D argued that the jury did not properly weigh the aggravators against the mitigators, primarily his difficult childhood, mental illness, and lack of criminal record.

D's claim is unreviewable. Weighing aggravating and mitigating circumstances is within the jury's purview. Bivins v. State, 642 N.E.2d 928, 946 (Ind. 1994). However, the jury is not required "to list mitigating circumstances or even provide information about its consideration of alleged mitigators." Weisheit v. State, 26 N.E.3d 3, 20 (Ind. 2015). Here, because the jury did not provide reasons for its sentence, there is no way for the Court to assess the jury's balancing of mitigating and aggravating circumstances. See Ward v. State, 903 N.E.2d 946, 960-61 (Ind. 2009). Held, judgment affirmed.

TITLE: Leonard v. State

INDEX NO.: E.10.a.

CITE: (5/2/2017), 73 N.E.3d 155 (Ind. 2017)

SUBJECT: LWOP "burning" aggravator; need not show intent

HOLDING: The State did not need to prove that Defendant intentionally burned the victim while the victim was alive to meet its burden to prove this aggravator beyond a reasonable doubt. Defendant lived with his girlfriend in Richmond Hill, a neighborhood on the southeast side of Indianapolis. To collect on a home insurance policy, they triggered a massive natural gas explosion of their home, which leveled the home of the neighbors, Dion and Jennifer Longworth. Jennifer died instantly, but Dion, trapped in the home's basement, died a slow death from burning and smoke inhalation while emergency responders tried to rescue him. In seeking a life without parole sentence, the State presented evidence that Defendant's acts qualified as an aggravator under Ind. Code § 35-50-2-9(b)(11), that is, he "burned, mutilated, or tortured the victim while the victim was alive," but specifically alleging only that Defendant burned Dion while he was alive, not that he tortured him.

Contrary to Defendant's argument, Nicholson v. State, 768 N.E.2d 443 (Ind. 2002) did not require the State to prove that Defendant intentionally burned Dion while he was still alive. In Nicholson, the defendant was charged with torturing the victim. The Court found the State failed to prove this aggravator because it did not prove "an appreciable period of pain or punishment intentionally inflicted and designed either to coerce the victim or for the torturer's sadistic indulgence." Id. at 447 (emphasis added). Despite the language of Ind. Code § 35-50-2-9(b)(11), an "intent" element should not be read into the "burned" aggravator. The definition of "torture" includes an "intent" component, but the definition of "burn" does not. See Webster's Third New International Dictionary (1993). Also, Defendant's reading of the statute would create an absurd result, because setting a fire to a residence by torch and burning a family alive would not satisfy Defendant's interpretation; it would be necessary for the perpetrator to "actively and personally burn each member of the family while alive." Held, judgment affirmed.

RELATED CASES: Tate, 161 N.E.3d 1225 (Ind. Ct. App. 2021) (jury reasonably relied on the number and nature of the victim's injuries in finding torture aggravator).

TITLE: Lewis v. State

INDEX NO.: E.10.a.

CITE: (10/4/2016), 59 N.E.3d 967 (Ind. 2016)

SUBJECT: LWOP sentence erroneous; court resentences D to 88 years

HOLDING: Tr. Ct. violated D's Sixth Amendment rights when it sentenced D to life without the possibility of parole after the jury was unable to reach a unanimous verdict as to whether the State proved its charged aggravating circumstance; the Tr. Ct. should have ordered a new penalty phase. See Kiplinger v. State, 922 N.E.2d 1261, 1265-66 (Ind. 2010). But because the State did not intend to pursue LWOP on a remand, the Court, in the interests of judicial economy, exercised its appellate authority to resentence D – Dennis v. State, 908 N.E.2d 209, 213 (Ind. 2009) - imposing sentences of 65 years for murder, 20 years for criminal deviate conduct as a B felony, and sustaining his previous three-year sentence for resisting law enforcement. Given the depravity of the offenses, the Court imposed consecutive sentences, creating an aggregate sentence of 88 years. Held, judgment reversed.

Note: In a previous appeal, the Court affirmed D's convictions, but remanded on the matter of the LWOP sentence. See Lewis v. State, 34 N.E.3d 240 (Ind. 2015). On remand the Tr. Ct. affirmed the LWOP sentence, and this appeal ensued.

TITLE: Oberhansley v. State

INDEX NO.: E.10.a.

CITE: (5/17/2023), Ind., 208 N.E.3d 1261

SUBJECT: Jury's LWOP recommendation implicitly reflected the statutory prescribed weighing of aggravators and mitigators --sentence not inappropriate under Indiana Appellate Rule 7(B) review

HOLDING: Defendant was charged with burglary and murder after originally being charged with the death penalty. The case involved heinous facts of Defendant breaking into his girlfriend's house and killing her in a most brutal fashion. Upon his arrest, Defendant was determined to be suffering from mental illness and there were repeated efforts to restore his competency. Eventually competency was restored, and Defendant filed notice he would plead the defense of insanity. The parties reached an agreement where Defendant would withdraw his insanity defense and the State would seek LWOP instead of the death penalty. The first trial ended in a mistrial. After another period where he was again being restored to competency, Defendant proceeded to trial and was found guilty. On appeal, he argued the jury lacked the verdict form for weighing aggravating and mitigating circumstances and failed to make a determination on that issue, which is a statutory prerequisite for an LWOP sentence. Defendant further argued the imposition of the LWOP sentence without the necessary jury finding violated his right to due process. The Indiana Supreme Court found the jury's LWOP recommendation implicitly reflected the necessary determination of the balance between aggravators and mitigators and thus, the trial court did not err in imposing the sentence and there was no due process violation. The Indiana Supreme Court also found Defendant's sentence was not inappropriate under Indiana Appellate Rule 7(B), in that the crime was brutal and even though Defendant had a history of mental illness, he exhibited deviousness and there were no positive character traits that would warrant a lesser sentence.

TITLE: Rhodes v. State
INDEX NO.: E.10.a.
CITE: (8-26-98), Ind., 698 N.E.2d 304
SUBJECT: Erroneous sentence - Life imprisonment without parole (LWOP)
HOLDING: D's sentence of LWOP was without statutory authorization & Tr. Ct. committed fundamental error when it sentenced D under statute which was not in effect at time of commission of crime. On date of offense, Ind. Code § 35-50-2-9 did not permit State to request sentence of LWOP. Sentence of LWOP was available only as alternative when State sought sentence of death, which here State had not. Sentence that exceeds statutory authority constitutes fundamental error. Bedwell, 481 N.E.2d 1090. Held, sentence vacated; D resentenced to term of 60 years.

TITLE: Shoun v. State

INDEX NO.: E.10.a.

CITE: (1/25/2017), 67 N.E.3d 635 (Ind. 2017)

SUBJECT: Sentence of life without parole affirmed

HOLDING: The defendant was sentenced to life without parole for the murder of his girl-friend, who was stabbed so many times that the coroner could not count the wounds. Her spleen and one kidney were completely cut out, and her pericardial sac was stabbed from inside her body. Evidence showed that almost all of her wounds were inflicted while she was still alive. The state sought life without parole based on the fact that the defendant was in the custody of the DOC at the time of the murder, and that he had mutilated the victim while she was alive. Before trial, defense counsel filed a petition alleging that the defendant had an intellectual disability and should not be subject to life without parole. However, before a hearing could be held, counsel withdrew his petition, and put on the record the defendant's IQ and adaptive functioning scores, as well as information about counsel's investigation, which included communication with his mother and juvenile probation officer, review of his school records, juvenile probation records, records from a juvenile placement and medical records. Counsel expressed his doubt that they could prove that the defendant's condition manifested itself prior to age 22, as required by statute. The defendant went to trial and was convicted and sentenced to life without parole, and he appeals his sentence raising three issues. First, the defendant argues that the trial court committed fundamental error by not finding that he had an intellectual disability and dismissing the LWOP request. Given the incomplete record and the fact that defense counsel withdrew the ID petition, the Court finds no fundamental error. Second, the defendant argues that the LWOP sentence is disproportionate in violation of Art. I, Sec. 16 of the Indiana Constitution. The Court rejects this argument, in light of the severity of the offense and the lack of proof of intellectual disability. Finally, the defendant argues that the sentence is inappropriate in violation of Appellate Rule 7(B). In support he raises his intellectual disability and "compromised psychological state," the influence of drugs and evidence that he was acting bizarre before and after the offense, and his abusive childhood. The Court argues that his intellectual disability was unproved, his drug use was voluntary, and he had an extensive criminal history. This, coupled with the severity of the offense, makes LWOP an appropriate sentence. Held, sentence of LWOP affirmed.

TITLE: Taylor v. State
INDEX NO.: E.10.a.
CITE: (12/5/2017), 86 N.E.3d 157 (Ind. 2017)
SUBJECT: LWOP inappropriate for 17-year-old Defendant
HOLDING: The 17-year-old juvenile defendant's LWOP sentence was inappropriate, so the aggregate sentence was revised to 80 years. See Ind. Appellate Rule 7(B).

Defendant and two friends went to visit D.G. at her residence. While Defendant was there, D.G. texted J.W., a former boyfriend, about having sex. Defendant was enraged when he learned this; he and his friends threatened to "punk out" J.W. Defendant threatened to assault D.G. if she did lure J.W. to come over. D.G. called J.W., who was suspicious that something was awry, but he eventually agreed to meet D.G. at a street corner near her residence. D.G. persuaded J.W. to stay at the corner for ten minutes, supposedly because D.G.'s sister would join them. Meanwhile, Defendant was lying in wait behind two residences. He emerged from behind the residences. When J.W. saw Defendant approach, he fled, but Defendant shot J.W. in the back; J.W. died soon thereafter. Defendant was convicted of murder and conspiracy to commit murder. The trial court imposed an LWOP sentence for murder and increased it by 15 years for a firearm enhancement. It imposed a 35-year sentence for conspiracy to commit murder, to run concurrently to the LWOP sentence. It then merged the enhancement and the concurrent sentence into the LWOP sentence.

The LWOP sentence was inappropriate. LWOP is the harshest punishment that may be imposed on a child, and it is a "denial of hope, a killer of behavior and character improvement . . . and a guarantee . . . of death behind bars." Brown v. State, 10 N.E.3d 1, 8 (Ind. 2014). Indeed, only four other Indiana juveniles have received such a sentence, and only one of those sentences was upheld. See Conley v. State, 972 N.E.2d 864, 880 (Ind. 2012).

Here, Defendant was only 17 when he committed his crimes. See Brown, 10 N.E.3d at 6. As this Court and the United States Supreme Court have recognized, "children are different." Id. (quoting Miller v. Alabama, 567 U.S. 460, 480 (2012)). "[J]uveniles are less culpable than adults and therefore are less deserving of the most severe punishments." Id. at 7 (citing Graham v. Florida, 560 U.S. 48, 68 (2010)). And while Defendant's difficult childhood does not absolve him of responsibility for his heinous and senseless crimes, LWOP "forfeits altogether the rehabilitative ideal." Brown, 10 N.E.3d at 8 (emphasis added) (quoting Miller, 567 U.S. at 473); see also Ind. Const. art. 1, § 18 ("The penal code shall be founded on the principles of reformation . . .").

As tragic and senseless as Defendant's crimes were, they were not as egregious as the crime in Conley; by strangling his 10-year-old brother with his bare hands, Conley committed a "drawn out crime" of "unimaginable horror and brutality." Conley, 927 N.E.2d 869-70, 880; id. at 876. Revising sentences by placing crimes "along a spectrum of heinous to horrific in no way diminishes the seriousness of any particular offense or the suffering of any particular victim." Hamilton v. State, 955 N.E.2d 723, 728 (Ind. 2011). "But it does uphold important distinctions by reserving the harshest punishments for the most heinous crimes, see id.; Inman v. State, 4 N.E.3d 190, 204 (Ind. 2014) as shown by the exceptional rarity of LWOP sentences for Indiana children, see Conley, 972 N.E.2d at 880 nn.6-8. [Thus], [o]ur collective judgment is that [Defendant's] character and the nature of his offense grievous as it was do not warrant making him Indiana's fifth juvenile sentenced to a guaranteed death in prison. Instead, we revise his sentence to an aggregate eighty years: sixty-five years the maximum term of years for murder, plus a fifteen-year enhancement for using a firearm." Held, judgment reversed. Slaughter, J., dissenting, joined by Massa, J., describing Defendant's crime as "depraved and heinous . . .

perpetrated against an unarmed and vulnerable juvenile who was lured into a death trap, where [Defendant] ambushed him. His crime reflects an utter disregard for human life.” Also, Conley should not set the floor “below which any juvenile whose offense is thought to be any less monstrous will obtain 7(B) relief.”

E. SENTENCING

E.11. Limitations on sentences

TITLE: J.R. v. State

INDEX NO.: E.11.

CITE: (6/25/2018), 100 N.E.3d 256 (Ind. 2018)

SUBJECT: Where parties agreed juvenile adjudications violated double jeopardy, vacating adjudication on another ground was inappropriate

HOLDING: On transfer, the Indiana Supreme Court ruled that where the parties agreed that the juvenile's adjudications violated the double jeopardy, the Court of Appeals should have vacated one of the adjudications on that ground, not on a ground that the parties had not briefed. J.R. was adjudicated delinquent for both dangerous possession of a firearm by a juvenile (Ind. Code § 35-47-10-5(a)) and carrying a handgun without a license ("CHWOL") (Ind. Code § 35-47-2-1(a)). In the original opinion, the Court of Appeals, sua sponte, ruled that it was impossible, as a matter of law, for a juvenile to commit CHWO since a juvenile is not eligible to get a license to carry a handgun. In its rehearing petition, the State contended this was error, arguing the statute enacted a blanket prohibition on carrying an unlicensed handgun, regardless of the reason the gun was not licensed. In its rehearing decision, the Court of Appeals affirmed its earlier decision and rationale. It also observed that the two statutes pertained to the same subject, and because the statute governing a juvenile's dangerous possession of a firearm was the more specific statute, it and it alone applied to the juvenile. See Sanders v. State, 466 N.E.2d 424, 428 (Ind. 1984) (where two statutes address the same topic, one generally and the other more specifically, the two statutes should be harmonized but if the statutes irreconcilably conflict, the more specific statute shall apply).

In granting transfer, the Supreme Court offered no analysis; it merely noted that the parties agreed there was a double jeopardy violation, and that the Court of Appeals should have vacated the CHWOL adjudication on that ground ("As the parties agree on disposition of the double jeopardy issue, we remand to the juvenile court to vacate the delinquency adjudication for CHWOL, and we affirm the delinquency adjudication for dangerous possession of a firearm."). See also J.G. v. State, 93 N.E.3d 1112, 1125 (Ind. Ct. App. 2018) (affirming delinquency adjudication for dangerous possession of a firearm and remanding to vacate adjudication for CHWOL where juvenile argued, and State conceded, the CHWOL adjudication should be vacated on double jeopardy grounds). Held, transfer granted, Court of Appeals ruling on suppression issue summarily affirmed, remaining part of Court of Appeals opinion vacated, and remanded.

. SENTENCING

E.11. Limitations on sentences

E.11.a. Multiple convictions (Ind. Code 35-41-5-3)

TITLE: Loman v. State
INDEX NO.: E.11.a.
CITE: (4th Dist., 09-29-94), 640 N.E.2d 745 (Ind. Ct. App. 1994)
SUBJECT: Double Jeopardy (DJ) - possession & obtaining drugs
HOLDING: D's convictions for both possession of controlled substance (PCS) & obtaining controlled substance by fraud (OCS) violated DJ because one cannot acquire possession by fraud through use of invalid prescription without also possessing it without valid prescription. Evidence showed D called doctor, saying he was patient of doctor's associate when he was not, & obtained prescription for pain killer, supposedly to "get him by" until he could come into office. When D called second time, doctor discovered he was not really patient & called police. D was found guilty of both PCS & OCS.

Ct. *sua sponte* found Tr. Ct. erred in entering judgment for both offenses, because they not only arose from same operative facts, but also were not distinct offenses for DJ purposes, Mudd v. State, Ind. App., 483 N.E.2d 782. Consistent with traditional DJ analysis, Ind. Code 35-38-1-6 precludes conviction & sentence on included offenses. D was charged with PCS without valid prescription under Ind. Code 35-48-4-7(a), & OCS by misrepresentation, fraud, forgery, deception, subterfuge, or alteration of prescription under Ind. Code 35-48-4-14(c).

To prove first offense, State showed D possessed drug without valid prescription, & to prove second, State showed he acquired same substance by fraud or deceit through use of invalid prescription. Ct. found that proof D obtained drug by fraud or deceit established possession without valid prescription as well, & that he couldn't acquire possession by fraud or deceit without also possessing substance without valid prescription. Therefore, DJ precluded convictions for both offenses. Held, judgment affirmed on other issues, & remanded for vacation of conviction for possession.

RELATED CASES: Bennett, 5 N.E.3d 498 (Ind. Ct. App. 2014) (Indiana double jeopardy prohibition violated where dealing and possession convictions based on the same cocaine); Harrison, 901 N.E.2d 635 (Ind. Ct. App. 2009) (Court, *sua sponte*, vacated D's conviction for possession of cocaine because it was based on the same cocaine which was used to prove dealing in cocaine).

TITLE: Wiseman v. State

INDEX NO: E.11.a.

CITE: (4/12/88), Ind., 521 N.E.2d 942

SUBJECT: Limitations on sentences - multiple forgeries; one offense

HOLDING: D was erroneously subjected to 7 forgery convictions for presenting 7 forged checks simultaneously to bank. Ultimate focus is identity of offense. Stout, 479 N.E.2d 563 (card at E.11.a). Single offenses may not be split up based upon each item involved to support multiple prosecutions. Id. Here, D presented 7 checks simultaneously to single teller, listed on single deposit slip. Conduct supports single count of forgery. Held, remanded for resentencing to reflect single forgery conviction.

RELATED CASES: Blythe, 14 N.E.3d 823 (Ind. Ct. App. 2014) (even though he falsified 9 separate signatures on election ballot, D committed only 1 forgery because he had but 1 purpose and falsified signatures during "relatively short period of time").

E. SENTENCING

E.11. Limitations on sentences

E.11.b. Multiple punishment/merger of offenses (Ind. Code 35-38-1-6) (see, also J.10.e)

TITLE: None

INDEX NO.: E.11.b.

SUBJECT: Double jeopardy - no merger

HOLDING: Glenn, 999 N.E.2d 859 (there was a sufficient separate basis to convict D of both resisting law enforcement and disorderly conduct); Storey, App., 875 N.E.2d 243 (because State used finished meth to prove dealing & unfinished meth to prove manufacturing, no DJ violation); Moore, App., 869 N.E.2d 489 (D's convictions for possession of anhydrous ammonia & possession of reagents or precursors are necessarily included offenses of dealing in methamphetamine under Ind. Code 35-38-1-67 & thus violate double jeopardy); Scott, App., 867 N.E.2d 690 (D's convictions for money laundering & forgery did not violate DJ under Ind. Constitution); Burton, App., (706 N.E.2d 568 (carjacking & kidnapping convictions premised on separate acts did not violate DJ); Emery, App., 696 N.E.2d 872 (convictions for attempted rape while armed with deadly weapon & sexual battery while armed with deadly weapon did not violate DJ; facts in this case supported convictions for two separate acts, despite their temporal proximity); Whitley, App., 553 N.E.2d 511 (resisting arrest & disorderly conduct do not merge); Stonebraker, 505 N.E.2d 55 (Crim L 202(1); conspiracy to commit murder & inducement to commit murder do not merge; inducement requires that offense actually be committed, while conspiracy requires overt act in furtherance of conspiracy); Christie, App., 536 N.E.2d 531 (where convictions for neglect & battery were based on separate acts, both convictions may stand); Haynes, App., 656 N.E.2d 505 (convictions & sentences for intimidation & harassment based on one telephone call to complaining witness did not violate double jeopardy); Tackett, 642 N.E.2d 978 (separate sentences for murder & criminal confinement appropriate, where confinement far exceeded that necessary to accomplish murder); Miller, App., 593 N.E.2d 1247 (no merger for convictions on 6 counts of dealing in unregistered securities, 6 counts of sale of securities by unregistered agent, & 6 counts of securities fraud because each set of 6 counts contained at least one element not common to other sets, even though all sets essentially stemmed from same acts. Sullivan, J., dissenting.)

TITLE: None

INDEX NO.: E.11.b.

SUBJECT: Double jeopardy - offenses merge

HOLDING: Bush, App., 772 N.E.2d 1020 (where there is no direct evidence that D had succeeded in completing manufacturing process for "batch" of meth, conviction for possessing precursors with intent to manufacture meth is LIO of dealing in schedule II controlled substance); Jenkins, App., 695 N.E.2d 158 (D improperly subjected to double jeopardy by convictions of both robbery & carjacking of same car; fact that robbery charge also included purse does not change fact that all elements of carjacking are found within robbery charge); Goudy, 689 N.E.2d 686 (where attempted carjacking charge & attempted robbery charge had identical elements of proof, both being based upon taking of same motor vehicle, "included offense" of attempted carjacking must be vacated pursuant to Ind. Code 35-38-1-6); Hicks, App. 631 N.E.2d 499 (Tr. Ct. properly merged child molestation conviction into confinement conviction, even though usually confinement would be merged into child molest. Here confinement was C felony, & child molest only D felony. Where D is convicted of both greater & lesser included offenses, greater conviction stands & lesser should be vacated, Jeffers, App., 605 N.E.2d 196. Although D argued greater conviction should merge into lesser in these circumstances, Ct. found no authority to support position.); Howard, 481 N.E.2d 1315 (battery merges into neglect of dependent as charged); Hall, 493 N.E.2d 433 (convictions & sentences for neglect of dependent vacated; convictions & sentences for reckless homicide affirmed; Ct. holds neglect of dependent is instrumentality by which reckless homicide was committed, *citing Howard*); Wethington, 560 N.E.2d 496 (where confinement is charged along with another offense, commission of which inherently involves restraint on victim's liberty, & where charging instrument makes no distinction between factual basis for confinement & facts necessary to prove element of other offense, confinement merges into other offense); Hopper, 475 N.E.2d 20 (criminal confinement (CC) merged with CC with deadly weapon; conviction for conspiracy to commit confinement merged with conspiracy to commit kidnapping); Mudd, App., 483 N.E.2d 782 (possession with intent to manufacture merged with dealing by manufacturing); Blanton, 533 N.E.2d 190 (public indecency merged into prostitution); Watkins, 575 N.E.2d 624 (child molest convictions merge, see card at K.3.e.3); Griffin, 583 N.E.2d 191 (attempted rape, sexual battery, & confinement, see card at E.11.b); Acuna, 581 N.E.2d 961 (child molest/sexual intercourse & incest merge, see card at K.3.e.3).

TITLE: Anderson v. State
INDEX NO.: E.11.b.
CITE: (5/26/83), Ind., 448 N.E.2d 1180
SUBJECT: Merger of offenses - attempted murder & armed robbery
HOLDING: Tr. Ct. did not err in sentencing D to separate terms for both attempted murder & armed robbery of same person. Although armed robbery conviction merges into felony murder conviction when armed robbery is underlying felony (Biggerstaff, 432 N.E.2d 34; Williams, 373 N.E.2d 142; Chandler, 363 N.E.2d 1233), merger doctrine is inapplicable in this case. There was no actual killing during robbery. Ct. analyzes charging information & finds D was charged with attempted murder rather than attempted felony murder, which is not a crime in Ind. (Head, 443 N.E.2d 44). D could be sentenced to separate terms because each crime involves an essential element distinct from the other. Held, no error. But see, England, App., 625 N.E.2d 1264 (where during robbery of grocery store, D shot & wounded customer who tried to stop him, convictions for A felony robbery & attempted murder were precluded by double jeopardy, because shooting of customer was used both to elevate robbery conviction & support attempted murder conviction. Held, remanded with instructions to enter conviction & presumptive sentence for B felony robbery. Ct. also noted in footnote that although usual remedy was to allow Ds to withdraw guilty pleas in light of sentencing error, here that procedure was not necessary because sentence imposed on remand would be less than that agreed to in plea agreement).

RELATED CASES: Wethington, App., 655 N.E.2d 91 (convictions for both robbery as Class & felony & attempted murder did not violate double jeopardy; class A enhancement of robbery conviction was based on bodily injury, while attempted murder charge was based on use of deadly weapon. See separate card at J.10.f).

TITLE: Armstead v. State

INDEX NO.: E.11.b.

CITE: (1st Dist. 2/7/90), Ind. App., 549 N.E.2d 400

SUBJECT: Harm to single entity arising from single incident

HOLDING: Single affray with multiple officers supports only one conviction for resisting law enforcement. Resisting law enforcement is offense against public administration, not against individual. See Ind. Code 35-44-3-3. Resisting law enforcement harms peace & dignity of state & its law enforcement authority, & harm caused by one incident is same regardless of number of officers resisted. Offense is akin in this way to bank robbery. Robbery of bank property harms only bank as single entity, regardless of how many bank employees are forced to relinquish bank property. Williams, 395 N.E.2d 239. Similarly, in context of resisting law enforcement, where only one incident occurs, there can be only one charge. See Brumbaugh, 491 N.E.2d 983; Roberson, 430 N.E.2d 1173; Shepler, 412 N.E.2d 62. Cf. Pettit, App., 439 N.E.2d 1175; Parks, 513 N.E.2d 170 (multiple incidents support multiple charges). Here, although 3 officers were involved in incident, only one conviction can stand. D argues that lesser offense against officer who actually put him under arrest should stand, with others set aside. However, Ct. App. reasons that D should be answerable for greatest harm resulting from incident. Held, felony conviction affirmed; misdemeanor convictions reversed.

RELATED CASES: Patton, App., 837 N.E.2d 576 (no error to charge & convict D with multiple counts of criminal recklessness against two different victims).

TITLE: Barker v. State

INDEX NO.: E.11.b.

CITE: (3rd Dist., 11-15-93), Ind. App., 622 N.E.2d 1336

SUBJECT: No double jeopardy (DJ) in enhancing multiple convictions for use of deadly weapon

HOLDING: No violation of DJ for Tr. Ct. to enhance D's convictions for rape, criminal deviate conduct, & robbery based on fact he was armed at time. D approached victim outside her home with knife & demanded money. He followed her inside house, forced her to perform fellatio, raped her twice & forcibly engaged in anal intercourse. He was convicted of rape as class A felony, criminal deviate conduct as class A, & robbery as class B, all enhanced by fact he was armed. Same DJ argument rejected in White, App., 544 N.E.2d 569, *trans. denied*, when Ct. noted element causing elevation of offenses not act of harming someone, but threat of harm from deadly weapon. Threats occurred during each of offenses & were distinct to each offense. Held, no DJ violation & convictions affirmed.

RELATED CASES: Hart, App., 671 N.E.2d 420 (use of deadly weapon occurred during course of 2 distinct offenses of escape & intimidation); Madden, App., 656 N.E.2d 524 (no DJ problem in enhancing D's convictions for attempted rape, confinement, & robbery based on his use of knife while committing 3 separate & distinct offenses); Lingler, App., 635 N.E.2d 1102 (No DJ problem in elevating two counts of rape, criminal deviate conduct, & confinement, all due to possession of deadly weapon, because each use of weapon was for commission of separate & distinct crime); Brown, App., 633 N.E.2d 322 (No error in elevating sentences for both Robbery & Criminal Confinement as Class B Felonies on basis D was armed with deadly weapon. While armed with knife, D robbed convenience store employee. Still armed with knife, he forced employee to office in rear of store, locked her in office & fled. D was not placed in double jeopardy because he committed two separate crimes while armed with knife, Smith, App., 611 N.E.2d 144, White, App., 544 N.E.2d 569. Threat of harm, which caused elevation of felonies, was distinct during commission of separate offenses.)

TITLE: Bass v. State

INDEX NO.: E.11.b.

CITE: (4/27/2017), 75 N.E.3d1100 (Ind. Ct. App. 2017)

SUBJECT: Double jeopardy - lesser included offense vacated

HOLDING: A concerned citizen found Defendant passed out in his vehicle in the middle of an intersection in Columbus. Defendant displayed the tell-tale signs of intoxication, and a subsequent blood draw showed he had methadone, oxycodone, and zolpidem in his blood. Defendant was charged two counts of OWI, one as a Class A misdemeanor (for the alleged endangerment of others) and one as a Class C misdemeanor (for operating with a schedule I or II controlled substance in the body).

At his bench trial, Defendant invoked the statutory defense, afforded to those who “consumed the controlled substance under a valid prescription . . .” Ind. Code § 9-30-5-1(d). The Tr. Ct. rejected the defense, finding that Defendant’s intoxication showed he had not taken the prescriptions “in the manner in which they were prescribed.” Thus, the Tr. Ct. found Defendant guilty of both counts of OWI and entered a “judgment” but not as to specific counts, stating the counts “merge for purposes of sentencing.”

Entry of conviction for both an offense and its lesser-included offenses is impermissible under both state and federal double jeopardy rules. Whitham v. State, 49 N.E.3d 162, 168 (Ind. Ct. App. 2015). If a Tr. Ct. does not formally enter a judgment of conviction on a finding of guilt, then it need not vacate the conviction, and merger is appropriate. Townsend v. State, 860 N.E.2d 1268, 1270 (Ind. Ct. App. 2007). However, if the Tr. Ct., as here, enters judgment of conviction on finding of guilt, then simply merging the offenses is insufficient and the lesser offense must be vacated. See id. Accordingly, Defendant’s lesser C misdemeanor conviction should be vacated on remand. Held, reversed and remanded with instructions. May, J., dissenting, arguing that the majority should have vacated Defendant’s Class C misdemeanor conviction on sufficiency of evidence grounds. While Tr. Ct. found that the statutory defense meant Defendant needed to take the drugs in the manner prescribed, the language of the defense is actually ambiguous, and thus should be interpreted in Defendant’s favor to meaning he needed to merely show he had a valid prescription, which he did.

Note: In 2017, IC 9-30-5-5(d) (Operating with controlled substance causing death) was amended to require prescriptions be taken in accordance with the prescription, which would result in a different outcome in death cases beginning 7/1/17.

TITLE: Britt v. State
INDEX NO.: E.11.b.
CITE: (1st Dist., 6-29-04), Ind. App., 810 N.E.2d 1077
SUBJECT: Double jeopardy - which conviction to vacate
HOLDING: Finding a double jeopardy violation, Ct. dismissed a possession of marijuana conviction as a Class D felony while affirming a possession conviction as a Class A misdemeanor. While typically a double jeopardy violation will result in the greater penalty remaining, Ct. kept the lesser-penalized conviction because of inconsistent judgments that found D guilty of cultivating less than 30 grams of marijuana while possessing over 30 grams of marijuana. Vacation of the conviction & sentence for the included offense of possession will result in D standing convicted of the offense having an additional element of proof but a lesser penalty. See Footnote 5. Held, judgment affirmed in part; remanded to vacate Class D felony possession conviction & to sentence accordingly.

TITLE: Bryant v. State
INDEX NO.: E.11.b.
CITE: (12/27/95), Ind., 660 N.E.2d 290
SUBJECT: Sentencing -- multiple punishment; payment of controlled substance excise tax (CSET)
HOLDING: D convicted of failure to pay CSET, growing & cultivating more than 30 grams of marijuana, maintaining common nuisance, & possession of less than 30 grams of marijuana. State imposed both civil & criminal sanctions on D for his failure to pay Indiana CSET. D appealed criminal penalty, claiming he was twice punished for same offense. Ct. held that civil & criminal penalties are each jeopardies & that both cannot be imposed without violating Double Jeopardy Clause of United States Constitution. Held, convictions for failure to pay CSET, growing & cultivating marijuana, & misdemeanor possession vacated, & conviction for maintaining common nuisance affirmed; DeBruler, J., concurring & dissenting; Sullivan, J., dissenting.

RELATED CASES: Tuan Chu, 991 N.E.2d 142 (Ind. Ct. App. 2013) (even assuming Bryant is still good law and is applicable in determining whether a civil sanction is a punishment for Indiana double jeopardy purposes, D did not show that the nonpayment penalties were punishments for double jeopardy purposes); Fassinger, 666 N.E.2d 58 (double jeopardy did not bar criminal prosecution for delivery of marijuana when CSET had been assessed & D agreed to pay tax; jeopardy does not attach until challenge to validity of assessment has been rejected, or when D pays tax in full & files claim for refunds from Department of Revenue under Ind. Code 6-8.1-9-1(a)); Hayse, 660 N.E.2d 325 (when CSET is assessed first & criminal conviction received later, criminal conviction is in violation of double jeopardy as second punishment for offense).

TITLE: Carter v. State

INDEX NO: E.11.b.

CITE: (7-17-01), Ind., 750 N.E.2d 778

SUBJECT: Merging lesser offense with greater offense - no double jeopardy violation

HOLDING: Where Tr. Ct. merges some offenses into others for purposes of sentencing, there is no double jeopardy violation. Kilpatrick v. State, 746 N.E.2d 52 (Ind. 2001). Ct. relieved Tr.Ct's. of practice adopted in Redman v. State, 679 N.E.2d 927 (Ind. Ct. App. 1997), which required Tr.Ct's. to order vacating lesser included offense on which there was no judgment & no sentence. There is no particular reason to order Tr. Ct. to vacate jury conviction on, for example, counts one or two where Tr. Ct. entered judgment only on count three. Held, transfer granted, order to vacate class A misdemeanor operating while intoxicated conviction reversed, judgment of Tr. Ct. affirmed.

Note: But see Clark, App., 752 N.E.2d 209 (noting that Kilpatrick decision recognized that vacating offense as opposed to merging it is appropriate at least in those instances involving lesser-included offenses).

RELATED CASES: R.W., 975 N.E.2d 407 (Ind. Ct. App. 2012) (reinstatement of lesser included offense of criminal mischief after Ct. vacated true finding for greater offense of attempted burglary did not violate double jeopardy); Green, 856 N.E.2d 703 (disapproving of Kochersperger, App., 725 N.E.2d 918 and Jones, App., 807 N.E.2d 58 on this issue & holding there is no need to remand on appeal to vacate lesser offense when offense was merged); Morrison, App., 824 N.E.2d 734 (unlike facts & circumstances of Laux, 821 N.E.2d 816, Tr. Ct. entered judgment of conviction upon each of jury verdicts & then "merged" convictions for sentencing purposes; merger after judgments of convictions have been entered does not cure double jeopardy violation); Payton, App., 818 N.E.2d 493 (Ct. vacated four convictions for sexual battery on double jeopardy grounds, as Tr. Ct.'s ruling that convictions merged with separate convictions for child molesting was not sufficient remedy & lesser-included offenses of sexual battery needed to be vacated).

TITLE: Ellis v. State
INDEX NO.: E.11.b.
CITE: (5/23/94), Ind. App., 634 N.E.2d 771
SUBJECT: Sentencing -- multiple convictions with same facts; criminal contempt & escape
HOLDING: D convicted of escape & criminal contempt. D claimed that once Tr. Ct. had found him in criminal contempt for fleeing Ct. room, principles of double jeopardy precluded subsequent trial for escape based on same conduct. Ct. held that imposition of cumulative punishment for D's flight from Ct. room did not violate double jeopardy principles because two offenses for which D was punished required proof of distinctly different elements. Held, conviction & sentence affirmed.

TITLE: Fletcher v. State

INDEX NO.: E.11.b.

CITE: (12/13/82), Ind., 442 N.E.2d 990

SUBJECT: Merger of offenses - murder & felony-murder

HOLDING: Where but one person dies in course of felonious assault, Tr. Ct. may not impose sentence for both murder (Ind. Code 35-42-1-1(1)) & felony-murder (Ind. Code 35-42-1-1(2)). Franks, 323 N.E.2d 221. Here, D was charged with & convicted of murder & felony-murder resulting from death (caused during robbery) of one person. Tr. Ct. sentenced D on both counts. Held, remanded with instructions to vacate murder sentence & to permit felony-murder sentence to stand.

TITLE: Fuller v. State

INDEX NO.: E.11.b.

CITE: (2nd Dist., 08-29-94), Ind. App., 639 N.E.2d 344

SUBJECT: Murder & felony murder merger - which to vacate

HOLDING: Where D was convicted of murder, felony murder, robbery, & confinement, confinement merged into robbery conviction, & felony murder merged into murder conviction. Ct. determined that confinement, as charged, alleged no confinement beyond that necessary to commit robbery, & therefore offenses merged. Although facts would have supported separate basis for confinement conviction because victim was forced to move to back of store, State alleged same confinement necessary to robbery in information. It was also necessary to merge murder & felony murder convictions, because only one person was killed. Ct., however, rejected D's argument that murder merged into felony murder, thus creating merger for felony murder & robbery. Ct. acknowledged divergence of authority on method to merge murder & felony murder, *i.e.*, which offense merged into other. In some cases Cts. have merged murder into felony murder, in others they have merged felony murder into murder, & in others Ct. did not specify. Ct. noted, however, that none of those cases were convictions for felonies in addition to murder charges involved. Guided by Pointon v. State, Ind., 408 N.E.2d 1255, Hicks v. State, Ind. 544 N.E.2d 500, & Johnson v. State, Ind., 510 N.E.2d 174 (vacating felony murder convictions where other felonies were involved), Ct. held that when D is convicted of murder, felony murder, & additional felony, felony murder should be merged into murder. To hold otherwise would permit person committing intentional murder while committing another felony to use felony murder rule to escape punishment for underlying felony. When person intentionally murders victim while committing another felony, double jeopardy does not bar punishment for both. Held, remanded with instructions to vacate convictions for confinement & felony murder, otherwise affirmed.

TITLE: Games v. State

INDEX NO.: E.11.b.

CITE: (7-22-97), Ind., 684 N.E.2d 466

SUBJECT: Double jeopardy (DJ) - multiple punishments

HOLDING: When analyzing claim of multiple punishments imposed in single criminal proceeding, U.S. S.Ct. has declared that sole purpose of DJ clause is to ensure that Ct. imposes no more punishment on D than legislature intended. Missouri v. Hunter, 103 S.Ct. 673 (1983). Whether multiple punishments may be imposed against D in single proceeding is, thus, solely matter of legislative intent. Iannelli v. U.S., 95 S.Ct. 1284. It is only when legislative intent to impose multiple punishments is uncertain that further inquiry is required. This inquiry, known as "same elements" test, determines whether legislature intended to impose separate punishments for multiple offenses arising in course of single act or transaction. Blockburger v. U.S., 52 S.Ct. 180 (1932). Whether there are two offenses or only one under Blockburger is determined by whether each statutory provision requires proof of an additional fact which the other does not. If Blockburger is satisfied, Ct. assumes that statutes are not punishing same offense & multiple punishment is constitutionally permitted.

Constrained by Supremacy Clause to bring decisions interpreting federal DJ Clause in line with federal jurisprudence, Ct. recognized that "same elements" test requires that Ct. look only to statutory elements of offenses, not to charging information, jury instructions outlining elements of crime, or underlying proof needed to establish elements. Held, judgment of post- conviction Ct. affirmed, with exception that conviction for conspiracy to commit battery must be vacated on DJ grounds; Sullivan, J., concurring.

Note: Ct. expressed no opinion as to whether DJ clause of Ind. Constitution, Art. I, Sec. 14, provides distinction between "successive prosecution" & "successive punishment" strands of DJ.

RELATED CASES: Richardson, 717 N.E.2d 32 (Ind. Constitution provides broader protection against DJ than U.S. const.; see card at J.10.f); Fulk, App., 686 N.E.2d 165 (imposition of maximum consecutive sentences for battery & invasion of privacy did not violate DJ); Sharp, App., 684 N.E.2d 544 (no DJ violation to base conspiracy conviction & prior conviction on same illegal drug activity).

TITLE: Gaunt v. State

INDEX NO.: E.11.b.

CITE: (4/28/23), Ind. Ct. App., 209 N.E.3d 463

SUBJECT: COA panel holds Wadle supplanted the common-law double jeopardy rules identified in Richardson

HOLDING: Defendant was convicted of aggravated battery, a Level 1 felony, and neglect of a dependent, a Level 1 felony, based on the victim's death. Defendant argued that elevating both of his convictions based on the same death constituted double jeopardy under one of the common-law rules that were identified in Richardson v. State, 717 N.E.2d 32 (Ind. 1999), and adopted by the Supreme Court in Guyton v. State, 771 N.E.2d 1141 (Ind. 2002). One of five common law rules identified in Justice Sullivan's concurrence was conviction and punishment for an enhancement of a crime where the enhancement is imposed for the very same behavior or harm as another crime for which the defendant has been convicted and punished. The Court of Appeals acknowledged Defendant would probably prevail under this common law rule. Still, it held that Wadle supplanted the common-law double jeopardy rules identified in Justice Sullivan's concurrence in Richardson. First, the Court said, "Wadle explicitly observed that the Indiana Supreme Court's adoption of the common-law rules 'announced by Justice Sullivan' as additional double jeopardy tests independent of Richardson 'generat[ed] confusion among the bench and bar over the proper standard to address claims of double jeopardy' and resulted in 'a patchwork of conflicting precedent.' Further, Wadle's stated purpose was to 'articulate an analytical framework in which to resolve claims of substantive double jeopardy under Indiana law.' This discussion suggests that, in announcing a new framework for analyzing substantive double jeopardy claims, the Court did not wish to retain the separate and conflicting common-law rules." Second, the Court said, "Wadle enumerated at least three other sources of protection against multiple punishments other than the Wadle and Powell tests," but common law double jeopardy rules were not one of those. Third, Wadle noted there is legislation codifying several common-law double jeopardy rules in Indiana Code §§ 35-38-1-6 and 35-41-5-3. Fourth, the Court cited decisions from other Court of Appeals panels, which have held that common-law rules did not survive Wadle: Morales v. State, 165 N.E.3d 1002, 1006-07 (Ind. Ct. App. 2021) (elevation rule), *trans. denied*; Woodcock, 163 N.E.3d at 870-71 ("very same act" rule); Jones v. State, 159 N.E.3d 55, 62 (Ind. Ct. App. 2020) (continuous crime doctrine), *trans. denied*; Hill, 157 N.E.3d at 1229 (all common-law rules); Diaz v. State, 158 N.E.3d 363, 368 (Ind. Ct. App. 2020) (same); *but see* Shepherd v. State, 155 N.E.3d 1227, 1240 (Ind. Ct. App. 2020) (holding that the same act rule survived Wadle), *trans. denied*; Rowland v. State, 155 N.E.3d 637, 640 (Ind. Ct. App. 2020) (same). Therefore, the Court concluded it could not consider Defendant's reliance on the common-law enhancement rule to assess whether the convictions violated double jeopardy. And because Defendant made no argument that his convictions violated double jeopardy under Wadle, the Court could not say his double jeopardy rights were violated. However, the Court agreed that the trial court erred by crediting Defendant with only 790 days of actual time and 263 days of good time credit. It remanded with instructions to credit Defendant with 915 days of actual time and 305 days of good time credit. Held: affirmed in part, reversed in part, and remanded.

TITLE: Griffin v. State
INDEX NO.: E.11.b.
CITE: (2d Dist. 12/31/91), Ind. App., 583 N.E.2d 191
SUBJECT: Double jeopardy precludes convictions for attempted rape, sexual battery, & confinement
HOLDING: D's convictions for sexual battery & confinement were precluded because of his conviction for attempted rape. Substantial step alleged in attempted rape was throwing victim to ground, pulling off her clothes, & touching, kissing & struggling with her. Confinement was charged as holding victim on ground. Because there was no evidence of extraneous interference with victim's liberty other than that necessary to effectuate attempted rape, confinement was included offense of attempted rape & conviction was precluded by double jeopardy.

Double jeopardy also precluded conviction for sexual battery, because it differed from attempted rape only in respect that less serious harm or risk of harm to victim, or lesser kind of culpability was required to establish its commission. Ind. Code 35-41-1-16(3), Watkins, 575 N.E.2d 624, Bowling, 560 N.E.2d 658. Bowling & Watkins constituted an implicit overruling of prior decision in Scrougham, App., 564 N.E.2d 542, where Ct. had found separate convictions & sentences for rape & sexual battery were not violative of double jeopardy but did not address statutory lesser harm standard. Held, convictions for confinement & sexual battery reversed & vacated, conviction for attempted rape affirmed. **Note:** Good discussion of double jeopardy.

RELATED CASES: Newgent, App., 897 N.E.2d 520 (where prosecutor charged and argued that D aided in murder by confining victim and by providing boyfriend the murder weapon, there was reasonable possibility that jury used the confinement and the providing of murder weapon to support both D's convictions for aiding in murder and confinement resulting in SBI despite other evidence being introduced); Williams, App., 889 N.E.2d 1274 (double jeopardy provision of Indiana Constitution barred D's criminal confinement conviction where reasonable probability exists that jury used same evidentiary facts to establish essential elements of attempted rape and battery); Bradley, 867 N.E.2d 1282 (D's convictions for both criminal confinement as a Class B felony & aggravated battery violated the "actual evidence" test for reviewing claims under the Double Jeopardy Clause of Indiana Constitution, because there is a reasonable probability that the facts used by the jury to establish essential elements of criminal confinement were also used to establish essential elements of aggravated battery); Gates, 759 N.E.2d 631 (D's confinement of victim was distinct & elevated from restraint necessary to commit other charged crimes); Byrd, App., 707 N.E.2d 308 (D's conviction & sentence for both attempted rape & lesser included offense of sexual battery violated Ind. Code 35-38-1-6); Ely, App., 655 N.E.2d 372 (convictions for both confinement & battery violated double jeopardy, where charging informations & evidence at trial relied on same facts to support both convictions).

TITLE: Grinstead v. State

INDEX NO.: E.11.b.

CITE: (7-22-97), Ind., 684 N.E.2d 482

SUBJECT: Double jeopardy - "same elements" test; multiple punishment claim under Federal Constitution

HOLDING: Review of multiple punishments under Double Jeopardy Clause of Federal Constitution requires that Ct. look only to relevant statutes in applying Blockburger "same elements" test, & no further. Factual elements in charging instrument & jury instructions are not part of this inquiry. For reasons explained in Games, this section, rule of Derado v. State & other cases suggesting additional consideration of instructions & manner in which offenses are charged, is no longer accurate statement of federal double jeopardy law. Here, D advanced his double jeopardy claim only under Federal Constitution. Convictions & consecutive sentences for murder & conspiracy to commit murder passed "same elements" test & did not violate D's federal constitutional right to be free from double jeopardy. Held, convictions affirmed.

RELATED CASES: Richardson, 717 N.E.2d 32 (Ind. Constitution provides broader protection against DJ than U.S. const.; see card at J.10.f); Potter, 684 N.E.2d 1127 (convictions for rape & intimidation based on D's same threats to victim did not violate DJ).

TITLE: Hill v. State

INDEX NO.: E.11.b.

CITE: 157 N.E.3d 1225 (Ind. Ct. App 2020) 10/05/2020

SUBJECT: Reckless homicide convictions arising from two fatalities did not violate double jeopardy under either old law or recently adopted test

HOLDING: Defendant's two reckless homicide convictions arising from one collision resulting in two fatalities did not violate double jeopardy under either the prior standard of Richardson v. State, 717 N.E.2d 32 (Ind. 1999) or the new standard set forth in Wadle v. State, 151 N.E.3d 227 (Ind. 2020) and Powell v. State, 151 N.E.3d 256 (Ind. 2020), which did away with all existing rules and constitutional tests for substantive double jeopardy. "The only common-law rule that survived Wadle and Powell is the continuous-crime doctrine, though only as part of the new tests, not as a separately enforceable double-jeopardy standard." In a footnote, the Court noted that it disagreed with prior Court of Appeals cases issued last month — Shepherd v. State and Rowland v. State — that "left undisturbed" the five categories of common-law protections identified by Justice Sullivan's concurring opinion in Richardson and later adopted by the full court in Guyton v. State, 771 N.E.2d 1141 (Ind. 2002). Regardless, Defendant's convictions did not run afoul of the "very same act" rule, which prohibits "[c]onviction and punishment for a crime which consists of the very same act as another crime for which the defendant has been convicted and punished."

TITLE: Jaske v. State
INDEX NO.: E.11.b.
CITE: (6/1/89), Ind., 539 N.E.2d 14
SUBJECT: Double jeopardy (DJ) - merger of offenses
HOLDING: DJ barred D's conviction & sentence for both battery & involuntary manslaughter where both resulted from same acts. D beat another prison inmate to death during "initiation" rite & was convicted of both battery & involuntary manslaughter. Because both convictions arose from same transaction, Ind. S. Ct. *sua sponte* inquires as to whether each conviction required proof of additional fact which other did not. See Elmore, 382 N.E.2d 893. Ct. looks at both statutory provisions & factual allegations in charging information. Hall, 493 N.E.2d 433. Here, battery charge required proof of no more facts than involuntary manslaughter charge. Held, remanded with instructions to vacate battery conviction. **Note:** See also separate subject matter cards at E.11.b: Double jeopardy - offenses merge; Double jeopardy - no merger.

TITLE: Johnston v. State

INDEX NO.: E.11.b.

CITE: (09/30/91), Ind., 578 N.E.2d 656

SUBJECT: Murder & attempted murder, no merger

HOLDING: Where on two occasions which were distinct in time, D attempted to murder victim, & on 3d occasion was successful, convictions on 2 attempted murder counts & one murder count were proper. D & accomplices first took victim to farm, where they hit him from behind with brick, beat him with nun-chucks, took his money, & left him for dead. Few hours later they returned to dispose of body, found he was still alive, beat him severely again, tied him up, smashed his head, wrapped body in tarp & threw body over bridge. Victim's body landed on bank of stream rather than in water, & when D went to body, he found victim was again still alive. Victim was beaten again & placed in water, with head held under water until he stopped moving & was dead. Ct. found time sequence showed each murder attempt & murder were separate & distinct acts & supported multiple convictions. The two attempts were accomplished by beatings, while murder was accomplished by beating & drowning. Held, convictions affirmed, J. Shepard dissenting as to merger of second attempted murder & murder.

TITLE: Kellogg v. State

INDEX NO.: E.11.b.

CITE: (1st Dist., 06-30-94), Ind. App., 636 N.E.2d 1262

SUBJECT: Double jeopardy (DJ) - Operating while intoxicated (OWI) & Neglect of Dependent

HOLDING: Convictions for both OWI & neglect of dependent were precluded by DJ, because both charges were predicated on same conduct. Although each offense had element not required for conviction on other; in information State relied on same conduct, operating car while intoxicated, to support both charges. Information for neglect of dependent stated D placed dependent in dangerous situation by operating vehicle while intoxicated, or with BAC > .10%, while she was passenger. Therefore, to prove necessary element of neglect of dependent, State relied on same conduct necessary to show OWI. After reviewing cases both finding DJ precluded multiple convictions & those finding it did not, Ct. determined that D's convictions for both offenses were not predicated on separate & independent acts at different times, but arose from single incident of drunk driving, making OWI factually included offense of neglect of dependent. Held, multiple convictions precluded by DJ, & cause remanded to vacate conviction for OWI & resentence on neglect of dependent, Robertson, J., dissenting on DJ issue.

TITLE: Kelly v. State

INDEX NO.: E.11.b.

CITE: (2d Dist. 9/14/88), Ind. App., 527 N.E.2d 1148

SUBJECT: Double jeopardy (DJ) - driving while intoxicated (DWI); multiple injuries

HOLDING: DJ precludes multiple punishments for multiple personal injuries resulting from same accident. D was convicted of both DWI resulting in death & DWI resulting in serious bodily injury, based on accident in which man was killed & his wife was injured. D received consecutive sentences, which he challenges because only one act of criminal conduct occurred. Traditional Blockburger analysis is not adequate, since issue does not concern same act punished as 2 separately defined offenses. Rather, D is being punished twice for 2 counts of same offense. Focus must be on definition of offense itself. Hurst, App., 464 N.E.2d 19. DWI is offense regardless of result. Ind. Code 9-11-2-2. It is conduct that is proscribed because of likelihood of bad result. See LaFave & Scott, Criminal Law 7-8. Unlike such offenses as murder, manslaughter, or battery, where bad result is gravamen of offense & therefore is included as element, result of bodily injury or death is simply factor enhancing punishment for offense. See Ind. Code 9-11-2-4,5. This intent is irrebuttably evidenced in language of these statutes, which identify "the crime" as violation of Ind. Code 9-11-2-2: "A person who violates [Ind. Code 9-11-2-2] commits a Class ... felony if the crime results in..." (Emphasis in opinion.) Held, conviction for DWI resulting in serious bodily injury vacated. **Note:** Summarily affirmed at 539 N.E.2d 25, Givan & Pivarnik, JJ., DISSENTING. 1994 amendment to OWI injury statute, Ind. Code 9-30-5-4, provides for separate offense for each victim.

RELATED CASES: Stafford, 83 N.E.3d 721 (Ind. Ct. App. 2017) (Ct. "constrained" to follow Kelly to hold that one act of reckless driving in a highway work zone cannot sustain two Class C felony convictions, even though it resulted in two deaths), McElroy, App., 864 N.E.2d 392 (no DJ violation for convictions & sentences for OWI causing death & failure to stop at accident resulting in death based on one death; D only punished once for causing the death because the death was only a circumstance of failure to stop & causation was not an element); Scuro, App., 849 N.E.2d 682 (D could not be convicted of 3 counts of dissemination of matter harmful to minors based on one occurrence, even though there was more than one victim); Nield, App., 677 N.E.2d 79 (convictions for 2 counts of leaving scene of accident violated DJ, because convictions stemmed from only one accident); Robinson, App., 835 N.E.2d 518 (distinguishing Nield, Ct. held D's convictions of failure to stop at accident resulting in injury & failure to stop at accident causing damage to property did not violate federal or state DJ principles even though convictions arose from single accident); Walker 582 N.E.2d 877 (see card at E.11.b).

TITLE: King v. State
INDEX NO.: E.11.b.
CITE: (1/5/88), Ind., 517 N.E.2d 383, *overruled* on other grounds 642 N.E.2d 511
SUBJECT: Two sentences for same injurious consequences - barred by double jeopardy (DJ)
HOLDING: Injuries to 2 victims cannot support enhancement of burglary to Class A felony where they also support murder & attempted murder convictions. Multiple punishment for same injuries prohibited. NC v. Pearce (1969), 395 U.S. 711, 89 S.Ct. 2072; Thompson, 290 N.E.2d 724 (Class A burglary & attempted murder conviction cannot stand on same serious bodily injury); Flowers, 481 N.E.2d 100 (same bodily injury cannot elevate 4 separate felony convictions). State argues Bevill had only 1 victim & this case has 2. However, this is not significant. D already punished with respect to each victim. To punish D again violates DJ. Held, remanded to vacate Class A burglary sentence & resentence as Class B.

RELATED CASES: Caldwell, 43 N.E.3d 258 (Ind. Ct. App. 2015) (enhancement of burglary and attempted rape convictions based on same injuries violated Indiana double jeopardy prohibition); Williams, App., 757 N.E.2d 1048 (there was reasonable possibility that evidentiary facts used by jury to establish essential elements of robbery as Class A felony were also used to establish essential elements of attempted murder); Hopkins, App., 747 N.E.2d 598 (D's convictions for Class A felony robbery & attempted murder violated Double Jeopardy under Article I, Section 14 of Indiana Constitution); Woods, 677 N.E.2d 499 (consecutive sentences for both murder & robbery as class A felony did not violate DJ, where basis for serious bodily injury supporting enhanced class A robbery was separate from force necessary to kill victim); Elwood, App., 673 N.E.2d 1 (DJ violated where D was sentenced for voluntary manslaughter & robbery as class B felony based on same bodily injury); Peterson, App., 650 N.E.2d 339 (no error in enhancing robbery & rape convictions based on D's possession of deadly weapon during commission of offenses, despite fact "injury" & "deadly weapon" enhancements appear together in various statutes); Campbell, 622 N.E.2d 495 (Multiple convictions for burglary as A felony & battery as C felony precluded because enhanced level of both based on same injurious consequences); Bustamante, 557 N.E.2d 1313 (death of single victim cannot support conviction for felony murder & Class A arson based on serious bodily injury); Wolfe, 549 N.E.2d 1024 (multiple injuries inflicted in single onslaught cannot support enhancement for both robbery & attempted rape); Hansford, 490 N.E.2d 1083 (injuries to 2 victims provided bodily injury element to support elevation of 2 counts); McDonald, 542 N.E.2d 552 (2 victims robbed in single incident; 1 victim stabbed; held, only 1 count could be elevated to Class A based on stabbing); White, 546 N.E.2d 569 (elevation of rape & criminal deviate conduct convictions, based on fact that D was armed, proper).

TITLE: Kocielko v. State

INDEX NO.: E.11.b.

CITE: (02-22-11), 943 N.E. 2d 1282 (Ind. Ct. App. 2011)

SUBJECT: Double jeopardy - single incident analysis

HOLDING: Court granted State's petition for rehearing of its opinion at 938 N.E.2d 243, which held that because D committed acts against a single victim in one confrontation, double jeopardy prevents his being convicted and sentenced upon both deviate sexual conduct and fondling. D argued that he could not receive multiple sentences for these sexual misconduct convictions because of rule announced in Bowling v. State, 560 N.E.2d 658 (Ind. 1990), specifically "the imposition of two sentences for the same injurious consequences sustained by the same victim during a single confrontation violated both Federal and State double jeopardy prohibitions."

Regardless of whether this principle remains a viable part of double jeopardy analysis, Bowling nonetheless espoused a sentencing rule that has not been explicitly rejected, *i.e.*, a sentence must reflect the episodic nature of the crimes committed. This "single incident analysis" for sentencing purposes has been embraced in other contexts. *See Beno v. State*, 581 N.E.2d 922 (Ind. 1991) (improper to impose consecutive sentences for multiple drug dealing convictions based on nearly identical State-sponsored sales as part of an ongoing operation). Thus, unless instructed to the contrary, Court should consider episodic nature of multiple violent crimes when committed against a single victim in a single confrontation. Here, Court held that imposition of concurrent sentences, as opposed to consecutive sentences, fairly reflects the episodic nature of the crimes committed by D. Held, rehearing granted, Tr. Ct. affirmed in all respects, except thirty year habitual offender enhancement on Class C felony conviction should be vacated because Class B felony conviction was so enhanced.

RELATED CASES: Walton, 81 N.E.3d 679 (Ind. Ct. App. 2017) (consecutive sentences inappropriate for related drug convictions), Vermillion, 978 N.E. 2d 459 (Ind. Ct. App. 2012) (disagreeing with Kocielko and Bowling, 560 N.E.2d 658 (Ind. 1990), Ct. found no abuse of discretion in imposing consecutive sentences for two acts of sexual misconduct with a minor that were part of a "single confrontation"; even though Richardson did not specifically address Bowling, it abrogated several other cases that relied on single-confrontation analysis, as noted by Ward v. State, 736 N.E.2d 265, 269 n.4 (Ind. Ct. App. 2000)).

TITLE: Kremer v. State

INDEX NO.: E.11.b.

CITE: (4th Dist., 11-21-94), Ind. App., 643 N.E.2d 357

SUBJECT: Propriety of multiple convictions

HOLDING: Tr. Ct. erred in accepting convictions of operating while intoxicated, operating with .10% BAC or more, & operating vehicle with controlled substance in blood. Although Tr. Ct.'s sentencing order stated that multiple convictions merged "for purpose of sentencing," order improperly implies that convictions otherwise remain viable. When lesser included offense is merged into greater offense, lesser offense is merged for all purposes, Hall v. State, Ind., 493 N.E.2d 433. Tr. Ct. should specifically state on record which convictions are vacated & which remain & should also indicate how sentences imposed correspond with remaining convictions. Held, conviction affirmed in part & reversed in part.

RELATED CASES: Hornback, App., 693 N.E.2d 81 (Tr. Ct. may *sua sponte* vacate conviction of operating vehicle with BAC of .10%).

TITLE: Mance v. State

INDEX NO.: E.11.b.

CITE: (02-17-21), Ind. Ct. App., 163 N.E.3d 367

SUBJECT: Lack of response from prosecutor does not constitute consent to modify sentence
absent indication prosecutor's office received letter

HOLDING: Petitioner was convicted and sentenced in 2004 for two murders. In 2020, Petitioner filed for sentence modification under I.C. 35-38-1-17(k) which states (after 365 days) a petitioner convicted of a crime of violence must get prosecutor's consent prior to filing a motion for sentence modification. Petitioner wrote a letter to the person who had been the trial court prosecutor in his case and said if he did not get a response from the trial court prosecutor in thirty days, he would consider the lack of response as prosecutor consent to filing his petition for sentence modification. Petitioner did not hear from the prosecutor and filed his petition for sentence modification, which was denied. Court of Appeals found no indication the prosecutor's office received the request for consent and the lack of response to a letter was not the equivalent of prosecutor consent. Court distinguished State v. Harper, 8 N.E.3d 694 (Ind. 2014), where it was clear the prosecutor's office was aware of the request for modification but did not object. *Helf*, denial of sentence modification affirmed.

TITLE: Marshall v. State

INDEX NO.: E.11.b.

CITE: (2d Dist. 12/20/90), Ind. App., 563 N.E.2d 1341

SUBJECT: Reckless homicide (RH) - multiple deaths from single accident

HOLDING: Tr. Ct. did not err in entering judgment & sentence against D for 6 counts of RH, based on single accident. D pled guilty to 6 counts of driving with .10 BAC resulting in death (BAC death) & 6 counts of RH, as result of single accident in which his 6 passengers were killed. D later petitioned for modification of sentence, asserting double jeopardy (DJ) & Tr. Ct. vacated 5 convictions for BAC death. Ct. App. finds that Tr. Ct. erred in failing to vacate either remaining BAC death conviction or one reckless homicide conviction based on death of same victim. See Drossos, App., 442 N.E.2d 1; Carter, App., 424 N.E.2d 1047. D also argues that Tr. Ct. erred in affirming 6 RH convictions resulting from single incident of reckless conduct. Focus of DJ inquiry is whether legislature intended to define separate offenses which might result from same conduct. Kelly, App., 527 N.E.2d 1148. Kelly Ct. examined DUI resulting in death statute & determined that essence of that offense is operating vehicle while intoxicated; resulting death is merely factor enhancing offense. Thus, Kelly Ct. concluded that legislature intended only one DUI resulting in death offense regardless of number of deaths. Same logic applies to BAC death offense. However, legislature has defined RH as reckless killing of another human being, Ind. Code 35-42-1-5, so that death is essence of offense. Accordingly, where multiple deaths occur in course of single incident, statute has been violated multiple times. Held, 5 RH convictions affirmed; remanded with instructions to vacate either remaining BAC death conviction or RH conviction.

RELATED CASES: Lockhart, App., 632 N.E.2d 374 (Order imposing consecutive sentences for DUI resulting in death, RH & criminal recklessness did not violate DJ. D's conduct caused two deaths & serious bodily injury to third person).

TITLE: Mathews v. State
INDEX NO.: E.11.b.
CITE: (06-28-06), Ind., 849 N.E.2d 578
SUBJECT: Multiple punishments -- damaging one property by fire can be only one arson; depreciation of seriousness of crime proper aggravator
HOLDING: The number of arsons of which a D can be convicted is based on the number of properties damaged. Damaging one property by fire is only one arson, even if the fire produces multiple consequences, any one of which is sufficient to constitute arson. The crime of Class B arson is completed upon knowingly or intentionally damaging property under at least one of the circumstances enumerated in subsections (a)(1)-(4), namely damaging property in excess of \$5,000, acting without property owner's consent, damaging structure used for religious worship or knowingly endangering human life. Arson can be enhanced to a Class A felony if the arson results in bodily injury to another person. Although damaging property is not sufficient to constitute arson, each of the four alternative Class B felony arsons require it & only damaging property is common to all. Thus, damaging property is the central element of arson. So long as only one person's property is damaged by fire, there is only one Class B felony arson even if more than one of the circumstances set forth in subsections (a)(1)-(4) are found.

Further, arson can be elevated to a Class A felony by bodily injury whether or not more than one person is injured, but injuries to multiple persons do not create multiple Class A felony arsons. If a consequence of a crime serves primarily to enhance the penalty for a crime that is committed without the consequence, multiple consequences do not establish multiple crimes. The crime of Class B arson is completed upon knowingly or intentionally damaging property under at least one of the circumstances enumerated in subsections (a)(1)-(4) & is only enhanced due to bodily injury to another person. Although endangering human life is element of arson, legislature chose to use "human life" rather than "person." Thus, an act of arson that is a Class B felony & also results in actual bodily injury to multiple people constitutes a single Class A felony arson. Here, the D committed one Class B felony arson by intentionally using fire to damage property under circumstances which met the criteria of both subsections Ind. Code 35-43-1-1(a)(2) & (a)(3). Even though the arson caused bodily injury to multiple people, D can be convicted of only one count of arson elevated to a Class A felony because of the resulting bodily injury.

The D's maximum, consecutive sentences for arson was appropriate based on the aggravators of D's need for correctional treatment, his lack of remorse, the nature & circumstances of the crime & the fact that sentences less than enhanced sentence would depreciate seriousness of crime. Ct. held that it is not error to enhance a sentence based upon aggravating circumstance that sentence less than enhanced term would depreciate seriousness of crime committed. Moreover, Blakely v. Washington, 542 U.S. 296 (2004) & Smylie v. State, 823 N.E.2d 679 (Ind. 2005) do not apply to a sentence imposed in 1994. Held, transfer granted, convictions for murder & Class A felony affirmed, & convictions for additional arsons reversed.

RELATED CASES: Clark, App., 732 N.E.2d 1225 (all 3 attempted arson convictions arose from same act & were not independently supportable, separate & distinct); Belser, App., 727 N.E.2d 457 (one fire cannot support five convictions for arson); Williamson, App., 798 N.E.2d 450 (double jeopardy would not have precluded State from charging D with five arson charges after a Tr. Ct. determined he caused a fire at his property that spread to four other owners' properties; thus appellate counsel was not ineffective for failing to argue Belser, App., 727 N.E.2d 457, as basis for vacating all but one of his arson convictions).

TITLE: Mihay v. State

INDEX NO.: E.11.b.

CITE: (11/23/87), Ind., 515 N.E.2d 498

SUBJECT: One shooting - one offense

HOLDING: Where D fired several shots at one time, & one shot hit victim, D cannot be convicted & sentenced for both criminal recklessness & attempted murder. State argues that criminal recklessness is not inherently included in attempted murder. This is true. However, these crimes can be charged so that criminal recklessness is factually included. Here, virtually the same charge was made in both informations. This is similar to convicting D of both robbery & armed robbery where single robbery was committed. [Citations omitted.] Held, remanded to set aside criminal recklessness conviction.

TITLE: Mills v. State

INDEX NO.: E.11.b.

CITE: (5/18/12), Ind. Ct. App., 211 N.E.3d 22

SUBJECT: Wadle double-jeopardy test does not permit consideration of evidence presented at trial to determine whether an offense is "included" in another

HOLDING: The Court of Appeals applied the test articulated in Wadle v. State, 151 N.E.3d 227 (Ind. 2020), to conclude Defendant's convictions for both neglect of a dependent resulting in catastrophic injury or death as a Level 1 felony and battery resulting in serious bodily injury as a Level 3 felony did not violate double jeopardy. In drawing its conclusion, the Court stated the three-part test in Wadle "does not permit us to look to the evidence presented at trial to determine whether an offense is included in another for purposes of substantive double jeopardy." Instead, the Court applied only the first two steps of the test and concluded that neither the neglect-of-a-dependent statute nor the battery statute clearly permits multiple punishment and that neither offense is included in the other either inherently or as charged and noted, "[a]s such, there is no double-jeopardy violation, and our analysis ends here." The Court acknowledged that its interpretation may produce harsh results and that other panels have looked at the evidence presented at trial, but quoted the language from Wadle and stated, "once a court has determined an offense is not included inherently or "as charged" in another offense, there is no need to look at the evidence presented at trial." Held, affirmed.

TITLE: Moffatt v. State

INDEX NO.: E.11.b.

CITE: (8/29/89), Ind., 542 N.E.2d 972

SUBJECT: Merger - burglary (with intent to commit theft) & theft do not merge

HOLDING: Double jeopardy does not prohibit sentencing D for both burglary charged as breaking & entering with intent to commit theft inside, & theft actually committed inside. To obtain conviction for burglary, it is not necessary for state to prove theft or any other felony; burglary is completed upon breaking & entering with intent to commit felony. Theft conviction does not require proof of breaking & entering. Thus, each offense requires proof of element which other does not require, so that they do not merge, & separate sentences may be imposed for each. Deamus, 479 N.E.2d 1319. Held, sentences upheld.

RELATED CASES: Smith, App., 671 N.E.2d 910 (DJ not violated by State's use of D's theft of handgun to prove both burglary & robbery offenses).

TITLE: Moore v. State

INDEX NO.: E.11.b.

CITE: (6-22-95), Ind., 652 N.E.2d 53

SUBJECT: Murder & robbery - double jeopardy claim

HOLDING: Convictions for both murder & robbery of same victim did not violate constitutional prohibition against double jeopardy. Jury found D guilty of murder while in commission of robbery (Felony Murder) & knowing & intentional murder. Tr. Ct. only entered judgment on latter count, & also entered judgment of conviction on robbery count. To support double jeopardy claim, D must demonstrate that same act constitutes violation of two distinct statutory provisions which do not require proof of additional fact. Wethington v. State, Ind., 560 N.E.2d 496. Here, murder & robbery statutes contain mutually exclusive elements - killing of another human being & taking of property from another person. Applying decisions in Mitchell v. State, Ind., 541 N.E.2d 265, & Flowers v. State, Ind., 481 N.E.2d 100, Ct. rejected D's double jeopardy claim.

However, Ct. vacated Class A enhancement of D's conviction & sentence for robbery. D may not be convicted & sentenced for both murder & robbery (Class A) where act that is basis for elevating robbery to Class A felony is same act upon which murder conviction is based. Mitchell. Held, remanded with instructions to vacate Class A robbery enhancement, & enter judgment of conviction & sentence for robbery as Class C felony.

RELATED CASES: Owens, App., 897 N.E.2d 537 (reduction from Class A to C felony was proper remedy because D was neither charged with nor instructed on deadly weapon element); McElroy, App., 864 N.E.2d 392 (no DJ violation for convictions & sentences for OWI causing death & failure to stop at accident resulting in death based on one death; D only punished once for causing the death because the death was only a circumstance of failure to stop & causation was not an element); Sanchez, App., 794 N.E.2d 488 (D's convictions for both felony murder & armed robbery violated double jeopardy because the conviction for felony murder could not be had without proof of the armed robbery); Wethington, App., 655 N.E.2d 91 (convictions for both robbery as Class & felony & attempted murder did not violate double jeopardy; class A enhancement of robbery conviction was based on bodily injury, while attempted murder charge was based on use of deadly weapon. See separate card at J.10.f).

TITLE: Newgent v. State

INDEX NO.: E.11.b.

CITE: (3rd Dist., 12-09-08), Ind. App., 897 N.E.2d 520

SUBJECT: Double jeopardy

HOLDING: Because there was a reasonable possibility that D's convictions for Criminal Confinement Resulting in Serious Bodily Injury and Assisting a Criminal were based on the same evidence as her conviction for Murder, the convictions violate double jeopardy. Multiple convictions do not violate Indiana's Double Jeopardy Clause if they logically could have been based on the same facts, but in light of the evidence, the instructions, the charges, and the argument of counsel, there is no reasonable possibility that the jury actually used exactly the same set of facts to establish both convictions. Lee v. State, 892 N.E.2d 1231, 1232 (Ind. 2008). In addition to convictions that violate the reasonable possibility test, a conviction for a crime which consists of the very same act as an element of another crime for which the D has been convicted violates Indiana double jeopardy. Guyton v. State, 771 N.E.2d 1141, 1143 (Ind. 2002).

Here, State charged that D confined the victim in Count I and aided her boyfriend in killing the victim by providing the boyfriend with a weapon and assisting him in binding and confining the victim in Count II. Thus, the acts used in the information to establish aiding in the murder were the very facts used to establish confinement. At trial, State supported both charges by referring to D's act of providing her boyfriend the murder weapon, a hammer. Even given the other evidence suggesting D's complicity, her act of providing the hammer likely had a significant impact, in light of the prosecutor's emphasis that the hammer injuries were fatal. Moreover, State failed to emphasize evidence distinct to each crime or to provide alternative acts separate from those alleged to prove confinement upon which the jury could base its murder verdict. Even if the jury could have relied on acts other than the confinement and the providing of the hammer to find that D aided in murder, there is a reasonable possibility they did not do so. The convictions for aiding in murder and confinement violate both the reasonable possibility test and the Guyton test.

Court also held that assisting a criminal conviction cannot stand where D was an active participant in the actual crime and her "assisting" conviction was merely an effort to protect or further the criminal scheme. Even if an assisting conviction and murder conviction are based on different evidence, they both cannot stand. Thus, pursuant to Indiana double jeopardy, D's conviction for assisting a criminal and confinement are vacated. Held, judgment reversed, in part, and affirmed, in part.

TITLE: Nicoson v. State
INDEX NO.: E.11.b.
CITE: (12-15-10), Ind., 938 N.E.2d 660
SUBJECT: Double enhancement for “using” firearm while “armed” does not violate state double jeopardy prohibition

HOLDING: Five-year enhancement under Ind. Code 35-50-2-11 for “using” a firearm while committing criminal confinement, where criminal confinement conviction was also elevated to a B felony for committing the offense while “armed” with a deadly weapon (Ind. Code 35-42-3-3(b)(2)(a)) does not violate Indiana Constitution’s prohibition on double jeopardy. See Ind. Const., Art. I, § 14.

Generally, double enhancements are impermissible absent explicit legislative direction. Mills v. State, 868 N.E.2d 446, 452 (Ind. 2007). The difference between possessing a firearm and using it has been recognized before. Mickens v. State, 742 N.E.2d 927 (Ind. 2001). The fact that a criminal confinement conviction is elevated for being armed while the sentence for criminal confinement can be enhanced for use of a firearm is compelling evidence the legislature intended to allow the double enhancements used here. The record clearly shows that D was not only armed with a deadly weapon but that he used it by firing the gun in the air, ordering the victims from the vehicle with it, and firing at the victims’ car as they drove away. Held, transfer granted, Court of Appeals’ opinion at 919 N.E.2d 1203 vacated, judgment affirmed. Rucker and Sullivan, JJ. dissenting believe that D’s sentence was enhanced “for the very same behavior” for which he was convicted and punished. D was “armed” the entire time he “used” the gun.

RELATED CASES: Duncan, 23 N.E.3d 805 (Ind. Ct. App. 2014) (because the prosecutor in opening and closing invited the jury to rely on D’s firing of a gun while fleeing to support convictions for attempted battery with a deadly weapon, pointing a firearm and the enhancement to resisting law enforcement by drawing or using a gun, there was a reasonable possibility that the jury relied on the same evidence for all three convictions; pointing a firearm conviction and enhancement of resisting law enforcement vacated); Stokes, 947 N.E.2d 1033 (Ind. Ct. App. 2011) (using previous dealing cocaine conviction to order D to serve sentence for unlawful possession of a firearm by a SVF consecutively to sentences for his other offenses and as part of D’s extensive criminal history as an aggravating factor did not violate general prohibition on double enhancements because unlawful possession by a SVF involves possession of a firearm by one who has committed a serious violent felony, including dealing in cocaine, and Ind. Code 35-38-1-7.1(a)(2) allows Tr. Ct. to consider D’s criminal history as an aggravator).

TITLE: Osborne v. State
INDEX NO.: E.11.b.
CITE: (8/15/85), Ind., 481 N.E.2d 376
SUBJECT: Limitations on sentence - old armed felony statute
HOLDING: Sentence was erroneous (PC 1) where D was sentenced to life for kidnapping & 15 years consecutive for armed felony (robbery). Here, Ct. finds Ind. Code 35-12-1-1 (repealed) provides for imposition of consecutive sentences only when: (1) additional crime was committed at same time, *citing Coleman*, 339 N.E.2d 51; & (2) crime was entirely separate/distinct from all felonies committed at same time. Ct. finds robbery was completed before kidnapping occurred. Armed felony was not separate offense because it was lesser included offense of robbery. *Dembowski*, 240 N.E.2d 815. Held, remanded with instructions to order sentence served concurrently. Givan DISSENTS.

TITLE: Parks v. State
INDEX NO.: E.11.b.
CITE: (3/5/86), Ind., 489 N.E.2d 515
SUBJECT: Sentencing -- multiple convictions with same facts; confinement
HOLDING: D convicted of two counts of criminal confinement. D claimed that consecutive sentences punished him twice for same offense. Ct. held that where D confined two people in car, wounded one & took car keys, there were two different victims & therefore no double jeopardy violation for two convictions for confinement. Held, conviction & sentences affirmed.

TITLE: Payne v. State
INDEX NO.: E.11.b.
CITE: (5th Dist., 10-24-02), Ind. App., 777 N.E.2d 63
SUBJECT: Erroneous merger of burglary & theft convictions
HOLDING: Tr. Ct. erred in merging D's burglary & theft convictions, because sentencing D for both convictions would not violate Indiana's double jeopardy clause. Under actual evidence test set forth in Richardson v. State, 717 N.E.2d 32 (Ind. 1999), there was no reasonable probability that jury used same evidentiary facts to convict D of both burglary & theft. Ind. Code 35-50-1-1 states that Tr. Ct. "shall fix the penalty of & sentence a person convicted of an offense." Thus, since sentencing D for both burglary & theft would not violate Indiana's double jeopardy clause, Tr. Ct. must sentence D on both counts pursuant to statute. Darden, J., dissenting, disagrees that Indiana Constitution requires that Tr. Ct. sentence D on both convictions, given precedents that emphasize Tr. Ct.'s discretion in sentencing.

TITLE: Polk v. State

INDEX NO.: E.11.b.

CITE: (3d Dist. 09/18/91), Ind. App., 578 N.E.2d 687

SUBJECT: Merger of offenses, robbery & confinement

HOLDING: Where evidence showed D threatened victim with gun to obtain money & jewelry, & then told victim to turn around & not move, it was sufficient to sustain convictions for both robbery & confinement. Confinement as charged was that D, while armed with handgun, confined victim by forcing him to remain in alley. Testimony at trial was that victim turned around as perpetrators stated, "'we don't [want] you to move, uh, we don't want you to do anything...'" As victim was turning around, robbers ran away. Ct. found evidence was sufficient to support inference by Tr. Ct. that after robbery was completed, one or both of robbers instructed victim to remain in alley, thus making force used to coerce victim into staying in alley different from that used to effectuate robbery.

Ct. distinguished case from Wethington, 560 N.E.2d 496 because unlike Wethington, information alleged two different factual bases for the robbery & confinement, & there was substantial probative evidence to sustain convictions on both counts. In so doing, Ct. noted that Wethington was limited to situations where confinement is charged along with other crime which inherently requires restraint on victim's liberty, & where charging information makes no distinction between factual bases for two offenses. Here, evidence showed confinement was distinct act & crime apart from robbery. Held, convictions affirmed, J. Miller, dissenting on this issue, arguing that any robber would tell victim not to move until he is gone & that legislature understood this when fixing presumptive sentence for robbery. See also, Jackson, App., 643 N.E.2d 905; Carrington, App., 619 N.E.2d 309, finding no merger.

RELATED CASES: Timberlake, App., 679 N.E.2d 1337 (separate convictions & sentences for robbery & confinement did not violate DJ); Stidham, Ind., 637 N.E.2d 140 (confinement charge did not merge with robbery charge because battering and confinement continued after robbery was completed).

TITLE: Potter v. State

INDEX NO.: E.11.b.

CITE: (8/10/83), Ind., 451 N.E.2d 1080

SUBJECT: Merger of offenses - robbery & theft

HOLDING: Tr. Ct. did not err in sentencing D for both robbery (money, jewelry, suitcase, car keys) & theft (victim's car) convictions. Here, D robbed victim at gunpoint in her apartment, taking personal items, including car keys. He asked which car was hers & took it. D contends 2 convictions merged because theft is lesser included offense of robbery. Ct. notes principle, while true (Rogers, 396 N.E.2d 348) does not apply because taking of car was an additional theft unrelated to those in apartment. State charged D with theft of car in separate count & he was convicted of that crime. Held, no error in sentencing D on both counts. DISSENT by Hunter, joined by Prentice, argues proper focus is on identity of offenses, not identity of their source, in determining whether D may be convicted & sentenced for multiple offenses arising from same act(s). Elmore, 382 N.E.2d 893. When D took car keys, he took means of controlling car. Fact D took car from parking lot after leaving victim tied up in her apartment does not make theft of car a separate crime. It was a lesser included offense of robbery of victim's car keys & personal property. See Holt, App., 383 N.E.2d 467. Theft conviction & sentence thereon should be vacated.

TITLE: Powell v. State

INDEX NO.: E.11.b.

CITE: (8/18/20), Ind., 151 N.E.3d 256

SUBJECT: While Indiana's attempted-murder statute contains no clear unit of prosecution, the multiple shots defendant fired—despite their proximity in space and time—amount to two chargeable offenses based on his dual purpose of intent to kill both victims.

HOLDING: Defendant's actions of firing multiple shots in rapid succession at two men seated in a car, despite their proximity in space and time, amounted to two distinct, chargeable acts of attempted murder. In reaching its conclusion, the Indiana Supreme Court described and applied its framework for analyzing claims of multiplicity, a branch of substantive double jeopardy based on the charging of a single offense in several counts. The Court framed the key question as whether the same act may be punished as two counts of the same offense and its task as determining whether the statute permits punishment for a single course of criminal conduct or for certain discrete acts within that course of conduct. The inquiry involves a two-step process: first, a review of the text of the statute to discern whether expressly or by judicial construction it indicates a unit of prosecution and then, if the statute is ambiguous, determining whether the facts indicate a single offense or distinguishable offenses. Any doubt counsels against turning a single transaction into multiple offenses. Here, while the attempted murder statute does not contain a clear unit of prosecution, Defendant's criminal acts indicate distinguishable offenses. First, the Court considered the attempted murder statute and concluded that alternative readings of it reveal equally legitimate ways of thinking about the statute's unit of prosecution: either by conduct or by result. Given the ambiguity, the Court then examined the facts to conclude that the multiple shots Defendant fired—despite their proximity in space and time—amount to two chargeable offenses based on Defendant's dual purpose of intent to kill both men.

RELATED CASES: Moore, 181 N.E.3d 442 (Ind. Ct. App. 2022) (two criminal recklessness convictions based on two shots fired in quick succession with the unified purpose of scaring the CWs out of her house constitute double jeopardy under Powell test); Kerner, 178 N.E.3d 1215 (Ind. Ct. App. 2021) (Ct. sua sponte concluded that D's two attempted robbery convictions violated double jeopardy though that conduct-based crime does not "fit neatly within the Powell framework"; although both victims suffered serious bodily injury, there was only one act of attempted robbery); Morales, 165 N.E.3d 1002 (Ind. Ct. App. 2021) (facts of case as charged and as proven establish D's two arson counts were a single offense).

TITLE: Randall v. State

INDEX NO.: E.11.b.

CITE: (11/17/83), Ind., 455 N.E.2d 916

SUBJECT: Merger of offenses - felony murder & robbery; robbery of several employees; confinement

HOLDING: Tr. Ct. erred in sentencing D on Count I felony-murder of pharmacist while committing robbery, Count II robbery of 2 other employees & Count III robbery of another employee where only store property was taken. Here, D contends he cannot be sentenced on Counts II & III because there was only one robbery (Williams, 395 N.E.2d 239) & robbery counts constituted underlying felony for felony-murder (Mitchell, 382 N.E.2d 932). Williams held when property of business establishment is taken from several employees of the business, there is only one robbery. See also Lash, 433 N.E.2d 764; Lane, 428 N.E.2d 28. Ct. refuses to reconsider Williams, as state urges. D also contends he should have been sentenced on only one of 5 confinement counts. Relying on Young, 409 N.E.2d 579 (D took money belonging to hotel & gun belonging to employee; held, 2 separate robberies - one of motel, one of employee's person), Ct. finds confinement was a personal crime of each person; D can be sentenced on all 5 counts. Held, sentences under Counts II & III ordered vacated; sentences on 5 confinement counts affirmed.

TITLE: Saucerman v. State

INDEX NO.: E.11.b.

CITE: (1st Dist. 7/2/90), Ind. App., 555 N.E.2d 1351

SUBJECT: Double jeopardy - receiving stolen property; multiple sources

HOLDING: Tr. Ct. erred in entering multiple convictions & sentences against D where evidence showed that on 1 occasion, he received property which had been stolen from multiple sources. D pled guilty to 3 counts of receiving stolen property, but on PCR he argues that factual basis was established for only 1 offense, since he received all stolen property at same time & place. State argues that D may receive multiple punishments because he had reason to know that items were stolen from distinct sources. Elements of receiving stolen property are knowing control over stolen property, knowing property to have been stolen by another with intent to deprive owner of use & benefit of such property. Nevertheless, gravamen of offense is possession of stolen property with guilty knowledge, & particular ownership of goods is not element of offense, nor is character of act affected by fact that property may have belonged to more than 1 owner. See People v. Loret (1988), 526 N.Y.S.2d 872. [Other citations omitted.] Although D here pled guilty to 3 counts of receiving stolen property, he testified that he received all stolen items at same time & place, & this was not contradicted by other evidence. Factual basis did not support 3 separate convictions. Held, denial of PCR reversed, remanded to vacate 2 convictions.

RELATED CASES: Beaty, App., 856 N.E.2d 1264 (if a person retains items of stolen property, knowing the property to be stolen at one time & one place, that D has committed but one criminal act of retention regardless of whether the items he received belong to several owners or were subject of more than one theft).

TITLE: Shields v. State
INDEX NO.: E.11.b.
CITE: (3/26/86), Ind., 490 N.E.2d 292
SUBJECT: Murder/felony murder - one death/one conviction
HOLDING: Tr. Ct. erred in entering judgment of conviction on murder & felony murder. Only one homicide occurred & D should not have been convicted of 2 counts of murder. See Kokenes, 13 N.E.2d 524. Held, remanded with instructions to vacate judgment of conviction for felony murder. ON REHEARING, 493 N.E.2d 460, Ct. rejects state's contention that because only one life sentence was imposed, D was not punished twice. Judgment of conviction alone, without imprisonment, does constitute punishment. Ball v. US (1985), U.S., 105 S. Ct. 1668, 84 L. Ed. 2d 740; Bean, 371 N.E.2d 713; Thompson, 290 N.E.2d 724.

TITLE: Starks v. State

INDEX NO.: E.11.b.

CITE: (2d Dist. 01/30/91), Ind. App., 565 N.E.2d 1142

SUBJECT: Double jeopardy (DJ) - multiple counts child molesting

HOLDING: DJ does not preclude D's conviction on 2 separate counts of Class B Child Molesting where, even though acts occurred in relatively short time span on one occasion, each was separate & distinct act that was source of distinct & separate harm to victim, & none were preparatory & incidental to others. D was charged with 3 counts of Class B child molesting, one count as Class C felony, & 1 count of confinement as Class D felony. Through plea bargain, D was sentenced to 2 concurrent 20-year terms for 2 counts of child molesting & 1 concurrent 4-year term on confinement. D filed petition for PCR based on grounds that plea was not knowing & voluntary because he had been advised that maximum sentence possible was 72 yrs.; & that because DJ permitted only conviction on one count of child molesting & one count of confinement, maximum sentence could be only 24 yrs. His petition was denied. Evidence showed that D forced victim to commit fellatio, victim unsuccessfully tried to get help, D then had anal & vaginal intercourse with victim, forced her to engage in act of fellatio, "lick his butt," & again engage in coitus. Ct. App. considered Ellis, 528 N.E.2d 60, & Lane, App., 539 N.E.2d 488, & found that act of coitus & 2 acts of deviate sexual conduct were separate & distinct, even though occurring in short time span, & that each act was source of distinct harm to victim & not preparatory & incidental to each other. Ct. also found that fondling count could have been supported by either second act of fellatio, second act of coitus, or forcing victim to lick D's posterior. Because of separate & distinct nature of acts, D was facing maximum sentence of 72 yrs., advice was correct, plea was knowing & voluntary, & denial of PCR was proper. Holding, judgment of PCR ct. affirmed.

RELATED CASES: Sharp, 951 N.E.2d 282 (Ind. Ct. App. 2011) *sum. aff'd.*, 970 N.E.2d 647 (Ind. 2012) (no DJ violation where State established that D committed two separate offenses, Class A and Class C felony child molesting, based on distinct facts); Scott, App., 771 N.E.2d 718 (absent some guidance from Indiana S.Ct. in which it authorizes review of double jeopardy claims following multiple convictions for child molesting utilizing an analysis outside of constitutional protections provided by Richardson, Ct. may apply only constitutional tests); Ward, App., 736 N.E.2d 265 (convictions for attempted child molesting & child molesting did not violate state & federal prohibitions against DJ, where fondling of child was separate offense from attempted penetration of child's anus).

TITLE: State v. Heemstra
INDEX NO.: E.11.b.
CITE: 721 N.W.2d 549 (Iowa 2006) 08/25/2006
SUBJECT: Fatal assault merges, precluding felony-murder based on assault
HOLDING: The Iowa Supreme Court *overruled* 24 years of precedent to hold that an assault that caused a death cannot serve as the basis for a conviction of felony-murder. Approving a new interpretation of the state's felony-murder laws, the majority joined other jurisdictions that have adopted a rule that a fatal assault merges into the homicide in these circumstances.

In the present case, D was convicted of first-degree murder after his jury was given instructions that allowed it to find the D guilty on a felony-murder theory if it found that D pointed a gun at the victim in a threatening manner and the gun accidentally discharged. Iowa's first-degree murder statute covers a killing by someone "participating in a forcible felony." "Forcible felony" is defined by statute in a way that includes an assault or other willful injury. Previously, Iowa courts had read these statutes broadly, holding that any willful injury qualifies as a "forcible felony." State v. Beeman, 315 N.W.2d 770 (Iowa 1982). This broader approach to the felony-murder rule taken by Iowa and some other jurisdictions permitted a felony-murder conviction to be based on the felony assault that led to the victim's death. In the present case, the majority noted that "the rationale of the felony-murder rule is that certain crimes are so inherently dangerous that proof of participating in these crimes may obviate the need for showing all of the elements normally required for first-degree murder." However, it added that its previous broad approach had been challenged in other states and in law review articles on the ground that allowing assault to be used as the underlying offense effectively converts every felonious assault resulting in death into first-degree murder, effectively eliminating other lesser forms of homicide such as manslaughter. Agreeing with other courts that have adopted the merger rule, the majority concluded that the its old rule extended the felony-murder doctrine beyond its justification.

TITLE: Stephens v. State

INDEX NO.: E.11.b.

CITE: (2d Dist. 03/23/92), Ind. App., 588 N.E.2d 564

SUBJECT: Merger of offenses - dealing & possession of cocaine

HOLDING: Where D dropped cocaine as he fled from officers coming to search his home for drugs, convictions for both cocaine found in house & that dropped outside, were precluded by double jeopardy. D was charged with, among other offenses, 2 separate counts of possession & one count of dealing cocaine. Officers had previously obtained warrant to search for drugs in D's residence, & when they arrived & approached D, he ran from them, discarding small bag in process. Bag was retrieved & found to contain cocaine. During execution of warrant, officers discovered over 12 grams of cocaine, & paraphernalia. Tr. Ct. acknowledged that D could not be punished for both possession & dealing of cocaine found in house, but Ct. of Appeals found he also could not be punished for possession of cocaine he dropped while he fled, relying on Young, App., 564 N.E.2d 972. Although cocaine was in 2 different places, there was still just one possession. Held, conviction for dealing reversed & remanded.

RELATED CASES: Carroll, 740 N.E.2d 1225 (DJ violation under Ind. Const. when State chose to charge dealing & possession offenses broadly & its closing argument was no more specific); Castillo, App., 734 N.E.2d 299 (where possession of cocaine was based on cocaine found during execution of search warrant & dealing cocaine was based on deal that occurred earlier in same day, convictions for both did not violate double jeopardy); Quick, 660 N.E.2d 598 (D could not be convicted of both dealing & possession absent distinction in charging document as to which drugs D was accused of dealing & which he was accused of possessing).

TITLE: Stout v. State

INDEX NO.: E.11.b.

CITE: (7/1/85), Ind., 479 N.E.2d 563

SUBJECT: Limitations on sentence - single larceny rule

HOLDING: Tr. Ct. erred in failing to consider 2 theft counts as 1 for purpose of trial & sentencing. D was charged with 2 counts of theft, for taking household items from victim's kitchen & car from same victim's garage. To determine whether D may be convicted & sentenced for multiple offenses arising from same act or acts, proper focus is on whether offenses are same, not whether they spring from same circumstances. Elmore, 382 N.E.2d 893. Here, offenses themselves are same; garage is part of one's home. Only other factor distinguishing 2 counts is particular property over which D is charged with having exerted unauthorized control. Information may charge in 1 count theft of any 1 or more items taken at 1 time from 1 place. Failure to do so does not allow state to split 1 offense for purpose of multiple prosecutions. Holt, App., 383 N.E.2d 467. Held, D committed 1 offense & is subject to 1 judgment & sentence. Pivarnik, J., CONCURS & DISSENTS.

RELATED CASES: Hill, 25 N.E.3d 1280 (Ind. Ct. App. 2015) (2 theft convictions constituted a single larceny because they occurred at the same cash register only 8 minutes apart); Keller, 987 N.E.2d 1099, *aff'd on reh'g*, 989 N.E.2d 1283 (Ind. Ct. App. 2013) (single larceny rule required Ct. to vacate one of D's two convictions of theft for taking from victim a social security check and several separate checks); J.R., (Ind. Ct. App. 2013) (distinguishing Stout, which involved multiple violations of the same theft statute, Ct. held that theft and auto theft findings are distinct offenses and violations of different statutes, thus no violation of single larceny rule); Borum, 951 N.E.2d 619 (Ind. Ct. App. 2011) (where D accosted one victim in car during attempted carjacking and then confronted her two friends outside of car during attempted robbery, there was not a single incident even though the victim in the car was alleged as a victim in both the attempted robbery and attempted carjacking); Walker, 903 N.E.2d 1022 (Ind. Ct. App. 2009) (where D robbed Wendy's while accomplice robbed neighboring BP station, the robberies were not one single larceny and convictions for both did not violate double jeopardy); Smith, 770 N.E.2d 290 (5 erroneous theft convictions vacated based on single larceny rule; neither Tr. Ct. nor defense counsel advised D of single larceny rule); Benberry, App., 742 N.E.2d 532 (where D purchased stolen credit cards at same time & from same place, there was only one theft offense); Raines, 514 N.E.2d 298 (D took truck & scuba gear, belonging to 2 roommates, from same residence; held, 1 theft); Williams, 395 N.E.2d 239 (taking business property from several employees constitutes 1 robbery of business).

TITLE: Stwalley v. State

INDEX NO.: E.11.b.

CITE: (2/20/89), Ind., 534 N.E.2d 229

SUBJECT: Multiple counts - same conduct

HOLDING: Where rape & child molesting charges are based on same conduct, double jeopardy bars two convictions. Here, D broke into 12-year-old victim's home & forced her to submit to sexual intercourse. D was charged with rape & child molesting & was convicted on both counts. Double jeopardy bars multiple punishment for same conduct, causing same harm to victim, over same short span of time. Kizer, 488 N.E.2d 704. Here, both charges arose from one act of sexual intercourse. To punish D for 2 offenses would violate double jeopardy bar. Held, child molesting conviction must be vacated.

RELATED CASES: Owens, App., 543 N.E.2d 673 (DJ bars convictions for both Class C & D child molesting based on same act of fellatio).

TITLE: Thurman v. State

INDEX NO.: E.11.b.

CITE: (10-7-20), Ind. Ct. App., 158 N.E.3d 372

SUBJECT: Double jeopardy - pointing a firearm and criminal recklessness convictions vacated as lesser included offenses of attempted murder

HOLDING: Court of Appeals vacated Defendant's pointing a firearm and criminal recklessness convictions, finding them to be included offenses of his separate convictions for attempted murder. Defendant pulled a gun on two separate people outside a truck stop. He first pointed the gun at a customer's face as the customer was leaving the store, shooting twice and hitting the customer with the second round. Defendant then unsuccessfully attempted to get a ride from a driver sleeping in his car, pointing the gun at the driver's face and shooting the driver after he refused to give Defendant a ride. A jury found Defendant guilty of two counts of attempted murder, two counts of Level 6 felony pointing a firearm, and two counts of Level 6 felony criminal recklessness. The Court of Appeals affirmed in part and reversed in part, concluding that Defendant's actions related to the customer and the driver were so compressed in terms of time, place, singleness of purpose, and continuity of action, that they constitute one continuous transaction. Under the circumstances, Court concluded that the two Level 6 felony counts of pointing a firearm and two Level 6 felony criminal recklessness counts relating to the customer and driver are included offenses of the two attempted murder counts. Held, attempted murder convictions affirmed, convictions for pointing a firearm and criminal recklessness vacated, remanded for the trial court to enter a sentence consistent with this opinion.

RELATED CASES: Starks, 210 N.E.3d 818 (Ind. Ct. App. 2023) (Ct. vacated D's conviction for pointing a firearm because it was a factually lesser-included offense of criminal recklessness as charged and facts presented at trial established a single crime, not two separate and distinct acts).

TITLE: Tingle v. State

INDEX NO.: E.11.b.

CITE: (04-05-94), Ind., 632 N.E.2d 345

SUBJECT: Merger - robbery with battery, theft & confinement

HOLDING: Convictions for aggravated robbery, battery, theft & confinement were preclude D by double jeopardy (DJ), because, as charged, latter three merged into first. Charges arose from situation where D & accomplice entered victim's home to use phone & beat him, tied him up, took his truck, various valuables, wallet, & money. Tr. Ct. found aggravated battery was included in aggravated robbery & so did not enter separate sentence on that charge, but gave maximum, consecutive sentences on other charges, for total of 73 years.

Information charged taking of currency as element of robbery, while taking of other items was basis of theft charge. Ct. found theft was actually included in robbery & separate sentence violated DJ. State argued charges involved different elements, taking of currency & taking of other items, but Ct. found elements were confused with facts. Element is taking, & all elements of theft are included in robbery, making it inherently included offense, Rogers, 396 N.E.2d 348. While various takings were split into separate charges, manner of charging is considered only when lesser offense is not inherently included in greater. Events at home were all part of same criminal transaction, & any of takings could have been used to support robbery charge. Where both cash & truck were taken during armed robbery, offense could not be split for multiple prosecutions. Confinement charge, while not inherently included in robbery, was also precluded because of way it was charged, Derado, 622 N.E.2d 181. One information charged that D knowingly confined victim while armed with a deadly weapon, while other charged holding victim without his consent while armed with deadly weapon. Ct. found that as charged latter offense was included in former & could not stand. Held, remanded for vacation of all but aggravated robbery conviction.

RELATED CASES: White, 944 N.E. 2d 532 (Ind. Ct. App. 2011) *sum.aff'd.*, 963 N.E.2d 511 (Ind. 2012) (theft and receiving stolen property convictions violate Ind. DJ where D drove getaway car after accomplice stole cash register and cash from restaurant and both men later divvied up the cash); Ho, App., 725 N.E.2d 988 (robbery & theft convictions did not violate DJ where theft was based on different items & victims, although part of one transaction); Games, 684 N.E.2d 466 (Ct. noted that previous interpretation of federal DJ clause, which looked beyond statutory elements, does not comport with federal jurisprudence).

TITLE: Wadle v. State
INDEX NO.: E.11.b.
CITE: (8/18/2020), Ind., 151 N.E.3d 227
SUBJECT: Richardson actual evidence test expressly overruled in favor of a new analytical framework for substantive double jeopardy claims
HOLDING: In expressly overruling the constitutional tests formulated in Richardson, the Indiana Supreme Court set forth the following test: When multiple convictions for a single act or transaction implicate two or more statutes with common elements, a court first looks to the statutes themselves. If the language of either statute clearly permits multiple punishment, either expressly or by unmistakable implication, the court's inquiry comes to an end and there is no violation of substantive double jeopardy. But if the statutory language is not clear, then a court must apply Indiana's included offense statutes, I.C. 35-38-1-6 and 35-31.5-2-168 to determine whether the charged offenses are the same. If neither offense is included in the other (either inherently or as charged), there is no violation of double jeopardy. But if one offense is included in the other (either inherently or as charged), then the court must examine the facts underlying those offenses, as presented in the charging instrument and as adduced at trial. The key question of that examination is whether the defendant's actions were "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction." If the factual analysis reveals two separate and distinct crimes, there is no violation of substantive double jeopardy even if one statutory offense is included in the other. But if the analysis shows a single continuous crime with one statutory offense included in the other, then the prosecutor may charge these offenses only in the alternative, not cumulative sanctions. The State can rebut this presumption only by showing that the statute--either in express terms or by unmistakable implication, clearly permits multiple punishment. Finally, the court emphasized that supplemental Indiana constitutional provisions work in harmony with the substantive double-jeopardy protections discussed above to bar multiple punishments in a single trial. Article 1, Section 16 of the Indiana Constitution requires that all penalties be "proportioned to the nature of the offense," the protections in Article 1, Section 13 entitle the defendant to clear notice of the charge or charges against him which operates to bar a conviction of a lesser included offense unless the charging instrument alleges all of the essential elements of that offense, and Article 7, sections 4 and 6, which through Ind. Appellate Rule 7(B), permit a criminal offender to challenge the trial court's sentence as "inappropriate in light of the nature of the offense and the character of the offender."

Here, Defendant was convicted of four offenses. The State conceded and the Court agreed that under the new framework, two of them--OWI endangering a person and OWI with a blood-alcohol concentration of 0.08 or more--violate double jeopardy. Neither statute clearly permits cumulative punishment, and the latter offense is an included offense of the former. The remaining two convictions were leaving the scene of an accident and OWI causing serious bodily injury. Neither statute clearly permits multiple punishments, either expressly or by unmistakable implication, so the Court proceeded to analyze the offenses charged under Indiana's included-offense statutes. The Court concluded that Level 5 felony OWI-SBI is included in the offense of Level 3 felony leaving the scene of an accident and found that because Defendant's actions were so compressed in terms of time, place, singleness of purpose, and continuity of action, they were one continuous transaction. As a result, the Court concluded that the separate statutory offenses present alternative (rather than cumulative) offenses and vacated the level 5 felony offense.

RELATED CASES: Vanderveer, 182 N.E.3d 893 (Ind. Ct. App. 2022) (convictions for both Level 5 felony using false information to obtain a handgun and Level 6 felony making a false statement on a criminal history information form violated double jeopardy); Phillips, 174 N.E.3d 635 (Ind. Ct. App. 2021) (D's two acts of licking C.W.'s vagina and putting his finger inside her, done within 5 to 10 minutes, resulted in two Level 1 felony child molesting convictions; under Wadle analysis, Ct. found no double jeopardy violation even though two counts were charged under different parts of the same statute; neither offense is included in the other); Carranza, 184 N.E.3d 712; Koziski, 172 N.E.3d 338 (Ind. Ct. App. 2021) (D's two acts of licking C.W.'s vagina and putting his finger inside her, done within 5 to 10 minutes, resulted in two Level 1 felony child molesting convictions; under Wadle analysis, Ct. found no double jeopardy violation even though two counts were charged under different parts of the same statute; neither offense is included in the other); Demby, 2021 Ind. App. LEXIS 44 (factual circumstances and charging information rendered aggravated battery a lesser-included offense of attempted murder, thus Ct. vacated aggravated battery conviction); Madden, 162 N.E.3d 549 (Ind. Ct. App. 2021) (convictions for Level 2 kidnapping for ransom and Level 5 kidnapping based on one removal violate double jeopardy; also, convictions for both criminal confinement and kidnapping, both enhanced based on a demand for ransom, and are so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction," violate double jeopardy). Powell, E.11.b and J.10.f (affirming two aggravated battery convictions because D's two acts of throwing hot water on C.W. were not continuous and therefore, did not constitute a single transaction); Jones, 159 N.E.3d 55 (Ind. Ct. App. 2020) (holding that Wadle and Powell "swallowed statutory and common law to create one unified framework for substantive double jeopardy claims—including the continuous crime doctrine." here, D's two battery convictions against same victim upheld under new double jeopardy test but kidnapping and confinement convictions vacated); Diaz, 158 N.E.3d 363 (Ind. Ct. App. 2020) (convictions for murder, and robbery of the same victim did not violate double jeopardy either under Wadle or old constitutional test, which Ct. addressed "only because there are outstanding questions about whether Wadle should be applied retroactively"); Rowland, 151 N.E.3d 637 (Ind. Ct. App. 2020) (09/08/2020) (D's convictions for possession of marijuana and paraphernalia did not violate double jeopardy, as neither offense is an included offense of the other either under statute or as charged; moreover, the two convictions did not violate the "very same act" rule in the common law because D's behavior of possessing marijuana was separate and distinct from his behavior of possessing paraphernalia).

TITLE: Walker v. State

INDEX NO.: E.11.b.

CITE: (3d Dist. 12/16/91), Ind. App., 582 N.E.2d 877

SUBJECT: Sentences for OWI resulting in death (OWI death) & .10% BAC resulting in death (BAC death) from same accident precluded

HOLDING: D may not be convicted & sentenced for both OWI death & BAC death, for same accident which resulted in deaths of 2 others. D was convicted of 2 counts of OWI death, 2 counts of BAC death, one count of OWI resulting in serious bodily injury, & one count of .10% BAC resulting in serious bodily injury. Individual who drives while intoxicated or with BAC of .10% or above resulting in multiple deaths or injuries, commits only one offense with multiple results. Kelly, Ind. App., 527 N.E.2d 1148. Convictions for both OWI death & BAC death from same incident are also precluded.

Ct. looked to Blockburger v. US, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306, & examined legislative intent for evidence of intent to provide for cumulative punishments. Ct. in Sering, App., 488 N.E.2d 369, found operating with .10% BAC to be lesser included offense of OWI, by concluding legislature did not intend cumulative punishments. Although Rouse, App., 525 N.E.2d 1278, held BAC death was not lesser included offense of OWI death, that decision dealt with conviction for both greater & lesser included offenses, & did not address cumulative punishment issue. Therefore, Rouse did not mandate finding of legislative intent to impose cumulative punishment for these offenses. Previous decisions have found double jeopardy in sentencing for both reckless homicide & OWI death or BAC death. Marshall, App., 563 N.E.2d 1341; Drossos, Ind. App., 442 N.E.2d 1; Carter, Ind. App., 424 N.E.2d 1047. Ct. found legislature created 2 separate offenses to address problems in proof & ensure offender did not escape punishment, not to cause offender to be punished twice. Held, one conviction for each offense of BAC death & OWI death vacated, & convictions for BAC injury & OWI injury vacated also. Remanded for sentencing on either remaining BAC death, or OWI death, leaving 2 convictions, for which one sentence may be imposed.

RELATED CASES: Radick, App., 863 N.E.2d 356 (Sullivan, J., dissenting on basis that the Class C misdemeanor OWI based on a controlled substance & the Class C felony OWI based on alcohol violated double jeopardy when only one person died due to the driving. The fact of killing one person is unaffected by the perpetrator's degree of intoxication or the number or classification of the particular intoxicants leading to D's impaired condition).

TITLE: Weemes v. State
INDEX NO.: E.11.b.
CITE: (3rd Dist., 07-25-94), Ind. App., 637 N.E.2d 832
SUBJECT: Burglary as A felony & criminal recklessness convictions merge
HOLDING: Where charging information for criminal recklessness (crim reck) alleged D committed offense by intentionally discharging firearm in direction of victim, & information for burglary as A felony alleged victim sustained bodily injury; crim reck merged into burglary & conviction for both was precluded by double jeopardy. Elements of crim reck as charged were that D recklessly, knowingly, or intentionally performed act creating substantial risk of bodily injury to another; & elements of burglary were that D broke & entered structure of another with intent to commit felony therein, & that bodily injury to another supported enhancement of offense to class A felony. Ct. found that to establish D caused victim's bodily injury, State necessarily established that he subjected her to substantial risk of bodily injury. Therefore, offense of crim reck as charged required proof of no additional fact that elevated burglary did not require, & so double jeopardy required merger of crim reck conviction into elevated burglary conviction. Held, affirmed in part & reversed on this issue, Garrad, J., dissenting on double jeopardy issue.

TITLE: Wells v. State

INDEX NO.: E.11.b.

CITE: (1st Dist. 03/18/91), Ind. App., 568 N.E.2d 558

SUBJECT: Double jeopardy (DJ) - confinement, attempted rape & armed robbery

HOLDING: D's conviction for confinement in addition to attempted rape & armed robbery was precluded by DJ considerations, because confinement charge did not include any allegation of force in excess of that alleged in attempted rape & armed robbery charges. Armed robbery Information alleged in part "'by using & threatening the use of force & by putting [the victim] in fear, all while armed with a deadly weapon, to wit, a gun;..." Attempted rape Information discussed force as "'all while using & threatening the use of deadly force & while armed with a deadly weapon, to wit: a gun;'" & confinement Information alleged confinement, "'all while armed with a deadly weapon, to wit: a gun;..."

Relying on Ryle, App., 549 N.E.2d 81, & Wethington, 560 N.E.2d 496 (see K.3.c.2), Ct. App. found all offenses charged inherently involved restraint on victim's liberty, & language of confinement Information made no distinction between factual basis for confinement & factual basis for force element contained in robbery & attempted rape Informations. No evidence of extraneous interference with victim's liberty beyond that necessary to effectuate robbery or attempted rape, & therefore DJ precluded conviction & sentence on confinement charge. Held, conviction & sentence on confinement reversed, convictions on other charges affirmed.

RELATED CASES: Stafford, App., 736 N.E.2d 326; Ely, App., 655 N.E.2d 372 (convictions for both confinement & battery violated DJ, where charging informations & evidence at trial relied on same facts to support both convictions); Jackson, App., 643 N.E.2d 905 (separate conviction for robbery & confinement upheld, charging instruments simply repeated language of statutes); But, see, Webster, App., 628 N.E.2d 1212 (DJ didn't preclude convictions for both rape & criminal confinement).

TITLE: Willette v. Fischer
INDEX NO.: E.11.b.
CITE: 508 F.3d 117 (2nd Cir. 2007) 10/29/2007
SUBJECT: Double jeopardy; failure to notify for sex offender registry not continuing violation
HOLDING: Second Circuit Court of Appeals held that the requirement of the New York Sex Offender Registration Act that registrants notify law enforcement of a change of address is not a continuing violation and thus one registrant's multiple convictions based on his ongoing failure to report a single move violated constitutional double jeopardy principles. The registration statute required the offender to register any change of address within 10 days of moving. After he moved and failed to make the required notification, he was convicted in state court of four counts of failure to notify. In a federal habeas petition, he challenged the state's position that each day that passed with no notification constituted an additional unit of prosecution. Court decided the proper unit of prosecution under the registration law is the move and that the multiple convictions violated the Fifth Amendment's double jeopardy clause by imposing multiple punishments for the same offense. Court rejected the State's argument that the unit of prosecution for a change-of-address violation is each day that a sex offender fails to report a new address, pointing out that Petitioner would be subject to a 3,000 year sentence if that were so.

TITLE: Woodcock v. State
INDEX NO.: E.11.b.
CITE: (01/28/2021), 163 N.E.3d 863 (Ind. Ct. App. 2021)
SUBJECT: Noting split, another panel holds common law principles of substantive double jeopardy no longer exist independently post-Wadle
HOLDING: Defendant was convicted of felony murder and Level 5 felony battery by means of a deadly weapon and sentenced to an aggregate of 62 years. While his appeal was being briefed, the Indiana Supreme Court “expressly overrule[d] the Richardson constitutional tests in resolving claims of substantive double jeopardy” and adopted an analytical framework that applies the statutory rules of double jeopardy where a defendant’s “single criminal act or transaction violates multiple statutes with common elements and harms one or more victims.” Wadle v. State, 151 N.E.3d 227, 235, 247 (Ind. 2020). The Court of Appeals noted a conflict among different panels of the court regarding whether the common law rules for analyzing substantive double jeopardy claims survived post-Wadle, but ultimately concluded that “the common law rules are incorporated into the Wadle analysis and no longer exist independently.” The court declined to definitively decide whether the Wadle analysis is to be applied retroactively and concluded that under either the common law formulation or the Wadle analysis, there is no violation of principles of substantive double jeopardy.

There was sufficient evidence that Defendant committed battery by means of a deadly weapon when he fired a gun at close range that struck the decedent in the forehead and then struck the complaining witness in the arm. A reasonable trier of fact could have found that when shooting the victim at close range, Defendant was aware of a high probability that anyone close to her could be struck by the exiting bullet, especially a person standing behind her. Finally, the Court found the aggregate sentence was not inappropriate in light of the nature of his offenses or his character.

RELATED CASES: Rice, 199 N.E.3d 815 (Ind. Ct. App. 2022) (Wadle cleared away the common law double jeopardy jurisprudence developed under Richardson).

TITLE: Woodruff v. State

INDEX NO.: E.11.b.

CITE: (6/26/2017), 80 N.E.3d 216 (Ind. Ct. App. 2017)

SUBJECT: Enhancements for habitual offender and firearm was not impermissible double enhancement

HOLDING: Tr. Ct. did not err in applying both the habitual offender enhancement and the firearm enhancement to Defendant's sentence for aggravated battery. This was not an impermissible double enhancement. Double enhancement analysis is proper when the proof of previous criminal conduct is the basis of more than one enhancement. "There is no impermissible double enhancement here because only one type of repeat offender statute that enhanced Woodruff's conviction was applied. Ultimately, Woodruff's aggravated battery conviction resulted in a dual enhancement, not for the same prior crimes, but for committing aggravated battery with a firearm while being a habitual offender." See Dye v. State, 972 N.E.2d 853, 857 (Ind. 2012), *aff'd on reh'g*, 984 N.E.2d 625 (Ind. 2013). Held, judgment affirmed.

TITLE: Yeagley v. State
INDEX NO.: E.11.b.
CITE: (9/6/84), Ind., 467 N.E.2d 730
SUBJECT: Merger of offenses - attempted voluntary manslaughter & burglary
HOLDING: Tr. Ct. did not err in sentencing D for both attempted voluntary manslaughter & burglary. Here, Ct. finds merger doctrine inapplicable. Elmore, 382 N.E.2d 893 (identity of offense test). Crimes are "clearly not identical." Fact same evidence may be used to establish elements in each crime does not make merger doctrine applicable. Held, no error.

TITLE: Young v. State
INDEX NO.: E.11.b.
CITE: (2d Dist. 01/16/91), Ind. App., 564 N.E.2d 968
SUBJECT: Double Jeopardy - multiple counts drug possession
HOLDING: D could be convicted on only one count of possession of cocaine where, although there were 2 separate packages possessed, possession of both packages was simultaneous. Evidence presented showed that when D was stopped, he had 1 gram of cocaine on his person, & subsequently 8 grams were found in spray can in his car. He was charged with Dealing in Cocaine, Class A felony & Possession of Cocaine, Class D felony. D was found guilty of the lesser included Possession of 3 grams or more of Cocaine as Class C Felony on count I, & on count II, guilty as charged. Ct. of Appeals held that although packages of cocaine were discovered at different times, his original possession of both packages was simultaneous, & therefore constituted single act of possession. Held, vacated conviction as to Count II, D Felony possession, affirmed on other issues. (See card at Z.4.a.)

Note: Ct. did not address whether packages could be aggregated for purpose of determining whether over 3 grams was possessed, as it was not necessary in this case.

RELATED CASES: Walton, 81 N.E.3d 679 (Ind. Ct. App. 2017) (D could be convicted of only 1 count of possession of cocaine with intent to deliver where he simultaneously possessed the cocaine in closely related locations, i.e., 2 apartments within the same apartment building), Walton, 81 N.E.3d 679 (Ind. Ct. App. 2017) (following Taylor v. State, 929 N.E.2d 912 (Ind. Ct. App. 2010), *trans. denied*, court held that D's 2 convictions for unlawful possession of a firearm by a serious violent felon were permissible), Williams, 930 N.E.2d 602 (Ind. Ct. App. 2010) (two Class C felony convictions for possessing two different brand names of pills both including the same schedule III controlled substance violated double jeopardy where D possessed a schedule III controlled substance in two different brand names of pill); Taylor, 929 N.E.2d 912 (Ind. Ct. App. 2010) distinguishing the possession of cocaine statute, court held that SVF convictions and sentences based on D's simultaneous possession of three different guns in his home did not violate the prohibition against double jeopardy); Storey, App., 875 N.E.2d 243 (because State used finished meth to prove dealing & unfinished meth to prove manufacturing, no DJ violation); Donnegan, App., 809 N.E.2d 966 (despite fact that cocaine was found at different times & places, D simultaneously possessed cocaine on his person & inside safe in his residence); Goffinet, App., 775 N.E.2d 1227 (no reasonable possibility that jury relied on same evidentiary facts to establish essential elements of both manufacturing methamphetamine & possession of precursors); Campbell, App., 734 N.E.2d 248 (convictions for two counts of possession at D's house & on his person violated double jeopardy).

E. SENTENCING

E.11. Limitations on sentences

E.11.c. Cruel and unusual (8th Amend; IndConst Art 1, 16) (see, also S.1 and S.2)

TITLE: Allen v. State

INDEX NO.: E.11.c.

CITE: (9/30/83), Ind., 453 N.E.2d 1011

SUBJECT: Cruel & unusual punishment

HOLDING: Tr. Ct. did not err in sentencing D to 158 years for convictions of criminal confinement, criminal deviate conduct, burglary, battery & habitual. Aggravating circumstances articulated by trial as to each count were sufficient to support enhancement of basic penalty. Here, Ct. rejects D's contention that sentence was disproportionate to seriousness of offenses. Length of term of punishment is primarily a legislative concern. Constitutional prohibitions against cruel & unusual punishment & vindictive justice are limitations upon acts of General Assembly & not upon discretion of Tr. Ct., so long as sentence imposed is within statutory limits. Abercrombie, 417 N.E.2d 316; Gingerich, 83 N.E.2d 47. Scope of review is set by ARSR 2. Held, sentence affirmed.

RELATED CASES: Miller, 483 N.E.2d 46 (fact sentence may exceed D's life expectancy does not violate 8th & 14th Amendments.); Petruso, 441 N.E.2d 446 (sentence extending beyond normal life expectancy does not violate Ind. Const. Art. 1, Section 18).

TITLE: Baxter v. State

INDEX NO.: E.11.c.

CITE: (4-24-00), Ind., 727 N.E.2d 429

SUBJECT: Maximum sentence manifestly unreasonable - limited involvement in murder

HOLDING: D's maximum sentence was manifestly unreasonable. Although Ct. has authority to revise & review sentences under Ind. Const. Art. VII, § 4, it will do so only when sentence is manifestly unreasonable in light of nature of offense & character of offender. Ind. App. R. 17(B). Issue is not whether in appellate Ct.'s judgment sentence is unreasonable, but whether it is clearly, plainly, & obviously so. Bunch, 697 N.E.2d 1255. Here, Tr. Ct. sentenced D to maximum term based on D's criminal history, which consisted of three juvenile arrests, one resulting in conviction, & three adult arrests, two resulting in convictions. However, all arrests & convictions were either for nonviolent offenses or based on mistaken identification. Also, D had reputation for peacefulness & took active roles in lives of his children. Lastly, unlike typical accomplice to crime, D's role as driver of car from which principal shot & killed driver of another car was limited. Thus, in view of D's uncertain criminal history, evidence submitted regarding D's character, & D's limited involvement in murder, it was manifestly unreasonable to impose maximum sentence. Held, conviction affirmed & remanded with instructions to reduce sentence to fifty-five years.

RELATED CASES: Brown, 720 N.E.2d 1157 (noting D's "role as follower" of co-D twice his age); Widener, 659 N.E.2d 529 (observing that D who participated in murder and robbery did not formulate or initiate planned offenses).

TITLE: Beatty v. State

INDEX NO.: E.11.c.

CITE: (03/13/91), Ind., 567 N.E.2d 1134

SUBJECT: Constitutionality & reasonableness of sentence

HOLDING: Tr. Ct. did not abuse its discretion in sentencing D to total of 150 years for 3 counts of kidnapping, 3 counts of criminal recklessness, & 1 misdemeanor count. Considering fact that D ultimately chose to refrain from inflicting bodily injury on his hostages, however, S. Ct. exercised its power to review & revise sentences under Art. 7, §4 of Ind. Const., & reduced D's sentence to total of 90 years as incentive to discourage future hostage takers from injuring innocent people. Tr. Ct. had enhanced each of D's Class A felony sentences to maximum of 50 years, each of Class D felony sentences to maximum of 4 years, imposed the maximum misdemeanor sentence of 1 year, & ordered the A felony sentences to be served consecutively, for total of 150 years.

D argued that sentence was disproportionate, cruel & unusual punishment, & manifestly unreasonable in light of offense & his character. D also argued that when offenses arise from single continuous transaction, sentence enhancement to maximum & imposition of consecutive sentences violated Ind. Code 35-38-1-3, 35-38-1-7, & 35-50-2-5; & that Tr. Ct. failed to adequately consider evidence of his mental state & motive as mitigators. S. Ct. found there is no constitutional or statutory prohibition to using same factors to enhance & impose consecutive sentences, & that while Tr. Ct. found no mitigators, it had no duty to negate each potentially mitigating circumstance. In addressing constitutional arguments raised, Ct. recognized that at first blush sentence appeared disproportionate, & there was possibility that D's aggressive assertion of what he saw as his rights might have impinged on patience of Ct. & affected sentence. However, considering nature of offense & character of offender, Ct. declined to find sentence manifestly unreasonable, disproportionate or cruel & unusual. Ct. did, however, take into consideration fact that no one was injured by D & relied in part on Fointno, (1986), 487 N.E.2d 140, in deciding to reduce D's sentence sua sponte. Held, convictions affirmed, cause remanded to Tr. Ct. with instructions to modify sentencing order in accord, J.J. Givan & Krahulik dissenting on modification issue.

RELATED CASES: Basie, 726 N.E.2d 242 (Beatty does not stand for proposition that Ct. will exercise its constitutional authority to review & revise sentences in every instance where hostage taker has not injured innocent people; exercise of such authority in those instances is fact sensitive) Bassie, 726 N.E.2d 242; Young, App., 620 N.E.2d 21 (In finding D's presumptive sentence of 10 years for dealing in cocaine plus 20 year HO enhancement was not manifestly unreasonable nor disproportionate, Ct. engaged in extensive discussion of differences between two concepts. Decision may be helpful in analyzing these concepts, & also contains considerable discussion & analysis of D's sentence that may provide argument in other cases.)

TITLE: Biel v. State

INDEX NO.: E.11.c.

CITE: (1st Dist., 11-21-00), Ind. App., 738 N.E.2d 337

SUBJECT: Presumptive sentence for voluntary manslaughter manifestly unreasonable

HOLDING: In light of D's severe, longstanding mental illness, lack of any criminal history, & absence of any aggravating circumstances, presumptive thirty-year sentence for voluntary manslaughter was manifestly unreasonable. Evidence showed that four teenage boys entered D's makeshift dwelling, threw bricks & boards at him, & refused to leave when asked to do so. Only then did D depart, return with gun, & shoot at boys. Totality of circumstances surrounding shootings, along with evaluation of character of D, called for considerable mitigation of D's sentence. Tr. Ct.'s failure to assign any mitigating weight to D's complete lack of criminal record & his severe & longstanding mental illness resulted in manifestly unreasonable sentence. Held, remanded to Tr. Ct. with instructions to impose minimum sentence of twenty years for voluntary manslaughter, to be served concurrently with two years for criminal recklessness; Robertson, S.J., concurring in result.

RELATED CASES: Lopez, App., 869 N.E.2d 1254 (mitigating weight of D's mental illness & lack of criminal history served only to offset the significant aggravating weight of the grievous nature & circumstances of the crime).

TITLE: Bray v. State

INDEX NO.: E.11.c.

CITE: (1st Dist., 03-30-93), Ind. App., 611 N.E.2d 187

SUBJECT: Maximum, consecutive sentences not manifestly unreasonable

HOLDING: Imposition of maximum, consecutive sentences imposed pursuant to plea agreement, was not manifestly unreasonable. D was charged with dealing in cocaine & dealing in schedule II controlled substances, both as class B felonies. Pursuant to agreement for guilty plea to possession of both as class D felonies, Tr. Ct. imposed two consecutive three (3) year sentences. Evidence revealed that D sold small amount of cocaine to confidential informant (CI), & two days later, D approached CI & offered to sell him some crank, which he did later that day. In finding sentences not manifestly unreasonable, Ct. distinguished D's situation from that found in Beno, 581 N.E.2d 922. Bray sold two different drugs at two different places & initiated second transaction himself. Held, sentence affirmed. But see Woodard, App., 608 N.E.2d 1185, E.11.c.

RELATED CASES: Allen, App, 719 N.E.2d 815 (maximum, consecutive sentence was not manifestly unreasonable where Tr. Ct. supported sentence with valid aggravating factors).

TITLE: Clark v. State

INDEX NO: E.11.c.

CITE: (11/1/90), Ind., 561 N.E.2d 759

SUBJECT: Disproportionate sentence - habitual offender (HO); DUI

HOLDING: Thirty-year HO enhancement of DUI sentence violates proportionality requirement of Art. I, Sec. 16 of Ind. Const. D was convicted of driving while suspended, & of DUI, which was elevated to D felony because of prior DUI conviction within 5 years. Tr. Ct. sentenced D to one year on driving while suspended & 4 years on DUI, then added 30-year HO enhancement, for total of 35 years to run consecutively. On appeal, D argues that sentence is excessive & disproportionate under 8th Amend. to U.S. Const. & Art. I, Sec. 16 of Ind. Const. U.S. Const. does not require extensive proportionality analysis in cases not involving life sentences without parole. See Taylor, 511 N.E.2d 1036. However, Ind. Const. requires that "all penalties shall be proportioned to the nature of the offense." Proportionality analysis of HO enhancement has 2 components. First, Ct. should inquire into nature & gravity of present offense, & if necessary, Ct. should then consider nature & gravity of predicate felonies upon which HO finding is based. [Citations omitted.] Here, second step is not necessary. 34 years of D's sentence resulted from conviction for DUI, which is ordinarily Class A misdemeanor, punishable by imprisonment of not more than one year. In light of this, & in light of fact that D's DUI did not result in injury to person or property, Ind. S. Ct. holds that DUI sentence of 2 years plus 2-year enhancement for aggravating circumstances is maximum allowed under Ind. Const. (**Note:** Because underlying felony was Class D, reduction of 20 years from HO enhancement was available option.) Held, HO enhancement reversed, remanded to enter sentence totaling 5 years. Pivarnik & Givan DISSENT.

RELATED CASES: Lindsey, App., 877 N.E.2d 190 (D's eight year sentence for a Class A misdemeanor & HSO was not disproportionate); Mills, 512 N.E.2d 846 (two year sentence for automobile theft conviction enhanced by 30 years for being HO not disproportionate, considering D's record showed he had propensity to commit automobile-related crimes which probation & short-term incarceration had failed to cure); Taylor, 511 N.E.2d 1036 (32 year sentence for theft of \$50 worth of merchandise did not violate Eighth Amend. because conviction was D's fifth nonviolent felony); Manley, App., 656 N.E.2d 277 (30-year HO enhancement of carrying handgun without license sentence did not violate Art. I, § 16 of Ind. Const.).

TITLE: Coker v. Georgia

INDEX NO.: E.11.c.

CITE: 433 U.S. 584 (1977) 06/29/1977

SUBJECT: Sentencing -- cruel & unusual punishment; excessive punishment

HOLDING: Death penalty is not invariably cruel & unusual punishment within meaning of Eighth Amendment; it is not inherently barbaric or unacceptable mode of punishment for crime. Neither is it always disproportionate to crime for which it is imposed. Here, D was convicted of rape & sentenced to death. Ct. held that because death penalty is excessive punishment for rape, it is cruel & unusual punishment within meaning of Eighth Amendment. Held, judgment upholding death sentence reversed & case remanded; Brennan, J., & Marshall, J., concurring; Powell, J., & Burger, C.J., dissenting.

RELATED CASES: Gregg, 428 U.S. 153 (punishment is excessive & unconstitutional if it makes no measurable contribution to acceptable goals of punishment such that it constitutes nothing more than purposeless & needless imposition of pain & suffering, or is grossly out of proportion to severity of crime).

TITLE: Ewing v. California
INDEX NO.: E.11.c.
CITE: 538 U.S. 11 (2003) 05/03/2003
SUBJECT: Three strikes law, habitual offender, cruel and unusual punishments, proportionality
HOLDING: California's 'three strikes law' requires a life sentence (with eligibility for parole after 25 years) for Ds who are convicted of a felony and who have two or more prior "serious and/or violent felony offenses." The D, who in this case was convicted of felony theft for stealing three golf clubs worth \$399 each, was sentenced to 25 years to life in prison and argued on appeal that the sentence was disproportionate to the severity of the crime, in violation of the Eighth Amendment to the U.S. Constitution.

The U.S. Supreme Court affirmed the D's sentence. The plurality opinion, written by O'Connor and joined by Kennedy and Rehnquist, held that the D's sentence was not grossly disproportionate and therefore did not violate the Eighth Amendment's prohibition against cruel and unusual punishments. Justice Scalia concurred in the judgment, reiterating his belief that the Eighth Amendment's bar on cruel and unusual punishments only guarantees "against certain modes of punishment" and not against disproportionate sentences. Justice Thomas concurred in the judgment as well but stated his view that "the Cruel and Unusual Punishments Clause of the Eighth Amendment contains no proportionality principle." The four dissenting justices variously pointed out that the text of the Eighth Amendment prohibits "excessive" punishments: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted", and that the D's sentence was "2 to 3 times the length of sentences that other jurisdictions would impose in similar circumstances."

TITLE: Gil v. State
INDEX NO.: E.11.c.
CITE: (6/5/2013), 988 N.E.2d 1231 (Ind. Ct. App. 2013)
SUBJECT: Failure to give D written copy of probation conditions
HOLDING: Ind. Code 35-38-2-2.3(b) provides that when a person is placed on probation, he "shall" be given a written statement specifying the conditions of probation. However, harmless error can be found if Tr. Ct. does not provide a written copy of the conditions but orally advises the D of the conditions and he acknowledges that he understands the conditions. Kerrigan v. State, 540 N.E.2d 1251 (Ind. Ct. App. 1989).

Here, Tr. Ct. failed to provide D a written statement of probation terms but did orally indicate the sole term of probation - no contact with the victim. However, D did not acknowledge this term; therefore, Tr. Ct. abused its discretion.

Court also reversed \$20,000 restitution order, as record was devoid of any evidence establishing value of jewelry or other damages caused by burglary for which D pled guilty. Held, judgment affirmed in part, reversed in part, and remanded.

TITLE: Graham v. Florida

INDEX NO.: E.11.c.

CITE: 130 S. Ct. 2011 (05-17-10)

SUBJECT: No LWOP for non-homicides committed by juveniles

HOLDING: The Eighth Amendment's Cruel and Unusual Punishment Clause categorically bans a sentence of life without parole (LWOP) for a juvenile offender convicted of a non-homicide offense. Although 37 states and the federal system have laws authorizing a sentence of LWOP for a non-homicide committed before the offender is 18, the fact that in practice, the sentence is rarely imposed demonstrates the existence of a consensus that such sentences are disproportionate. The juvenile offender convicted of a non-homicide crime must have some meaningful opportunity for release, based on demonstrated maturity and rehabilitation.

Here, 16-year-old D helped rob a restaurant, during which an accomplice beat the manager with a steel bar. D was sentenced to a year in jail and three years' probation. The next year, at 17, D and two 20-year-old accomplices committed a home invasion robbery, and Tr. Ct. sentenced D to LWOP for violating his probation. U.S. Supreme Court reversed, holding that Eighth Amendment does not permit a juvenile offender to be sentenced to LWOP for a non-homicide crime. Reaffirming Roper v. Simmons, 543 U.S. 551 (2005), Court noted that juveniles are less culpable than adult offenders as shown by "developments in psychology and brain science [that] continue to show fundamental differences between juvenile and adult minds."

Court also looked at the penological justification for the sentence, and found that it did not serve: (1) retribution, because it was too severe for the offenders in question; (2) deterrence because as found in Roper, juveniles are less likely to be deterred by long-term consequences, due to their immaturity; (3) incapacitation, because there is no evidence from which to infer that these juveniles will always be a danger to society; or (4) rehabilitation, because they have no hope of parole and no reason to change their behavior. Held, judgment reversed, Florida Court of Appeals' opinion at 982 So.2d 43 reversed and remanded. Roberts, C.J., CONCURRING, agreed that D's sentence was too severe, but disagreed about imposing a categorical ban and would use a case-by-case approach. Stevens, J., joined by Ginsburg and Sotomayor, JJ., CONCURRING, said Justice Thomas's "static approach" to the Eighth Amendment did not allow for societal progress and would entail unacceptable human consequences. Thomas, J., joined by Scalia J., and Alito, J. (in part), DISSENTING, questioned distinction drawn between killings and other sorts of violent crimes, and said majority was wrong about facts in United States and abroad and wrong as a matter of principle to take account of international opinion. Alito, J., DISSENTING, said majority's opinion did nothing to affect even quite long fixed sentences.

Note: This is the first time the Court has imposed a categorical ban on a sentencing practice outside the context of the death penalty.

RELATED CASES: LeBlanc, 137 S. Ct. 1726 (2017) (on habeas review, S.Ct. ruled that Virginia's "geriatric release program" provided a meaningful opportunity for eventual release and thus complied with Graham; see full review in this section), Miller, 132 S. Ct. 2455 (Sup. Ct. 2012) (The Eighth Amendment forbids a sentencing scheme mandating life in prison without the possibility of parole for juvenile homicide offenders; see full entry, this section).

TITLE: Harmelin v. Michigan

INDEX NO.: E.11.c.

CITE: 501 U.S. 957 (1991) 06/27/1991

SUBJECT: Mandatory life imprisonment without parole

HOLDING: Mandatory sentence of life in prison without parole for cocaine possession does not violate 8th Amend. Here, D argues it is "cruel & unusual" to impose mandatory sentence of such severity, without any consideration of mitigating circumstances. Specifically, D had no prior felony convictions. D's claim that consideration of mitigating circumstances is constitutionally required does find support in court's death penalty jurisprudence. [Citations omitted.] However, court refuses to extend such requirement to non-death cases because there is qualitative difference between death & all other punishments. Kennedy, joined by O'Connor & Souter, CONCURRING (in part because sentencing scheme possesses mechanisms for consideration of individual circumstances such as prosecutorial discretion before sentence & executive/legislative clemency afterwards); White, joined by Blackmun & Stevens, DISSENTING; Marshall, DISSENTING; Stevens, joined by Blackmun, DISSENTING.

TITLE: Harrington v. State
INDEX NO.: E.11.c.
CITE: (01/14/92), Ind., 584 N.E.2d 558
SUBJECT: Manifestly unreasonable sentence - Murder
HOLDING: When considered in light of mitigating factors, Tr. Ct.'s finding of aggravating factors was insufficient to warrant enhanced sentence of 60 years for murder. Tr. Ct. found following aggravators: 1) that D is in need of correctional or rehabilitative treatment in penal facility; 2) that imposition of reduced sentence would depreciate seriousness of crime; & 3) that facts & circumstances surrounding crime were aggravating. Mitigating circumstances found were that D had no history of delinquency or criminal activity, & that he led law-abiding life for substantial period before commission of crime. D also argued that fact Ct. found him to be remorseful & that he had been pursuing education & good behavior while institutionalized, were mitigators to consider. S. Ct. found only relevant & applicable aggravator identified in judge's order was body of trial evidence, & that standing in opposition to weight of mitigation, it was clearly insufficient to support 20-year sentence enhancement. Held, remanded for imposition of standard 40-year sentence, Givan, J., dissenting on this issue.

TITLE: Hazelwood v. State

INDEX NO.: E.11.c.

CITE: (2/5/2014), 3 N.E.3d 39 (Ind. Ct. App. 2014)

SUBJECT: Lifetime suspension of driving privileges not unconstitutional as applied to recidivist traffic violator

HOLDING: Because the suspension of D's driving privileges for life does not constitute punishment, D's constitutional claims that his lifetime suspension is a disproportionate punishment and a cruel and unusual punishment necessarily fail. See Schrefler v. State, 660 N.E.2d 585 (Ind. Ct. App. 1996). Ind. Code § 9-30-10-14 and 15, which prohibit reinstatement of D's driving privileges because he had been convicted of Class C felony operating a vehicle after his license had been forfeited for life, is not unconstitutional as applied to D. Held, *denial* of petition for reinstatement of driving privileges affirmed.

TITLE: Howard v. State

INDEX NO.: E.11.c.

CITE: (8/14/84), Ind., 467 N.E.2d 1

SUBJECT: Limitation on sentences -- proportionality claim

HOLDING: D was convicted of burglary, found to be habitual offender (HO), & sentenced to life imprisonment under Ind. Code 35-8-8-1. D argued that his sentence for life as HO upon conviction for nonviolent crime of burglary & prior history of two other nonviolent crimes was cruel & unusual punishment & that constitutionality of his life sentence must be reconsidered in light of Solem, 463 N.E.2d 277. In that case, D's life sentence for uttering no account check was reversed after finding that it was grossly disproportionate to nature of offense. Solem Ct. stated that constitutional permissibility of sentence should be analyzed according to gravity of offense, harshness of penalty, & sentences imposed on other criminals in same jurisdiction. However, S. Ct. also noted that reviewing Ct. rarely will be required to engage in extended analysis to determine that sentence is not constitutionally disproportionate. Here, Ct. held that crime was serious since there was potential threat of violence to persons who might have been present in building entered & object of burglary was to remove business's safe. In addition, even though D's prior crimes could be classified as non-violent, they were also serious crimes of burglary & possession of heroin. Also, there were other individuals in State serving life sentences for crimes of theft, forgery, & burglary when they have been found to have two or more prior felony convictions. Held, denial of petition for post-conviction relief affirmed.

TITLE: Howard v. State
INDEX NO.: E.11.c.
CITE: (5th Dist., 12-29-93), Ind. App., 626 N.E.2d 574
SUBJECT: Consecutive sentences for multiple drug buys not unreasonable
HOLDING: Tr. Ct. did not err in imposing consecutive maximum sentences for three counts of dealing in marijuana, because sentence was not unreasonable under circumstances. Police bought marijuana from D 4 times between October 19 & November 21, 1989, through use of single confidential informant. For each sale, D was charged with 3 counts: dealing, possession, & maintaining common nuisance, for total of 12 counts. Plea agreement called for guilty pleas to three dealing counts, & dismissal of other counts, with Tr. Ct. given discretion to order sentences to be concurrent or consecutive, or any combination thereof.

Ct. rejected argument, based on Beno, 581 N.E.2d 922, that consecutive sentences are precluded where drug sales involve multiple sales of single drug to one informant in short period, pursuant to state sponsored drug sting. Ct. distinguished Beno, noting Beno was sentenced after jury trial & D was sentenced by plea agreement that allowed Ct. to enter consecutive sentences. Ct. interpreted Beno to have found D's sentence only manifestly unreasonable, not illegal. Ct. also distinguished Beno because their Tr. Ct. inappropriately imposed maximum consecutive sentences to make example of D. Here, Tr. Ct. considered multitude of individual sales, magnitude of operation, & D's criminal activity. Ct. also noted that D's 9-year sentence was considerably less severe than 74-year sentence involved in Beno & concluded that as matter of law it could not say sentence was inappropriate to offense & offender. Held, sentences affirmed, Baker, J., dissenting, finding Beno indistinguishable, & also *citing* Woodard, App., 609 N.E.2d 1185, involving guilty plea.

RELATED CASES: Mendoza, App., 737 N.E.2d 784 (3 sales of marijuana to State where D initiated last two sales and D was only convicted of possession could be run consecutively); Pritscher, App., 675 N.E.2d 727; Weaver, App., 676 N.E.2d 22 (maximum, consecutive sentences for 2 counts of dealing in marijuana not manifestly unreasonable, given D's extensive criminal history, facts of crime, & lack of mitigating circumstances involved); Ragland, App., 670 N.E.2d 51 (distinguishing Beno, Ct. noted that written plea agreement contained express provision allowing consecutive or concurrent sentences).

TITLE: Humphrey v. Wilson

INDEX NO.: E.11.c.

CITE: 282 Ga. 520, 652 S.E.2d 501 (Ga. 2007) 10/26/2007

SUBJECT: Sentence for teen sex disproportionate, cruel and unusual due to statutory change

HOLDING: Georgia Supreme Court held a sentence of 10 years' imprisonment without parole imposed on a D who engaged in consensual oral sex at age 17 with a 15-year-old amounted to cruel and unusual punishment in violation of the Eighth Amendment. Court decided that the state legislature's decision following D's conviction to subject conduct like his too much lighter penalties evidenced a sea change in the Georgia citizenry's attitudes about oral sex between consenting teenagers. At the time of D's conviction, the statutory minimum sentence for the crime was 10 years in prison with no possibility of probation or parole, with a requirement of registration as a sex offender upon release. The Georgia legislature amended the statute so that the crime is a misdemeanor and no longer triggers registration requirements when applied to consensual acts between teenagers who differ in age by no more than four years, with the legislation expressly providing that the new provisions were not to have retroactive effect. Court held that D was entitled to relief from his sentence because the amendment to the law demonstrates that the citizens of Georgia no longer believe that consensual sex between teenagers is so serious as to mandate a minimum of 10 years in prison. That change in attitude means that D's sentence is grossly disproportionate in violation of the Eighth Amendment. Court based its proportionality analysis on Justice Kennedy's concurrence in Harmelin v. Michigan, 501 U.S. 957 (1991) which was further developed in Ewing v. California, 538 U.S. 11 (2003).

TITLE: Jones v. Mississippi
INDEX NO.: E.11.c.
CITE: 141 S.Ct. 1307, (U.S. 2021) 04/22/2021
SUBJECT: Life without parole sentence for juvenile upheld - findings as to why defendant was incorrigible or irredeemable not constitutionally required
HOLDING: Under the Eighth Amendment, at a sentencing hearing for a homicide committed by a person who was under eighteen (18) years of age at the time of the offense, the trial court need not make any findings, explicit or implicit, as to why the defendant was incorrigible or irredeemable before imposing a life without parole sentence. The Eighth Amendment only requires discretion on the trial court's part: "a State's discretionary sentencing system is both constitutionally necessary and constitutionally sufficient." Slip op. at 5 (emphasis added).

The dissent contended that by holding that the court need not, even implicitly, find that the youthful offender is one of the rare children whose crimes reflect irreparable corruption, the majority "guts Miller v. Alabama, 567 U.S. 460 (2012), and Montgomery v. Louisiana, 577 U.S. 190 (2016)."

Practice Pointer: Despite the result in Jones, Indiana law should still require an explicit finding as to whether youth was a mitigating factor, and how it weighed against any aggravating factors before imposing life without parole. Indiana Code § 30-50-2-9(c)(7), "Death Sentence; Life Without Parole," explicitly provides the fact that the defendant was less than eighteen (18) at the time the murder was committed is a potential mitigator. Further, subsection (l) of the statute requires that before a death sentence or life without parole may be imposed, the jury or trial court must find that the State proved at least one aggravating factor beyond a reasonable doubt, and that it outweighed "any mitigating circumstances that exist" Practitioners should use the considerations of Miller v. Alabama, 567 U.S. 460 (2012); and Montgomery v. Louisiana, 577 U.S. 190 (2016) to frame the argument as to why and how youth is a significant mitigating factor, and outweighs other aggravating factors, and the trial court must respond with an explicit finding. Even for defacto life without parole sentences, this should be the strategy, and trial courts will most often be required to address youth as mitigation by explicit findings. Anglemyer v. State, 868 N.E.2d 482 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007), requires a sentencing statement by the trial court articulating all of the aggravating factors and mitigating factors supported by the record. This is only unnecessary where the sentence imposed is the advisory (Ind. Code § 35-38-1-1.3), but in reality, most defacto life sentences are going to be enhanced beyond the advisory sentence for whatever offense, or a combination of consecutive sentences. Again, practitioners should use the considerations of Miller and Montgomery, as well as applicable Indiana sentencing considerations as to why youth mitigates against extremely long sentences for youthful offenders. See, e.g., Fuller v. State, 9 N.E.3d 653 (Ind. 2014); Brown v. State, 10 N.E.3d 1 (Ind. 2014); and Stidham v. State, 157 N.E.3d 1185 (Ind. 2020).

TITLE: Kennedy v. Louisiana

INDEX NO.: E.11.c.

CITE: 554 U.S. 945, 128 S.Ct. 1, 171 L.Ed.2d 932 (2008) 10/01/2008

SUBJECT: Eighth Amendment bars death penalty for child rape

HOLDING: In 5-4 decision, Majority held the Eighth Amendment bars States from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the victim's death. The Amendment's Cruel and Unusual Punishment Clause "draws its meaning from the evolving standards of decency that mark the progress of a maturing society." The standard for extreme cruelty "itself remains the same, but its applicability must change as the basic mores of society change." Furman v. Georgia, 408 U.S. 238 (1972). Under the precept of justice that punishment is to be graduated and proportioned to the crime, informed by evolving standards, capital punishment must "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"
Roper v. Simmons, 543 U.S. 551 (2005). A review of the authorities informed by contemporary norms, including the history of the death penalty for this and other non-homicide crimes, current state statutes and new enactments, and the number of executions since 1964, demonstrates a national consensus against capital punishment for the crime of child rape. Alito, J., dissented, with Roberts, C.J., and Scalia and Thomas, JJ. joining.

TITLE: Lockard v. State

INDEX NO.: E.11.c.

CITE: (1st Dist., 10-21-92), Ind. App., 600 N.E.2d 985

SUBJECT: Reasonableness of sentence, consecutive sentences

HOLDING: Forty-nine-year sentence for plea to 7 counts of confinement was not manifestly unreasonable. D was charged with 17 counts of child molesting, 7 counts of confinement, and 8 counts of intimidation. Pursuant to agreement, he pled guilty to confinement charges, and was required to give clean-up statement and pass polygraph. He gave two clean-up statements, and took polygraph, but examiner stated D had not told complete truth. Tr. Ct. found that because D did not pass polygraph, it was not bound by cap on sentencing, and sentenced D to seven consecutive 7-year sentences, with one year of each suspended.

Ct. found Tr. Ct. had carefully weighed aggravating and mitigating circumstances, finding mitigators that D had been molested as child, worked regularly, and was remorseful. Ct. also found as aggravators, however, that D admitted that he had repeatedly molested step-daughters and threatened them, that he needed correctional or rehabilitative treatment in penal institution, that reoccurrence of crime was likely, and that imposition of reduced sentence would depreciate seriousness of crime. Ct. found sentences were appropriate, and that Tr. Ct. could properly use admissions given during clean-up and presentence statements. Ct. also found no abuse of discretion in making sentences consecutive. Prior criminal conduct not reduced to conviction, can still be considered as aggravator.

TITLE: Lockyer v. Andrade
INDEX NO.: E.11.c.
CITE: 538 U.S. 63, 123 S. Ct. 1166, 155 L.Ed.2d 144 (2003) 03/05/2003
SUBJECT: Three strikes law, proportionality, clearly established law
HOLDING: The D was convicted of two counts of theft after shoplifting \$150 worth of videotapes from two stores. Under California's "three strikes law" he was sentenced to two consecutive prison terms of 25 years to life. The California Court of Appeal rejected his claim that the sentence violated the Eighth Amendment prohibition of cruel and unusual punishments. California's Supreme Court denied review and the federal district court denied a petition for habeas relief. The Ninth Circuit reversed, holding that the D's sentence violated the Eighth Amendment and that the state court's decision was 'contrary to, or involved an unreasonable application of, clearly established Federal law', a precondition for federal habeas relief under the AEDPA (28 U.S.C. § 2254).

The U.S. Supreme Court declined to reach the issue of whether the state court erred on the merits of the D's Eighth Amendment claim, holding 5-4 that §2254 forecloses federal habeas relief because the state court's decision was not "objectively unreasonable." The dissenters (the same as in Ewing v. California, decided the same day) would have held that "[t]he California court's holding was an unreasonable application of clearly established precedent" and that the D had received "the rare sentence of demonstrable gross disproportionality"

TITLE: Matter of Gardner

INDEX NO.: E.11.c.

CITE: (4th Dist.; 6-29-99), Ind. App., 713 N.E.2d 346

SUBJECT: Sentence for contempt -- disproportionate & manifestly unreasonable

HOLDING: Eleven & one-half year sentence for criminal contempt was manifestly unreasonable.

Power to punish contempt is limited by reasonableness. Matter of Craig, 552 N.E.2d 53 (Ind. Ct. App. 1990). In order to find sentence manifestly unreasonable, Ct. must determine whether sentence is appropriate given particular offense & character of offender. Here, refused to testify at deposition of another's case although State offered him immunity. Tr. Ct. found Gardner in criminal contempt of Ct. & sentenced him to eleven & one-half years imprisonment. Because Indiana Code classifies perjury & obstruction of justice, offenses comparable to criminal contempt, as Class D felonies, Gardner should be sentenced as if he committed Class D felony. Because maximum sentence for Class D felony is three years, eleven & one-half year sentence for contempt was manifestly unreasonable. Held, judgment reversed & remanded with instructions that Tr. Ct. vacate sentence for criminal contempt & impose sentence of three years.

TITLE: Mayberry v. State

INDEX NO.: E.11.c.

CITE: (4th Dist., 12-20-92), Ind. App., 605 N.E.2d 244

SUBJECT: Sentence not manifestly unreasonable

HOLDING: Sentencing D to 7 years for Class C felony forgery was not manifestly unreasonable, even though offense charged involved one count of forging \$50 check, D had no prior criminal history, & D was 66 years old & in poor health. In aggravation of sentence, Tr. Ct. found following facts: victim was 85 years old, D showed no remorse, D gave varying accounts of events, D showed pattern of conduct where she took several thousand dollars of victim's money, & harassing phone calls were made to victim. Tr. Ct. found D's age, health problems, & absence of prior convictions to be mitigators.

To enhance sentence, Ct. need only state one aggravating factor. At trial, over 20 additional checks drawn on victim's account were introduced to show common scheme or plan, & Tr. Ct. may properly consider evidence of prior criminal conduct not reduced to conviction as aggravator. Given legitimate aggravating factors, Ct. did not find sentence unreasonable. Held, conviction & sentence affirmed, Miller, J., dissenting on sentence, & Sullivan, J., concurring in result.

Note: In lengthy & vigorous dissent, Justice Miller set forth considerable additional factual evidence not discussed in majority opinion, which arguably constituted strong mitigation evidence. Additionally, in footnote, he discussed standard for review of sentence based on manifest unreasonableness, which can be used in arguments. It appears that in general, Ct's. App. will be very unlikely to use their power to modify sentences, & that petitions for transfer on this issue are usually going to be necessary.

RELATED CASES: Catt, App., 749 N.E.2d 633 (35-year sentence for 4 counts of forgery & 15 counts of theft was not manifestly unreasonable, where D took \$671,000 from 27 different people & financially devastated at least 4 of his victims).

TITLE: Miller v. Alabama
INDEX NO: E.11.c.
CITE: (06-25-2012), 132 S.Ct. 2455 (2012)
SUBJECT: Statutorily required LWOP sentences for juveniles who commit homicide violate Eighth Amendment

HOLDING: The Eighth Amendment forbids a sentencing scheme mandating life in prison without the possibility of parole for juvenile homicide offenders. Jackson (14) and two other boys went to a video store to commit a robbery. One of the other boys shot and killed the store clerk. Arkansas charged Jackson as an adult with capital felony murder and aggravated robbery, and a jury convicted him of both crimes. The Tr. Ct. imposed a statutorily mandated sentence of life without the possibility of parole. Miller (also 14) and a friend beat Miller's neighbor and set fire to his trailer after an evening of drinking and drug use. The neighbor died. Miller's case was eventually removed to adult court, where he was charged with murder in the course of arson. A jury found Miller guilty, and the Tr. Ct. imposed a statutorily required punishment of life without parole. The concept of proportionality is central to the Eighth Amendment. Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 2021 (2010). Proportionality is viewed less through a historical lens than according to "the evolving standards of decency that mark the progress of a maturing society." Estelle v. Gamble, 429 U. S. 97, 102 (1976).

Roper v. Simmons, 543 U. S. 551 (2005), and Graham emphasized that the distinctive features of youth weaken the rationale for imposing the harshest sentences on juvenile offenders, "even when they commit terrible crimes." Because retribution relates to an offender's culpability, "the case for retribution is not as strong with a minor as with an adult." Graham, 560 U.S. at 48, 130 S. Ct. at 2028; see also Roper, 543 U. S. at 571. Likewise, the characteristics that make juveniles less culpable make them less susceptible to deterrence from harsh sentences. Graham, 560 U.S., at 48, 130 S. Ct. at 2028; Roper, 543 U. S. at 571.

Mandatory sentences prevent a Tr. Ct. from considering an offender's age and the related characteristics and circumstances. "Under mandatory schemes, every juvenile will receive the same sentence as every other the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one." Cert. granted, Arkansas Supreme Court and Alabama Court of Criminal Appeals reversed, and remanded. Kagan, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, J.J.; Breyer, J., concurring, joined by Sotomayor, J.; Roberts, C.J., Dissenting, joined by Scalia, Thomas, Alito, J.J.; Thomas, J., Dissenting, joined by Scalia, J.; Alito, J., Dissenting, joined by Scalia, J. The case was consolidated with Jackson v. Hobbs, No. 10-9647 (June 25, 2012).

RELATED CASES: Jones v. Mississippi, 141 S.Ct. 1307 (U.S. 2021) (Eighth Amendment does not require explicit or implicit findings as to why juvenile defendant was incorrigible or irredeemable before imposing a life without parole sentence; see full review, this section); Newton, 83 N.E.3d 726 (Ind. Ct. App. 2017) (Miller does not apply where juvenile facing the death penalty had the opportunity to receive individualized sentencing but chose to forgo it by agreeing to plead to LWOP in exchange for the State forsaking the death penalty; see full review, this section), Montgomery, 141 S. Ct. 264 (2016) (rule in Miller that mandatory LWOP sentences for juveniles violates 8th amendment is to be applied retroactively to state cases on collateral review)

TITLE: Newton v. State

INDEX NO.: E.11.c.

CITE: (9/6/2017), 83 N.E.3d 726 (Ind. Ct. App. 2017)

SUBJECT: Juvenile LWOP sentence does not violate 8th amendment

HOLDING: The requirement in Miller v. Alabama that a juvenile cannot be subjected to a mandatory LWOP sentence but instead must receive individualized sentencing does not apply where, as here, the juvenile had the opportunity to receive individualized sentencing but chose to forgo it through a plea agreement. In September of 1994, Defendant, then 17, met with friends to discuss killing someone because, the night before, one of his fellow gang members was kicked out of a party at Ball State University. The next day, Defendant and his accomplices spotted Christopher Coyle, a Ball State student whom they did not know, walking alone. They tried to rob Coyle, but he had no money, so they took Coyle to an alley where Defendant shot Coyle in the back of the head. The State charged Defendant with murder and sought the death penalty. The parties later agreed the State would forsake the death penalty in exchange for Defendant agreeing to LWOP. In his 2013 Successive Petition for Post-Conviction Relief, Defendant claimed his LWOP sentence was unconstitutional in light of Miller v. Alabama, 132 S.Ct. 2455 (2012) and Montgomery v. Louisiana, 136 S. Ct. 718, 733 (2016). Miller held that mandatory LWOP sentencing for juveniles violates the 8th Amendment, and Montgomery held that Miller is retroactive. Miller does not apply here for two reasons. First, unlike the Alabama statute at issue in Miller, Indiana's statutes do not impose mandatory LWOP sentences for juveniles under any certain circumstances. Second, Miller only requires that a juvenile have the opportunity to receive individualized sentencing where the juvenile can raise mitigating circumstances, including those related to the juvenile's age and lack of maturity. See Montgomery, 136 S. Ct. at 733. Defendant had this opportunity, but chose to forgo it for the certainty of LWOP instead of risking the death penalty.

However, even though Defendant was not entitled to an individualized sentence per Miller, he essentially received this kind of sentencing. The trial court refused to accept the plea agreement until it thoroughly considered whether the evidence demonstrated LWOP was proper. It heard evidence on mitigating factors and made findings regarding Defendant's youth and his prospect of rehabilitation before accepting the plea agreement. Thus, in deciding to accept the sentence of LWOP for Defendant, the trial court considered the factors prescribed by Miller and Montgomery. Held, judgment affirmed.

TITLE: Poling v. State

INDEX NO.: E.11.c.

CITE: (2nd Dist.; 09-20-06), Ind. App., 853 N.E.2d 1270

SUBJECT: Proportionality- unconstitutional where same act can constitute two different levels of felonies

HOLDING: Class C felony neglect of dependent, Ind. Code 35-46-1-4, is unconstitutional in that it violates the Proportionality Clause, Article I, Section 16, of the Indiana Constitution. With regard to the Proportionality Clause, a finding of unconstitutionality should be reserved for penalties so disproportionate to the nature of the offense as to amount to clear constitutional infirmity sufficient to overcome the presumption of constitutionality afforded to legislative decisions about penalties. State v. Moss-Dwyer, 686 N.E.2d 109, 112 (Ind. 1997). Pursuant to Ind. Code 35-46-1-4, if a jury finds a D guilty of cruel confinement of a dependent, the jury can characterize the crime as either a class C or class D felony. Thus, one D can receive a harsher sentence than another for the very same crime. Appellate court shares its hope that the legislature will clarify Ind. Code 35-46-1-4 to distinguish the elements of neglect of a dependant as a class D or class C felony. Held, judgment affirmed in part & reversed in part, with instructions to reduce D's three class C felony convictions to class D felony convictions.

RELATED CASES: Matthews, Jr., 944 N.E. 2d 29 (Ind. Ct. App. 2011) (as the mental state required for class D felony criminal recklessness is "recklessly, knowingly or intentionally" and thus is different from the mental state required for class B or class C felony battery which is "knowingly or intentionally," there is no proportionality violation); Morris, App., 921 N.E.2d 40 (if theft and criminal conversion "are indeed one and the same, they violate the proportionality clause of the Indiana Constitution; see full review at K.4.h or K.4.r); Mann, App., 895 N.E.2d 119 (although the injury required for both Class B felony aggravated battery and Class C felony battery causing SBI is the same, the intent required for the offenses is different; thus, because the legislature could rationally conclude that a D who intends to inflict injury on another are more blameworthy than a D who intended to touch another rudely, it follows that a more severe punishment for aggravated battery is not disproportionate).

TITLE: Pritscher v. State

INDEX NO.: E.11.c.

CITE: (2nd Dist., 12-31-96), Ind. App., 675 N.E.2d 727

SUBJECT: Sentence proportionality - dealing in cocaine

HOLDING: 38-year sentence for three counts of dealing in cocaine was not disproportionate to nature of offenses under Indiana Constitution, Article I, Section 16. In addition to aggravating factors present in record, Ct. noted that D himself found his sentence possibilities reasonable, as evidenced by his plea agreement. Further, sentences fell well within statutory parameters, as D faced maximum prison term of 60 years. Held, judgment affirmed.

RELATED CASES: Gregory-Bey, 669 N.E.2d 154 (sentencing Ct. cannot enhance sentence to send personal, political, or philosophical message).

TITLE: Roper v. Simmons

INDEX NO.: E.11.c.

CITE: 543 U.S. 551 (2005) 03/01/2005

SUBJECT: Death Penalty, Juvenile Offenders, Cruel and Unusual Punishment

HOLDING: The 8th Amendment's prohibition of cruel and unusual punishment, made applicable to the states by the 14th Amendment, bars imposition of the death penalty for offenders who were younger than 18 at the time of their crimes.

RELATED CASES: Atkins v. Virginia, 536 U.S. 304, (8th Amendment bars execution of mentally retarded offenders).

TITLE: Saunders v. State
INDEX NO.: E.11.c.
CITE: (01/22/92), Ind., 584 N.E.2d 1087
SUBJECT: Manifestly unreasonable sentence - drug offenses
HOLDING: Sentence totaling 140 years for 2 counts of A felony drug dealing, 2 counts of A felony conspiracy to deal, 1 count of B felony drug dealing, & 1 count of B felony conspiracy to deal, was manifestly unreasonable in light of nature of offense & character of offender. S.Ct. granted transfer of Saunders, App., 562 N.E.2d 729, & vacated earlier decision with respect to sentencing issue only.

Tr. Ct. had *cited* D's long history of criminal activity, fact crimes were committed while D was on parole, & likelihood D would commit another crime, as aggravating reasons for imposing consecutive sentences. S. Ct. noted that D was convicted of arson in 1976, & fleeing police officer in 1984, for which he was on parole when he committed instant offenses. Ct. then found that no reasonable person could conclude that 140-year sentence was justified by Tr. Ct.'s aggravating factors. Ct. did find that D's history justified making dealing counts consecutive to each other & conspiracy counts consecutive to each other, but that ordering the dealing counts & closely related conspiracy counts to also be consecutive, rendered sentence manifestly unreasonable. Held, remanded with instructions to modify sentence to have 70-year total dealing sentence be served concurrently with 70-year total conspiracy sentence, Givan & Dickson, J.J., dissenting.

RELATED CASES: Saunders, App., 794 N.E.2d 523 (alleged applicability of Beno to D's direct appeal would have still resulted in a 70-year sentence; see full review at G.6.e); Love, App., 741 N.E.2d 789; Evans, 725 N.E.2d 850 (50-year sentence for dealing in cocaine as class A felony was manifestly unreasonable in light of nature of offense & character of 19 year-old D).

TITLE: Sowell v. State

INDEX NO.: E.11.c.

CITE: (5th Dist. 04/28/92), Ind. App., 590 N.E.2d 1123

SUBJECT: Sentence not manifestly unreasonable nor disproportionate

HOLDING: Sentence of 11 years for prostitution conviction, enhanced by D felony habitual finding, was not unconstitutionally disproportionate nor manifestly unreasonable. D was found guilty of prostitution, & offense was enhanced to Class D felony because of prior convictions. Ct. sentenced D to maximum 3 years on Class D felony, & also enhanced sentence by 8 additional years, because of finding of Class D felony habitual offender (DHO) status. Same prior felonies were used for both elevation of offense to Class D felony & DHO status, but apparently D had total of 9 convictions for prostitution in past 10 years, plus convictions for possession of marijuana (misdemeanor) & resisting arrest (offense level unknown). Ct. found that nature of present offense alone would not justify enhancement, but that long history of prior offenses distinguished case from Clark, 561 N.E.2d 759, & made it more analogous to situation in Best, 566 N.E.2d 1027. Ct. therefore found that sentence was not manifestly unreasonable or disproportionate. Held, conviction & sentence affirmed.

Note: In *Best, supra*, the Ct. found that habitual enhancement was not constitutionally prohibited altogether as it had been in Clark, but still held regular HO enhancement was limited to 10 years. In *Best*, D had 18 prior convictions, & one of instant offenses was Class C felony, as opposed to Sowell, who had 9 convictions, of which apparently only 3 were felonies of Class D.

TITLE: State v. Moss-Dwyer

INDEX NO.: E.11.c.

CITE: (10-23-97), Ind., 686 N.E.2d 109

SUBJECT: Proportionality claim - false information & handgun licenses

HOLDING: Legislature did not violate constitutional requirement of proportionality by punishing submitting false application for handgun license as Class C felony while punishing carrying handgun without permit as Class A misdemeanor. Article I, Section 16, of Ind. Constitution requires all penalties to be proportioned to nature of offense. Statute is unconstitutional only for penalties so disproportionate to nature of offense as to amount to clear constitutional infirmity sufficient to overcome presumption of constitutionality afforded to legislative decisions about penalties. Steelman, App., 602 N.E.2d 152. In Conner, 626 N.E.2d 803, Ct. held that more severe punishment for dealing in fake substance than for dealing in marijuana violated proportionality requirement, because legislature exhibited pattern of punishing marijuana offenses more leniently than other drug offenses. Here, legislature has shown pattern of punishing crimes involving misinforming or deceiving public officials harshly. In light of presumption of constitutionality of statutes & heavy burden on party asserting unconstitutionality, handgun permit penalty scheme does not violate proportionality requirement of Ind. Constitution. Held, judgment reversed.

RELATED CASES: Shepard, 157 N.E.3d 1209 (Ind. Ct. App. 2020) (no proportionality clause violation in vacating D's Level 2 felony voluntary manslaughter conviction and sentencing only on Level 1 felony aggravated battery charge; the legislature could have rationally chosen to impose a more severe punishment where knowing and intentional action results in death (Level 1 felony aggravated battery) than where death has resulted when action was not fully knowing and intentional because of sudden heat (voluntary manslaughter); Giden, 150 N.E.3d 654 (Ind. Ct. App. 2020) (felony escape conviction relating to pretrial home detention upheld but Ct. encouraged legislature to reconsider penalties); White, 978 N.E. 2d 475 (Ind. Ct. App. 2012) (D failed to carry heavy burden that feticide enhancement statute is unconstitutional; D's heavy burden dictated by separation of powers doctrine, which requires restraint when reviewing legislative prescriptions for punishments); Brown, App., 856 N.E.2d 739 (Ct. rejected D's argument that the penalty for identity deception is unconstitutionally disproportionate as compared with the penalty for impersonation of a public servant; see full review at K.11.o).

TITLE: State v. Timbs

INDEX NO.: E.11.c

CITE: (10-28-19), Ind., 134 N.E.3d 12

SUBJECT: Framework for determining if property forfeiture is excessive under Eighth Amendment

HOLDING: On remand from the United States Supreme Court, which unanimously reversed the Indiana Supreme Court's prior holding at 84 N.E.3d 1179 and held that the Eighth Amendment's Excessive Fines Clause applies to the states through the 14th Amendment. In its first Timbs decision, the Indiana Supreme Court allowed the state to move forward with the forfeiture of Timbs' \$40,000 Land Rover because the U.S. Supreme Court had not specifically ruled that the Excessive Fines Clause had been incorporated to the states. Here, as with its first Timbs ruling, the Indiana Supreme Court did not decide on remand whether the forfeiture of Timbs' vehicle under Indiana Code § 34-24-1-1(a)(1)(A) is excessive. But relying on Austin v. United States, 509 U.S. 602 (1993), the Court held that the forfeiture of Timbs' vehicle is a "fine" under the Eighth Amendment. In developing a framework for trial courts to use when evaluating a forfeiture under the Eighth Amendment, the Court considered Austin and United States v. Bajakajian, 524 U.S. 321 (1998). Rejecting the State's argument that the excessiveness question turns only on whether the property was an instrumentality of the crime, the majority instead held that "the Excessive Fines Clause includes both an instrumentality limitation and a proportionality one for use-based in rem fines." That holding is supported by precedent, history and the text of the Excessive Fines Clause. Specifically, to stay within the bounds of the Excessive Fines Clause, a use-based fine must meet two requirements: (1) the property must be the actual means by which an underlying offense was committed; and (2) the harshness of the forfeiture penalty must not be grossly disproportional to the gravity of the offense and the claimant's culpability for the property's misuse. A use-based fine will be considered excessive if the property was not an instrumentality of the underlying crimes. The relevant crimes "are those on which the State bases its forfeiture case." In this case, the Court determined Timbs' Land Rover was an instrumentality of his crimes based on the fact that he drove the vehicle to one of the controlled buys. The Court then adopted a gross-disproportionality standard for reviewing civil forfeitures under the Eighth Amendment. That standard, which is different than the standard used with the Cruel and Unusual Punishment Clause, considers three non-exclusive factors: the harshness of the punishment, including the property owner's economic means; the severity of the offenses; and the claimant's culpability. In remanding the case for an excessiveness analysis using this framework, the Court instructed the trial court to "determine whether Timbs has overcome his burden to establish that the harshness of the forfeiture's punishment is not only disproportional, but grossly disproportional, to the gravity of the underlying dealing offense and his culpability for the Land Rover's corresponding criminal use." Slaughter, J., dissenting, would "embrace the State's proposed rule, which asks only whether the forfeited asset was the instrumentality of a crime... at least until the Supreme Court tells us otherwise." Further, the majority's ruling does not give trial courts guidance on how to apply the newly created framework.

TITLE: State v. Timbs

INDEX NO.: E.11.c.

CITE: (06-10-21), Ind., 169 N.E.3d 361

SUBJECT: Harshness of vehicle's forfeiture grossly disproportionate to the gravity of Defendant's crime and his culpability for the vehicle's misuse

HOLDING: In forfeiture proceeding, Timbs met his high burden of showing that the harshness of his Land Rover's forfeiture was grossly disproportionate to the gravity of his underlying drug dealing offense and culpability for the vehicle's misuse. In so holding, Court declined the State's invitation to reconsider the proportionality test developed in State v. Timbs, 134 N.E.3d 12 (Ind. 2019) for examining forfeitures under the Excessive Fines Clause. The State argued instead that the court should focus primarily on the question of whether the property to be forfeited is an instrumentality of the crime. "[Timbs'] adoption of the gross-disproportionately analysis was based on a number of reasons — signals from the U.S. Supreme Court that proportionality was a necessary piece of the excessiveness inquiry for *in rem* fines; the recognition that almost all courts have rejected the State's proposed instrumentality-only test; the fact that modern *in rem* forfeitures are divorced from their historical roots; and the text and history of the Excessive Fines Clause. " In applying the gross disproportionately framework, Court reached the same conclusion as the trial court that Timbs met his burden, considering his culpability, the harshness of the punishment and the severity of the offense. While Timbs was very blameworthy for the property's misuse, the "*in rem*" fine was overly harsh, and the dealing crime was of lesser severity. The forfeiture of the Land Rover was significantly more punitive than remedial, and contrary to the State's claim, the trial court did not endorse a blanket rule that if a crime didn't have a discernible victim, then a forfeiture must be grossly disproportionate. "Rather, the trial court's analysis focused on a fact that even the State's brief seems to acknowledge: Timbs' crime did 'not involve specific injuries to specific victims.'" The Court further pointed out that other factors revealed the purpose of the use-based *in rem* forfeiture was to significantly punish Timbs, including the extent to which the vehicle's forfeiture would remedy the harm caused; the Land Rover's market value; other sanctions imposed on Timbs; and the effects the forfeiture will have on him. Slaughter, J., concurring to highlight his "deep concerns" with what the Court's totality-of-the-circumstances excessiveness test means and how lower courts will apply it in future cases. Massa, J., dissenting, disagrees that Timbs met his high burden to show gross disproportionately.

TITLE: Sweany v. State

INDEX NO.: E.11.c.

CITE: (02-08-93), Ind., 607 N.E.2d 387

SUBJECT: Sentence not manifestly unreasonable

HOLDING: Where Tr. Ct. found no mitigating circumstances & following aggravating circumstances:

1) past history of criminal & delinquent activity; 2) need for correctional & rehabilitative treatment in penal facility; 3) imposition of reduced sentence would depreciate seriousness of crime; 4) little or no remorse over act or grief over death of wife; & 5) brutal nature of crime & manner of its commission; enhanced sentence of 60 years for murder was not manifestly unreasonable. D argued that most aggravators were merely verbatim recitals of statutory aggravators without facts or explanations to support conclusions, & that second factor does not show why presumptive sentence would not be sufficient. He also challenged use of lack of remorse and/or grief & brutality of crime as aggravators, arguing one murder cannot be more brutal than another, & that victim probably didn't feel anything after first couple plunges of knife. Single aggravating factor may support enhanced sentence, even when it is only prior criminal history, Wills, 578 N.E.2d 363. D was involved in criminal activity as juvenile, & prior actions toward wife (beatings & threats) could be fairly characterized as criminal. Ct. also stated that lack of remorse could be considered as aggravator & held that while it would have preferred more particularized articulation of reasons for enhanced sentence, it could not say sentence was manifestly unreasonable. Held, conviction & sentence affirmed.

RELATED CASES: Smith, 636 N.E.2d 124 (74-year sentence for attempted deviate conduct as A felony, two counts of criminal confinement, plus HO enhancement, not disproportionate sentence); Wilson, App., 635 N.E.2d 1109 (Forty-year sentence for attempted murder & carrying handgun without license imposed on 19-year-old D not manifestly unreasonable).

TITLE: Timbs v. Indiana

INDEX NO.: E.11.c.

CITE: (2/20/2019), 139 S. Ct. 682 (U.S. 2019)

SUBJECT: Excessive Fines Clause is enforceable against the States through the 14th Amendment

HOLDING: The Eighth Amendment's protection against excessive fines is an incorporated protection applicable to the states under the 14th Amendment's Due Process Clause. Timbs pleaded guilty to dealing in a controlled substance and conspiracy to commit theft. At the time of Timbs's arrest, the police seized a Land Rover SUV Timbs had purchased for \$42,000 with money he received from an insurance policy when his father died. The State sought civil forfeiture of Timbs's vehicle, charging that the SUV had been used to transport heroin. Observing that Timbs had recently purchased the vehicle for more than four times the statutory maximum \$10,000 monetary fine assessable against him for his drug conviction, the Tr. Ct. denied the State's request. The vehicle's forfeiture, the court determined, would be grossly disproportionate to the gravity of Timbs's offense, and therefore unconstitutional under the Eighth Amendment's Excessive Fines Clause. The Court of Appeals affirmed, but the Indiana Supreme Court reversed, holding that the Excessive Fines Clause constrains only federal action and is inapplicable to state forfeitures.

In a unanimous opinion, U.S. Supreme Court held that the Excessive Fines Clause is enforceable against the States through the 14th Amendment, the protection having been "a longstanding part of the American legal tradition." See Austin v. United States, 509 U.S. 602 (1993). "Like the Eighth Amendment's proscriptions of 'cruel and unusual punishment' and '[e]xcessive bail,' the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority. This safeguard...is 'fundamental to our scheme of ordered liberty.'"

However, the Court stopped short of deciding whether the Excessive Fines Clause is incorporated as it relates specifically to civil in rem forfeitures, the core dispute of the state litigation. The question of whether the Eighth Amendment's Excessive Fines Clause restricts the States' use of civil asset forfeitures was not properly before the court because the Indiana Supreme Court "nowhere addressed the Clause's applicability to civil in rem forfeitures." Held, Indiana Supreme Court opinion at 84 N.E.3d 1179 vacated and remanded for further proceedings. Gorsuch, J., concurring, opined that the appropriate vehicle for incorporation might be the 14th Amendment's Privileges and Immunities Clause, not the Due Process Clause. Thomas, J., concurring on basis that the Privileges and Immunities Clause was the better incorporation vehicle.

TITLE: Virginia v. LeBlanc
INDEX NO.: E.11.c.
CITE: (6/12/2017), 137 S. Ct. 1726 (2017)
SUBJECT: Virginia gives juveniles meaningful chance for eventual release
HOLDING: The Eight Amendment prevents states from sentencing juveniles who commit non-homicide offenses to life without parole. Graham v. Florida, 560 U.S. 48 (2010). Here, the post-conviction Tr. Ct. did not unreasonably apply Graham by finding that Virginia's "geriatric release program" gave LeBlanc a meaningful opportunity for eventual release.

In 1999, when 16, LeBlanc raped a 62-year-old woman; he was sentenced to a life term. Graham held that even though states are not required to guarantee eventual freedom to juvenile offenders like LeBlanc, they must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Virginia's avenue for potential release is its geriatric release program, under which the Parole Board considers an inmate's conduct during incarceration, relationship with staff and other inmates, and changes in attitude.

Citing Graham, LeBlanc asked the post-conviction to vacate his life sentence. In denying the request, the Tr. Ct. found that the Virginia geriatric release program provides a meaningful opportunity for release, even though LeBlanc must serve at least 40 years to be eligible for the program. LeBlanc sought habeas relief, which the District Court granted, finding "no possibility that fair-minded jurists could disagree that the state court's decision conflicts" with Graham. The 4th Circuit affirmed.

The District Court and 4th Circuit erred in finding that the Tr. Ct. unreasonably applied Graham. Reliance on parole-related factors does not make the Virginia program objectively unreasonable. Consideration of these factors would, in fact, allow a parole board to order a former juvenile offender's release in light of her "demonstrated maturity and rehabilitation." Graham, 560 U.S. at 75.8

Habeas review does not allow consideration of LeBlanc's claims that a) the Parole Board's substantial discretion to deny geriatric release deprives him of a truly meaningful opportunity for release and b) juveniles cannot seek relief until they have spent at least four decades in prison. These may be substantial claims on direct review but lie outside the narrow scope of federal habeas review, which is not to correct error, even clear error, but to set aside state court rulings only when the ruling is "so lacking in justification" that no fair-minded jurist could uphold it. Woods v. Donald, 135 S. Ct. 1372 (2015). Held, District Court decision at 2015 WL 4042175 and 4th Circuit decision at 841 F.3d 256 reversed; State post-conviction court affirmed. Per curiam; Ginsburg, J., concurring in judgment.

RELATED CASES: Graham, 130 S. Ct. 2011 (05-17-10) (on habeas review, S. Ct. ruled that Virginia's "geriatric release program" provided a meaningful opportunity for eventual release and thus complied with Graham; see full review in this section); Miller, 132 S. Ct. 2455 (Sup. Ct. 2012) (The Eighth Amendment forbids a sentencing scheme mandating life in prison without the possibility of parole for juvenile homicide offenders; see full entry, this section).

TITLE: Wilson v. State

INDEX NO.: E.11.c.

CITE: (01/07/92), Ind., 583 N.E.2d 742

SUBJECT: Manifestly unreasonable sentence - Habitual offender

HOLDING: Where D received 4-year enhanced sentence for D felony theft plus enhancement of additional 30 years because of habitual offender finding, such sentence was manifestly unreasonable. Theft occurred when D was 48 & involved picking up aluminum from scrap company lot & reselling it. In 1961 & 1964, D was convicted of vehicular theft & burglary, & served 6 months on each charge. In 1965, he received 10-year sentence for robbery while armed, & in 1977 he received \$3 fine for keeping dive. In 1982, he received suspended sentence for possession of marijuana. Prior felonies used for habitual offender finding were armed robbery & possession of marijuana convictions. Pursuant to Ind. Code 35-50-2-8(e) Tr. Ct. had 2 options to subtract from 30-year habitual offender enhancement: it could have subtracted up to 10 years because one prior felony was Class D felony; & up to 20 years because current felony was Class D. Tr. Ct. rejected these options. S.Ct. concluded that in light of offense & character of offender, i.e., value of stolen items was slight & intrusion was minimal, & convictions bearing significant weight on sentencing occurred when D was in his 20s & prior to successful completion of parole, 34-year sentence was unreasonable. Held, Ct. of Appeals decision affirmed on issue of conviction, but cause remanded for imposition of presumptive 2-year sentence on theft & enhancement of 10 years for habitual offender status, for total of 12 years. Givan, J., dissenting.

TITLE: Woodard v. State

INDEX NO.: E.11.c.

CITE: (2nd Dist., 03-09-93), Ind. App., 608 N.E.2d 1185

SUBJECT: Sentence found manifestly unreasonable

HOLDING: Five 15-year consecutive sentences for dealing in cocaine, based on multiple buys in police sting, were manifestly unreasonable. Five convictions were based on controlled sales to one individual on December 1, 1988, & four controlled sales to another individual on December 13 & 14, 1988, & January 10 & 11, 1989. In imposing sentences, guilty plea Ct. found as aggravators that D had numerous arrests & convictions (in 13-year period, she had 7 theft convictions & drug conviction as class D felony), & that present offenses involved repeated dealing in cocaine. Ct. found that in light of D's prior criminal history, enhancing each sentence by five years was not manifestly unreasonable. Ct. also found, however, that because of police sting with multiple buys to same individual on consecutive days, making all sentences consecutive was unreasonable. Relying primarily on Beno, 581 N.E.2d 922, Ct. held that sentences for sales on December 1, December 13, & January 10, could be served consecutively, but that sentence for sale on December 14 should be concurrent to sentence for December 13 sale, & that sentence for January 11 sale should be concurrent to sentence for January 10 sale, for maximum sentence of 45 years. Ct. appeared to interpret Beno as precluding maximum, consecutive sentences for drug sales committed because of nearly identical State-sponsored buys in short time frame. Held, remanded for resentencing in light of manifest unreasonableness. But see, Bray, App. 611 N.E.2d 187, on separate card holding contra.

E. SENTENCING

E.11. Limitations on sentences

E.11.d. Sentence for lesser offense exceeds sentence for greater

TITLE: Landaw v. State

INDEX NO.: E.11.d.

CITE: (2/28/72), Ind., 279 N.E.2d 230

SUBJECT: Sentence for lesser offense exceeds sentence for greater

HOLDING: Lesser included offense cannot carry greater penalty than higher offense. Here, D pled guilty to entering to commit felony & was sentenced to term of not less than one nor more than ten years. Several months after his release on parole, D was returned to prison as parole violator. D then sought to have his sentence set aside & asked for discharge order, arguing that his sentence constituted cruel & unusual punishment because offense of entering to commit felony is lesser included offense of second-degree burglary, which carried lesser penalty than entering to commit felony. Sentence was reduced from one to ten years, to one to five but Tr. Ct. refused to set sentence aside & to order D's discharge. Because legislature exceeded its constitutional power when it established maximum sentence for offense of entering to commit felony which was greater than maximum penalty for higher offense of second-degree burglary, Tr. Ct. properly reduced D's sentence on lesser included offense to maximum penalty for higher offense rather than discharging D. Held, denial of post-conviction relief affirmed.

E. SENTENCING

E.11. Limitations on sentences

E.11.e. Incarceration of indigent for failure to pay fine (14th Amend; Ind.Const. Art. 1, 22; Ind. Code 35-38-1-18)

TITLE: Patton v. State

INDEX NO.: E.11.e.

CITE: (1st Dist. 1/16/84), Ind. App., 458 N.E.2d 657

SUBJECT: Incarceration of indigent for failure to pay fine - plea agreement; restitution

HOLDING: Tr. Ct.'s imposition of 2-year sentence under plea agreement (stating that D could avoid incarceration by making full restitution of \$2,405.13) did not violate due process or equal protection. Here, D contends he was imprisoned solely because he lacked financial resources to make restitution, *citing* Bearden v. GA (1983), U.S., 103 S. Ct. 2064, 76 L.Ed.2d 221. In Bearden, D was ordered to pay restitution as a condition of probation. Bearden paid \$200, but then lost his job & was unable to pay remainder. The U.S. S. Ct. held: "If the State determines a fine or restitution to be the appropriate & adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it." 103 S. Ct. at 2070. Ct. distinguishes Bearden. No suspended sentence, probation or condition was imposed. Imprisonment was required under D's plea bargain. Held, no error.

RELATED CASES: Barnes, App., 676 N.E.2d 764 (Tr. Ct. found that D was indigent by choice because he chose to violate law; this is not situation where probationer is unable to comply with financial conditions through no fault of his own. Instead, D voluntarily engaged in course of conduct which made him unable to comply with financial conditions of his probation; D's constitutional rights to fundamental fairness were not violated by his probation revocation & incarceration.)

E. SENTENCING

E.11. Limitations on sentences

E.11.f. Vindictive sentencing (North Carolina v. Pearce)

TITLE: Barnett v. State

INDEX NO.: E.11.f.

CITE: (1st Dist. 09/23/92), Ind. App., 599 N.E.2d 232

SUBJECT: Vindictive sentencing not found

HOLDING: D was originally convicted of dealing in Schedule III Controlled Substance (B felony), dealing in Schedule IV Controlled Substance (C felony), and two counts of possession of Schedule IV Controlled Substance (D felonies). Tr. Ct. merged all counts into first Class B felony and sentenced D to 15 years. On appeal, D's conviction for B felony was reversed and merger of other three counts was set aside. On remand, Tr. Ct. merged D felonies into C felony, and imposed sentence of 7 years on that count. Ct. of Appeals rejected D's argument that sentence on remand was proportionally harsher than original sentence, and in violation of prohibition against imposing harsher sentence after successful appeal. In both sentences, Tr. Ct. imposed presumptive sentences, and increased them due to aggravating circumstances. First sentence was increased by 50% of possible aggravation, and second sentence was increased by 75% of possible aggravation, but original presumptive sentence was increased by 5 years, and second sentence was only increased by 3 years. Tr. Ct. was not required to stick to same percentage of aggravation as that previously used, and D did not receive harsher sentence on remand.

RELATED CASES: Owens, 916 N.E.2d 913 (Ind. Ct. App. 2009) (no denial of due process when court resentenced D on murder conviction to a sentence that was five years greater in length, but did not exceed the aggregate sentence originally imposed on both convictions at issue); Champlain, 717 N.E.2d 576 (sentence after retrial was shorter than original sentence because although original sentence had more years suspended, suspended portion was revoked prior to retrial); Alcorn, 638 N.E.2d 1242 (application of savings clause, which precluded use of amended statute, is not violation of principle of reformation; neither is it exercise of vindictive justice where death penalty statute was amended to include life without parole as sentencing option for murders occurring after June 30, 1993 & D committed murder prior to that date).

TITLE: Craig v. State

INDEX NO.: E.11.f.

CITE: (5th Dist. 05/30/91), Ind. App., 571 N.E.2d 1326

SUBJECT: Resentencing after appeal of contempt conviction

HOLDING: Unless record indicates facts, unknown at time of first sentencing, to justify an increased sentence, it is denial of due process on remand after appeal to impose sentence greater than that which should have been imposed originally. D was found in contempt for refusal to answer 3 questions after having been granted use immunity, & Tr. Ct. sentenced him to 90 days imprisonment for each refusal, for total of 270 days. On direct appeal, Matter of Craig (1990), Ind. App., 552 N.E.2d 53, Ct. held D's refusal to answer 3 questions was only one act of contempt & remanded for resentencing. At resentencing, Tr. Ct. entered 270-day sentence for single act of contempt. Ct. of appeals held increased sentence improper in light of North Carolina v. Pearce (1969), 395 U.S. 711, where concern was that increased sentence after successful appeal would open door to "vindictive" sentencing.

While Ct. emphasized that it didn't find existence of vindictive or retaliatory motive, it found Pearce did not require proof of actual vindictiveness, only danger of same. Held, reversed & remanded for sentence not in excess of 90 days.

Note: Ct. also rejected State's position that sentence should be upheld because it was reasonable under circumstances & found that determination of reasonableness would not alter due process concerns present. Ct. stressed that it was not attempting to restrict discretion of Tr. Ct. to deal with contempt, within constitutional limits.

RELATED CASES: Morris, 114 N.E.3d 531 (Ind. Ct. App. 2018) (Trial De Novo Rules allow court to impose greater sentence than inferior court after retrial on appeal; see full review, this section); Smith, 695 N.E.2d 909 (Ind. 1998) (unsupervised probation being changed to supervised probation on resentencing was justified increase due to behavior in jail awaiting resentencing).

TITLE: Hicks v. State

INDEX NO.: E.11.f.

CITE: (5-30-00), Ind., 729 N.E.2d 144

SUBJECT: Vindictive sentence - requires vacated conviction

HOLDING: Where D's case was remanded solely for resentencing without his conviction being set aside, vindictive sentencing law did not apply. Whenever judge imposes more severe sentence upon D after new trial, reasons for his doing must affirmatively appear. North Carolina v. Pearce, 395 U.S. 711, *overruled* on other grounds by Alabama v. Smith, 490 U.S. 794 (1989). Here, D appealed conviction, which was affirmed but remanded for resentencing. D was originally sentenced to 50-year presumptive term with 10-year enhancement; on resentencing, D was sentenced to 40-year presumptive term with 20-year enhancement. Because D only cited cases which involved increased total sentence upon retrial or plea negotiations after original conviction was set aside, Pearce is not applicable to D's situation, which involves resentencing without original conviction being set aside. Thus, Tr. Ct. properly resentenced D. Held, judgment affirmed.

Note: Ct. also upheld resentencing based on fact that total length of sentence was not increased.

TITLE: Hill v. State

INDEX NO.: E.11.f.

CITE: (11/17/86), Ind., 499 N.E.2d 1103

SUBJECT: Vindictive sentencing - harsher sentence than co-D who pled guilty

HOLDING: Due process was not violated where D, who went to trial, was sentenced to 50 years for burglary & co-D, who pled guilty was sentenced to 20 years. Here, D contends disparity in sentences demonstrates his sentence was based in part on decision to exercise right to jury trial rather than plead guilty, *citing* NC v. Pearce (1969), 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656. U.S. S.Ct. in Bordenkircher v. Hayes (1978), 434 U.S. 357, 98 S.Ct. 663, found no constitutional infirmity where prosecutor filed habitual offender charge after D refused plea bargain. See also Walker, App., 454 N.E.2d 425 (Ct. rejects D's contention that fine 10 times greater than non-jury cases with similar facts constituted punishment for exercise of jury trial). Ct. finds D provides inadequate indicia that his exercise of his jury trial right contributed to severity of sentence. Held, sentence revised for other reasons.

RELATED CASES: Pauley, 668 N.E.2d 1212 (D failed to show that trial judge enhanced his sentence because D elected to go to trial).

TITLE: Hull v. State
INDEX NO.: E.11.f.
CITE: (2nd Dist., 12-30-05), Ind. App., 839 N.E.2d 1250
SUBJECT: Increased sentence on resentencing -- conduct by D
HOLDING: On resentencing for two murder convictions, Ct. found no error or due process violation in increasing D's sentence from 75 years to 90 years, where a new aggravator arose after the initial sentencing. In D's initial appeal, Ct. remanded because the law did not allow a delayed sentence to be imposed against D. Hull v. State, 799 N.E.2d 1178 (Ind. Ct. App.2003). Previously, Tr. Ct. had made a portion of the second count consecutive & the rest concurrent. On remand, Tr. Ct. corrected that error by making the sentences consecutive while suspending a portion. However, the entire sentence exceeded the previous sentence. Tr. Ct. found the same aggravators & mitigators as before but found as an additional aggravator since the first sentence that D committed perjury. D had put into evidence a letter from a co-D stating that she was the shooter, but since his initial sentencing D filed a notarized affidavit in the co-D's PCR proceeding stating that the letter was a forgery & he was the shooter. "Because the Tr. Ct. relied on identifiable conduct by [D] that occurred after the original sentencing," the Tr. Ct. did not err in increasing D's sentence. Ct. found North Carolina v. Pearce, 395 U.S. 711 (1969), which held that imposition of greater sentence on a criminal D after a successful appeal of his conviction would deny due process, was inapplicable because D did not appeal his conviction but rather his sentence. The harm Pearce seeks to prevent is not a greater sentence but the "vindictiveness of a sentencing judge" for a successful appeal. D presented no evidence of vindictiveness. Held, judgment affirmed.

TITLE: Linthicum v. State

INDEX NO.: E.11.f.

CITE: (8/20/87) Ind., 511 N.E.2d 1026

SUBJECT: Vindictive sentencing - after PCR

HOLDING: Tr. Ct. erred in imposing greater sentence after successful PCR action. Following vacation of robbery conviction, state added habitual offender count & Tr. Ct. added 30-year enhancement. At time D filed PCR petition, PC Rule 1, Section 10 prohibited imposition of more severe penalty after successful PCR action. Due process requires that Ds must be able to pursue PCR without fear that state will retaliate. Blackledge v. Perry (1974), 417 U.S. 21, 94 S. Ct. 2098, 40 L.Ed.2d 628. Showing of bad faith is unnecessary. Perry. See also Ballard, 318 N.E.2d 798. Here, after D filed PCR petition, but before S. Ct. granted it, legislature adopted Ind. Code 35-50-1-5 providing that sentencing Ct. may impose greater penalty after successful PCR action. D argues statute is unconstitutional. S.Ct. does not go so far, reasoning that statute is now consistent with amendments to PC Rule 1, Section 10, which provide that sentencing Ct. may impose greater penalty if it states its reasons on the record. Reasons must include reliance on identifiable conduct by D occurring after original sentencing. Held, habitual offender finding vacated; remanded for correction of sentence.

RELATED CASES: Ault, App., 705 N.E.2d 1078 (PC Rule 1 & 10 did not apply because enhanced penalty of eight years, for lesser offense, coupled with restitution order, is not more severe penalty than presumptive ten-year sentence imposed for original, greater offense); Dukes, App., 661 N.E.2d 1263 (affirmed Tr. Ct.'s imposition of greater sentence upon D's conviction than was originally imposed after he pleaded guilty; PCR 1 §10(c) allows more severe penalty when conviction based on plea agreement is set aside); McBroom, 530 N.E.2d 725 (sentence on additional charges filed after successful PCR, even though concurrent, constitutes more severe penalty in violation of Section 10).

TITLE: Misztal v. State

INDEX NO.: E.11.f.

CITE: (3rd Dist., 09-27-93), Ind. App., 620 N.E.2d 73

SUBJECT: Finding aggravators upon resentencing not vindictive

HOLDING: On remand after appeal reduced D's conviction from murder to voluntary manslaughter, it was not error for judge to find aggravators not mentioned in first sentencing. D was originally sentenced to 39 years, but conviction was reduced on direct appeal, Misztal, App., 598 N.E.2d 1119, *trans. denied*. At first sentencing hearing, Tr. Ct. found mitigator of D's advanced age, but no aggravators were noted. On remand, Ct. found from presentence report that D had threatened people with deadly weapons on two previous occasions, & that his advanced age was mitigator. Resentencing Ct. determined that aggravators outweighed mitigators, & that further reduction of sentence would depreciate seriousness of crime & imposed 17-year sentence for voluntary manslaughter. Ct. rejected argument that it was improper for resentencing Ct. to impose aggravated sentence when original Ct. had found no aggravators & there were no changed circumstances. In Barnett, App., 599 N.E.2d 232, it was found proper for D to receive proportionally greater sentence on remand for resentencing from B felony to C felony, because there was no "chilling effect" on appellate rights due to fact D received a lesser overall sentence. Ct. found similar circumstance here, where sentence went from 39 years to 17. Ct. also found no authority saying resentencing Ct. doesn't have discretion to consider mitigators & aggravators in light of conviction on lesser charge. S. Ct. has found that aggravators, applied to one charge prior to remand, can be considered for purpose of resentencing D on other charges for which presumptive sentence had been originally imposed, Flowers, 528 N.E.2d 1096. Held, resentencing order affirmed.

TITLE: Morris v. State

INDEX NO.: E.11.f.

CITE: (11/21/2018), 114 N.E.3d 531 (Ind. Ct. App. 2018)

SUBJECT: Trial De Novo Rules allow court to impose greater sentence than inferior court after retrial on appeal

HOLDING: Indiana's Trial De Novo Rules (effective Jan. 1, 1998) do not bar a court from imposing a greater sentence than an inferior court after retrial on appeal. Thus, Tr. Ct. did not abuse its discretion in sentencing D to the maximum possible sentence of one year for public indecency after being initially convicted in Elkhart City Court and receiving a one-year suspended sentence and seeking a trial de novo in the Elkhart Superior Court. The very definition of a trial de novo means a "new trial on the entire case--that is, on both questions of fact and issues of law--conducted as if there had been no trial in the first instance." Black's Law Dictionary (2014). Restraining a court's ability to sentence a defendant by prohibiting a court from imposing a greater sentence is inherently inconsistent with the nature and definition of a trial de novo.

Court also rejected D's inappropriateness challenge to his maximum sentence, noting D's criminal history and the fact he was in a position of trust when he exposed himself to his stepdaughter's 14 year-old friend.

TITLE: Sanjari v. State
INDEX NO.: E.11.f.
CITE: (1/15/2013), 981 N.E.2d 578 (Ind. Ct. App. 2013)
SUBJECT: Vindictiveness - resentencing; aggregate sentence
HOLDING: Tr. Ct.'s resentencing of D after reversal on double jeopardy grounds was not vindictive.

Due process requires that vindictiveness against a D for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. Whenever a judge imposes a more severe sentence upon a D, the reasons for doing so must be clear, or the presumption arises that there has been a vindictive purpose. However, under a due process analysis, where the aggregate period of incarceration on resentencing is no greater than the original aggregate sentence, there is no presumption of vindictiveness. Here, Tr. Ct. sentenced D to two consecutive five-year sentences for two class C felony non-support convictions. On appeal, the Court revised one of the class C felony convictions to a class D felony on double jeopardy grounds. At remand, Tr. Ct. increased D's sentence on the remaining class C felony from five to eight years and sentenced him to two years on the class D felony, for an aggregate of ten-years. Because the aggregate sentence was the same before and after appeal, there is no presumption of vindictive sentencing. Further, D did not show any evidence of actual vindictiveness on the part of the Tr. Ct. Held, judgment affirmed.

TITLE: Texas v. McCullough

INDEX NO.: E.11.f.

CITE: 475 U.S. 134 (1986) 02/26/1986

SUBJECT: Increased sentence following reversal & reconviction

HOLDING: 14th Amend. Due Process Clause precludes increased sentences following reversal of conviction & subsequent reconviction if increase is motivated by vindictiveness on part of sentencing judge. NC v. Pearce (1969), 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed.2d 656. Whenever more severe sentence is imposed after new trial, reasons for increase must affirmatively appear. Id. Here, Court finds no basis for presumption of vindictiveness because: (1) sentencing court itself granted D's motion for new trial; (2) D was entitled by law to choose to be resentenced by either judge or jury & chose resentencing by judge, & (3) different sentencers assessed varying sentences that D received (first sentence was imposed by jury). Even if Pearce presumption of vindictiveness were held to apply, findings of Tr. judge overcame presumption. Sentencing authority may justify increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to original sentencing proceedings. Wasman v. U.S. (1984), 468 U.S. 559, 104 S.Ct. 3217, 82 L.Ed.2d 424. However, justifications for imposing increased sentence cannot be limited only to events which occur subsequent to initial sentence. Here, sentencing judge relied upon evidence which was not presented at first sentencing & upon her belief that first sentence was too lenient. These findings constituted "objective information justifying the increased sentence." U.S. v. Goodwin (1982), 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 74. Brennan CONCURS IN JUDGMENT; Marshall, joined by Blackmun & Stevens, DISSENTS.

TITLE: Williams v. State

INDEX NO.: E.11.f.

CITE: (3d Dist. 7/3/86), Ind. App., 494 N.E.2d 1001

SUBJECT: Vindictive sentencing

HOLDING: Tr. Ct. did not err in resentencing D to 10 years enhanced by 2 years for robbery after D successfully challenged validity of his habitual offender enhancement. Here, D's prior sentence was 10 years for robbery conviction enhanced by 30 years for habitual finding. D contends Tr. Ct. had no jurisdiction to increase robbery sentence & such increase violated double jeopardy & D's rights to due process & equal protection. Ct. finds when habitual offender enhancement is added to D's sentence, this is a factor in Tr. Ct.'s decision whether to impose presumptive sentence for underlying felony or to increase/decrease presumptive sentence due to aggravating or mitigating circumstances. After reviewing IN & U.S. S. Ct. law, Ct. determines Tr. judge had no motive to be vindictive, thus presumption & stringent requirements of NC v. Pearce (1969), 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 do not apply. Tr. judge indicated on record that due to D's lengthy criminal history, he would have enhanced presumptive sentence originally, probably adding more than 2 years, had D not also been eligible for enhanced sentence by virtue of habitual finding. Held, Tr. Ct.'s resentencing affirmed.

RELATED CASES: Gray, App., 871 N.E.2d 408 (Tr. Ct. did not violate D's due process rights by imposing murder & attempted murder sentences consecutive to one another after they were first imposed concurrently; no evidence Tr. Ct. was motivated by vindictiveness, even assuming P.C. Rule 1(10)(b) applied).

E. SENTENCING

E.11. Limitations on sentences

E.11.g. Other

TITLE: Bleeke v. Lemmon

INDEX NO.: E.11.g.

CITE: (4/16/2014), 6 N.E.3d 907 (Ind. 2014)

SUBJECT: Offender against children cannot apply to offenses committed before July 1, 2005

HOLDING: “Offender against children” (OAC) label cannot be applied to anyone who committed their underlying sex offense prior to July 1, 2006. For all persons charged with either a residential restriction offense (Ind. Code 35-42-4-11) or an “unlawful employment offense” (IND. CODE 35-42-4-10), and the sex offense that triggered the restriction occurred before July 1, 2006, the OAC statutes do not apply to those persons. Here, parolee should not be considered an OAC based on his 2005 attempted criminal deviate conduct conviction. Held, transfer granted, Court of Appeals’ opinion at 982 N.E.2d 1040 vacated, judgment affirmed in part and reversed in part.

TITLE: Howard v. State
INDEX NO.: E.11.g.
CITE: (8/29/85), Ind., 481 N.E.2d 1315
SUBJECT: Limitations on sentences - Ind.Const. Art I, Section 16
HOLDING: Ind.Const. Art. I, Section 16 (excessive bail, punishment & penalties) does not prohibit adding or subtracting time by finding aggravating or mitigating circumstances. Collins, 415 N.E.2d 46. Held, sentence affirmed.

TITLE: Slade v. State
INDEX NO.: E.11.g.
CITE: (02-07-11), 942 N.E. 2d 115 (Ind. Ct. App. 2011)
SUBJECT: Judicial estoppel doctrine did not preclude sentencing enhancement
HOLDING: Tr. Ct. did not err in concluding that D's sentence for Class A felony dealing in cocaine was non-suspendible below twenty years when the State dismissed its firearm sentence enhancement allegation pursuant to written plea agreement. D contends that the State should have been judicially estopped from arguing that he was required to execute a minimum of twenty years of his sentence because that position is allegedly inconsistent with dropping the firearm sentence enhancement allegation. Judicial estoppel prevents a party from asserting a position in a legal proceeding inconsistent with one previously asserted. Wabash Grain, Inc. v. Smith, 700 N.E.2d 234 (Ind. Ct. App. 1998).

Court concluded that judicial estoppel does not apply here because: 1) there is no indication that State ever asserted that D's sentence was non-suspendible below twenty years due to his firearm possession; 2) even if State had asserted that position, it is not inconsistent with dismissing the firearm sentence enhancement allegation (Ind. Code 35-50-2-13), which is separate and independent from Indiana's statutory sentencing scheme; and 3) there is absolutely no indication that the State played "fast and loose" with Tr. Ct. or made any misrepresentations, intentional or otherwise. Held, judgment affirmed.

TITLE: Thomas v. State
INDEX NO.: E.11.g.
CITE: (10/4/82), Ind., 440 N.E.2d 463
SUBJECT: Limitations on sentences - absurdity of lesser penalty for armed than unarmed offense
HOLDING: Conviction for commission of felony while armed (CFWA), i.e., voluntary manslaughter, under Ind. Code 35-12-1-1 (repealed 1977) upheld where penalty for CFWA is greater (10-30) than voluntary manslaughter (2-21). Ct. distinguishes armed kidnapping cases - there penalty for armed kidnapping is greater than penalty for CFWA. See Moon, 366 N.E.2d 1168; Coleman, 339 N.E.2d 51. Ct. rejects D's argument that conviction for CFWA would result in absurdity not intended by legislature if voluntary manslaughter is included within meaning of "any felony" in CFWA statute because potential/actual harm is already punished by crime of voluntary manslaughter. Ct. finds deadly weapon creates potential for harm not otherwise present. Walton, 398 N.E.2d 667. Held, conviction affirmed.

E. SENTENCING

E.12. Credit time (Ind. Code 35-50-6-3 et seq)

TITLE: Barber v. Thomas

INDEX NO.: E.12.

CITE: (06-09-10), U.S., 130 S. Ct. 2499

SUBJECT: Defendant not entitled to pretrial credit for time served in county jail at request of the federal government

HOLDING: A defendant is not entitled to credit for pretrial confinement if the defendant's custody is a result of charges with a different sovereign.

Defendant in federal custody under United States Immigration and Customs Enforcement (ICE), and transported to face local charges is not entitled to credit time spent in local jail prior to entry of his judgment and conviction on local charges. Here, Defendant was arrested in Indiana on local charges, posted bond and was released from local Indiana charges but he was under an ICE immigration hold. Later, the State requested that he be transported to Indiana where he was held in the local jail prior to trial. Defendant pleaded guilty and at sentencing argued he should be entitled to pretrial detention credit for the time he was held in the local jail prior to his sentencing. Court of Appeals finds Defendant's pretrial confinement in the local jail was not a result of the criminal charges for which the trial court here was imposing sentence. In other words, Defendant was not subject to pretrial/presentence confinement based upon the Indiana charges for which he had already posted bond and been released. Rather, he was in custody with the permission and on behalf of the federal authorities who transported him to Indiana to face the current charges. Accordingly, Defendant was not entitled to credit for the time served after he was returned to Indiana awaiting conviction and sentencing

TITLE: Barber v. Thomas
INDEX NO.: E.12.
CITE: (06-09-10), U.S., 130 S.Ct. 2499
SUBJECT: Calculation of good time credits for federal prisoners – “term of imprisonment” refers to the length of imprisonment actually served, not full length of sentence imposed
HOLDING: 18 U.S.C. § 3624(b)(1), which enables federal prisoners to earn up to 54 days credit against their sentences “at the end of each year” for good behavior “during that year” does not require the Bureau of Prisons (BOP) to base its calculation on the length of the full term of incarceration imposed by the sentencing judge. Rather, the statute allows the BOP to tally and set aside an inmate's good-time credit at the end of each year of actual confinement and ignore any portion of the sentence imposed that he or she will not serve as a result of credit earned earlier. Thus, although throughout sentencing statutes “term of imprisonment” means the sentence imposed, Court sought to identify the “most natural meaning” that was workable in the specific context (i.e., time served) and sided with the BOP calculation.

The interpretational problem presented by the case is a product of the “crazy quilt” nature of federal criminal law. In the 1970s Congress rejected attempts to codify federal criminal law and chose to continue the process of adding new provisions without a unifying theme or consistency in the use of language. Hence, the same language appears in different statutes but without clear legislative guidance as to meaning in varying contexts. Held, Ninth Circuit Court of Appeals' opinion affirmed. Kennedy, J., joined by Stevens and Ginsburg, DISSENTING, would have read the term so as to apply it consistently across the different statutes in which it was used, would have rejected the BOP calculations and adopted a modified version of the calculation proposed by the prisoners.

TITLE: Brown v. State

INDEX NO.: E.12.

CITE: (04-27-11), 947 N. E.2d 486 (Ind. Ct. App. 2011)

SUBJECT: Credit time - no retroactive application of statute providing credit time

HOLDING: Tr. Ct. did not abuse its discretion by denying D's Motion for Additional Credit Time.

Retroactive application of a statute is appropriate when: (1) the new statute is remedial; (2) a strong and compelling reason exists for applying it retroactively; and (3) retroactive application does not violate a vested right or constitutional guaranty. Walsman v. State, 855 N.E.2d 645, 650 (Ind. Ct. App. 2006). Here, D was on home detention when he violated the rules of community corrections. Tr. Ct. gave D credit for the actual time served on home detention and ordered the remainder of his sentence to be served in the DOC. At the time of D's offense, a person on home detention as a direct commitment to community corrections was not entitled to credit time (2 for 1). IND. CODE 35-38-2.6-6 (2004). However, while D was serving his home detention sentence, the legislature amended IND. CODE 35-38-2.6-6 to hold that a person on home detention as a direct commitment to community corrections is entitled to credit time. D claimed that the amendment to IND. CODE 35-38-2.6-6 should apply retroactively to him in order to double the amount of time he has served. But, Court found that the amendment was not remedial in that it was part of a wholesale change to the community corrections programs and not seeking to cure a singular defect in the statute. Moreover, Court is doubtful that the legislature intended post-hoc halving of sentences without some indication that it was intentionally pursuing such an end. Nor does the refusal to retroactively apply the amendment violate equal protection. Avoiding the administrative burden of recalculating sentences and protecting the integrity of sentences already imposed are legitimate State interests in refusing to retroactively apply the amendment. Thus, D was not entitled to credit time for the time he served on home detention. Held, judgment affirmed.

TITLE: Crase v. State
INDEX NO.: E.12.
CITE: (10-04-19), 136 N.E.3d 220 (Ind. Ct. App. 2019)
SUBJECT: Guilty plea barred D from challenging credit-restricted felon status
HOLDING: By specifically agreeing in his plea agreement that he shall be classified as a credit restricted felon Defendant waived any challenge to his classification on appeal. Defendant is bound by the terms of his plea agreement, including the term indicating that he shall be classified as a credit restricted felon. Even assuming such classification resulted in an illegal sentence, Defendant cannot challenge the sentence after entering into a plea agreement and benefiting from the terms of the agreement, i.e., that two Class A felony child molesting charges were reduced to Class B felony charges and the executed portion of his sentence was capped at ten years. Furthermore, waiver notwithstanding, evidence was sufficient to support Defendant's classification as a credit restricted felon.

TITLE: Harding v. State
INDEX NO.: E.12.
CITE: (3/3/2015), 27 N.E.3d 330 (Ind. Ct. App. 2015)
SUBJECT: Erroneous calculation of credit time - probation revocation
HOLDING: Tr. Ct. incorrectly calculated the amount of credit time D had accrued prior to the revocation of his probation as well as the sentence imposed after the revocation. Tr. Ct. revoked D's probation and suspended sentence and ordered him to serve the remaining balance of his sentence at the DOC, which the court calculated was 3897 days with 264 credit days, for a total remaining sentence of 3633 days.

D is not entitled to credit time while he was on probation from February 13, 2014 until his April 4, 2014 violation and from April 4, 2014 until May 30, 2014, while he was apparently evading an arrest warrant. D did not meet his burden to show he met an exception to Ind. Code § 35-50-6-6, which provides that a person does not earn credit time while on probation, and there is no credit time for evasion. The parties disputed the balance of the executed days to which the 1,592 days of credit should be applied. The revocation of the suspended sentence conforms to the original 5,100-day sentence imposed, so the 1,592 days of credit time should be applied to that. Held, judgment reversed and remanded with instructions to award D 1592 days of credit time and apply it to his 5,110-day original sentence, leaving a 3518-day sentence.

TITLE: Hendrix v. Duckworth
INDEX NO.: E.12.
CITE: (12/21/82), Ind., 442 N.E.2d 1058
SUBJECT: Credit time - lifers
HOLDING: A life prisoner has no statutory (Ind. Code 11-13-3-2(b)(3)) or constitutional (Cottingham, 424 N.E.2d 105; Dunn, 377 N.E.2d 868) right to good time credit. Here, D filed petition for habeas corpus relief requesting the Ct. to determine whether it is unconstitutional to deny good time credit as provided in Ind. Code 11-1-1-9.1(a) (repealed effective 10/1/80) to a prisoner serving life for first degree murder. Ct. finds petition is not a proper petition for writ of habeas corpus because immediate release not sought; neither can it be treated as a PCR petition. Ct. exercises judicial discretion & addresses issue "to discourage ... further futility." Constitutionality of Ind. Code 11-1-1-9.1 is moot issue, as statute is repealed. Present statute (Ind. Code 11-13-3-2) specifically precludes life prisoners from earning good time. Held, no error in dismissal of habeas petition.

TITLE: Kincaid v. State
INDEX NO.: E.12.
CITE: (11-12-02), Ind., 778 N.E.2d 789
SUBJECT: D entitled to credit for time served on probation when resentenced on same offense
HOLDING: Double jeopardy requires that time served on probation must be credited toward a new sentence of probation imposed for same conviction after D successfully petitions for post- conviction relief. Ind. Code 35-50-1-5 & Post-Conviction Rule 1(10) require credit for time served on probation by successful post-conviction petitioner whose original sentence is set aside & is resentenced. In this case, Tr. Ct. did not credit D with 636 days of probation he had already served for his first conviction, which was subsequently vacated as result of successful post- conviction petition. D then served an additional term of punishment (probation) for a second conviction based on very same offense. Federal constitution required that D receive 636 days credit from first sentence toward second sentence. North Carolina v. Pearce, 395 U.S. 711 (1969). Moreover, in this case D cannot be said to have agreed in plea agreement to forego his constitutional right to credit for time served.

However, because D did not appeal his sentence until after he violated terms of his probation, Tr. Ct. did not commit reversible error by requiring him to serve out unexecuted portion of his sentence. Even though D's sentence was erroneous, D was not entitled to make that determination unilaterally & disregard terms of his probation. Held, transfer granted, Tr. Ct.'s order to serve remainder of sentence affirmed.

TITLE: Komyatti v. State
INDEX NO.: E.12.
CITE: (07-28-10), 931 N.E.2d 411 (Ind. Ct. App. 2010)
SUBJECT: Credit time - parole revocation
HOLDING: Revocation of D's parole did not deprive him of good time credit earned during previous period of incarceration. D was incorrect that once he earned credit time while incarcerated, he could not be ordered back to prison to serve remainder of original fifty-five-year sentence for a 1983 murder. D's release on parole did not mean he completed his sentence and was entitled to discharge. See Harris v. State, 836 N.E.2d 267, 282 (Ind. Ct. App. 2005). "Rather, credit time statutes are only applied to determine when felons are eligible for parole. While on parole, the parolee remains in legal custody because, although parole is an amelioration of punishment[,] it is, in legal effect, still imprisonment." See id. Because D violated parole, there was no legal barrier to returning him to prison to serve the remainder of his sentence, though D will again accumulate credit time while serving that time. See Ind. Code ' 35-50-6-1(c). Held, judgment affirmed.

TITLE: Niccum v. State

INDEX NO.: E.12.

CITE: (12/20/2021), Ind. Ct. App., 181 N.E.3d 993

SUBJECT: Calculation of good time credit is determined by accrued time.

HOLDING: Defendant was on probation when arrested for another offense. He spent three days in jail before being released on his own recognizance. The trial court revoked his probation and ordered him to serve the remainder of his suspended sentence in the Department of Correction but failed to award him credit for the three days he was in jail pending his probation revocation. The State agreed Defendant was entitled to accrued time for the days spent in jail but argued the case should be remanded to the trial court for consideration of whether Defendant was entitled to good time credit, arguing the day he was arrested should not count. Citing I.C. 35-50-6-3.1(c), the Court of Appeals held that Defendant had earned three days of accrued time, which entitled him to one day of good time credit.

TITLE: Sales v. State
INDEX NO.: E.12.
CITE: (4th Dist. 6/21/84), Ind. App., 464 N.E.2d 1336
SUBJECT: Good time - lesser jail term as condition of probation
HOLDING: Tr. Ct. did not err in sentencing D to 180 days suspended & as a condition of probation requiring D to serve 30 days in jail without good time credit. Ind. Code 35-7-2-1(c) [now Ind. Code 35-38-2-2(d)] precludes good time credit on lesser jail term ordered as condition of probation. Statute applies to both consecutive & intermittent sentences (e.g. 30 days, 10 weekends). Held, no error. **Note:** Statute was replaced by Ind. Code 35-38-2-2(d), which applies only to intermittent sentence.

TITLE: State v. Moore

INDEX NO.: E.12.

CITE: (2nd Dist., 07-22-09), 909 N.E.2d 1053 (Ind. Ct. App. 2009)

SUBJECT: Tr. Ct. jurisdiction - DOC deprivation of credit via SOMM

HOLDING: Tr. Ct. erroneously found that it lacked jurisdiction to order DOC to restore prisoner's credit time classification and reinstate privileges relating to visitation and education. Indiana courts have no subject matter jurisdiction to review prison disciplinary actions. However, they do have jurisdiction to review other types of DOC actions, such as those involving a prisoner's constitutional rights.

Here, prisoner was convicted of a sex offense, but maintained his innocence throughout his trial and subsequent proceedings. Prisoner agreed to participate in the SOMM program but refused to admit his guilt. His attorney sent prisoner's SOMM counselor a letter *citing* to the Fifth Amendment and explaining that he advised prisoner to refrain from discussing details of his case. Without addressing the Fifth Amendment claim, DOC found prisoner violated SOMM requirements, demoting him from Credit Class I to Class III and ordering him "out of school." Prisoner filed a motion in the Tr. Ct. requesting DOC be ordered to restore his credit classification and privileges. Tr. Ct. originally granted the Motion, but later granted DOC's Motion to Correct Errors based on lack of subject matter jurisdiction. Although prisoner's Motion requested restoration of credit time and privileges imposed as part of DOC's discipline, the gravamen of prisoner's claims was based on the constitutionality of SOMM requirements. DOC cannot violate a prisoner's constitutional right against self-incrimination, impose sanctions because the prisoner asserts his rights, and then hide behind the shibboleth of "no review of prison disciplinary matter." Thus, Tr. Ct. had subject matter jurisdiction to review the deprivation of credit time and privileges after such deprivation occurred pursuant to prisoner's claim of his right against self-incrimination.

Because DOC based its entire defense on its subject matter jurisdiction argument, there is a clear non-constitutional basis for deciding the case. Although refusing to address the constitutionality of SOMM, Court noted it appears that SOMM is similar to the programs found unconstitutional in Johnson v. Fabian et al., 735 N.W.2d 295 (Minn. 2007) and Bender v. New Jersey DOC, 812 A.2d 1154 (2003). Held, judgment reversed and remanded with directions that Tr. Ct. vacate its grant of the motion to correct error and reinstate its original order in favor of prisoner.

TITLE: Tate v. State
INDEX NO.: E.12.
CITE: (2nd Dist., 8-17-04), Ind. App., 813 N.E.2d 437
SUBJECT: Credit time - Ct. must apply time to crimes for which D has been detained
HOLDING: In probation violation sentencing, Tr. Ct. did not have authority to save pretrial detention credit time & apply it upon disposition of unrelated pending charge. State on appeal conceded this pursuant to Ind. Code 35-38-3-2 & 35-50-6-3 & argued for remand. Ct. sua sponte noted a "strong argument" for waiver existed as D requested his pretrial detainment be saved, but as the law apparently precludes such a sentence & considering the State's position on appeal, the Ct. reversed & remanded to the Tr. Ct. to revise the sentence & provide his pretrial credit, noting that as it had no information on how the pending charge was resolved that sentence may need to be revised as well. Held, judgment reversed & remanded.

TITLE: Temme v. State

INDEX NO.: E.12.

CITE: 169 N. E.3d 857 (Ind.) 06/21/2021

SUBJECT: Defendants not at fault for early release earn credit for time erroneously at liberty as if still incarcerated

HOLDING: The DOC erroneously awarded Defendant 450 days of jail credit. As a result, he served only a portion of his felony sentences and was released from custody 450 days earlier than he should have been. When the State realized the error, it petitioned for Defendant's return to custody to serve the time owed on his felony sentence. The Indiana Supreme Court found that the credit time statute (Ind. Code chapter 35-50-6) only concerns credit time while an inmate is imprisoned or confined. The Court held that as long as the defendant bears no active responsibility in his early release, he or she is entitled to credit while erroneously at liberty as if still incarcerated. However, the defendant's projected release date serves as a firm backstop. When it discovers an error, the State must petition a trial court to recommit the defendant to resume his or her sentence if, after calculating credit time, any sentence remains to be served. Held, transfer granted, Court of Appeals' opinion at 158 N.E.3d 423 vacated, reversed and remanded to the trial court to calculate any credit time owed with Defendant to be recommitted to the appropriate authority if any time remains to be served.

TITLE: Young v. Indiana Department of Correction
INDEX NO.: E.12.
CITE: (12/8/2014), 22 N.E.3d 716 (Ind. Ct. App. 2014)
SUBJECT: DOC credit-time restoration policy does not result in disparate treatment
HOLDING: Inmates at the Department of Correction are subject to having credit time taken away for disciplinary violations. DOC's policies provide for credit time to be restored later under certain circumstances, but only while the inmate is still serving the same sentence. Young had consecutive sentences to serve; during one, he had credit time taken away and later partially restored. After his first sentence was completed, while he was serving a later sentence, he petitioned for restoration of the remaining credit time from his first sentence. DOC denied the request based on its own policy. Court rejected Young's argument that the policy denied him equal protection under the Fourteenth Amendment to the United States Constitution and Article 1, Section 23 of the Indiana Constitution. Held, judgment affirmed.

E. SENTENCING

E.12. Credit time (Ind. Code 35-50-6-3 et seq)

E.12.a. Presentence time served

TITLE: Adams v. State

INDEX NO.: E.12.a.

CITE: (3/15/2019), 120 N.E.3d 1058 (Ind. Ct. App. 2019)

SUBJECT: Hours spent in pretrial incarceration count as one day for purposes of calculating accrued time

HOLDING: In calculating credit time at sentencing, Tr. Ct. improperly calculated D's accrued time by failing to recognize the six to eight hours he spent in jail after his arrest and before posting bond later that same day. Tr. Ct. refused to give D this one day of accrued credit because he had not been in jail "for twenty-four hours." Ind. Code § 35-50-6-0.5 refers to the amount of "time" that a person is imprisoned or confined, but the term "time" is ambiguous because it is not defined elsewhere in Title 35, Article 50. Applying the rule of lenity, Court remanded with instructions to issue a corrected sentencing order recognizing the correct amount of time, one day, during which D was deprived of his liberty prior to sentencing. In so holding, Court noted that any other approach would be an administrative burden on the jail and Department of Correction.

TITLE: Blanton v. State

INDEX NO.: E.12.a.

CITE: (4th Dist., 7-16-01), Ind. App., 754 N.E.2d 7

SUBJECT: Credit time - pretrial time served against sentence for probation revocation

HOLDING: Tr. Ct. did not err in refusing to grant D credit for 126 (63 actual) days served prior to sentencing toward his eventual 180-day sentence for probation revocation. D was sentenced to three years with all suspended but 126 days. When Tr. Ct. revoked D's probation, it revoked 180 days of sentence previously suspended & gave D credit time of eighteen days. Where, as here, D is found to have violated conditions of probation, Tr. Ct. may order execution of sentence that was suspended at time of initial sentencing. Ind. Code 35-38-2-3(g)(3). Although there is no explicit mention of credit time, allowing Tr. Ct. to order execution of entire "suspended" sentence necessarily implies that credit time applied at sentencing is not to be applied again. To hold otherwise would award D pretrial credit time twice, an absurd result not countenanced by either statute or decisional law. Held, judgment affirmed.

RELATED CASES: Kincaid, 778 N.E.2d 789 (double jeopardy requires that time served on probation must be credited toward a new sentence of probation imposed for same conviction after D successfully petitions for post-conviction relief).

TITLE: Boling v. State
INDEX NO.: E.12.a.
CITE: (1/24/2013), 982 N.E.2d 1055 (Ind. Ct. App. 2013)
SUBJECT: No credit restricted felon status for attempted child molesting
HOLDING: After D was convicted of Class A felony attempted child molesting, Tr. Ct. erred in determining him to be a credit restricted felon. If D had been convicted of a completed act of child molesting pursuant to Ind. Code. 35-42-4-3(a), his offense would have fallen within the statutory definition of a credit restricted felon. However, attempted child molesting involving deviate sexual conduct is not listed as a qualifying offense in the credit restricted felon statute (Ind. Code. 35-31.5-2-72(1)), nor is the attempt statute cited. Court rejected State's argument, based on Haggenjos v. State, 441 N.E.2d 430 (Ind. 1982), that the purpose of the credit restricted felon statute is not served by excluding attempt convictions. Haggenjos has not been explicitly *overruled*, but its application has been limited to the specific statute interpreted therein. Held, judgment affirmed in part and reversed and remanded to remove credit restricted felon designation.

TITLE: Brown v. State

INDEX NO.: E.12.a.

CITE: (5th Dist.; 6-12-09), 907 N.E.2d 591 (Ind. Ct. App. 2009)

SUBJECT: Pretrial credit time - effect of plea dismissing some charges

HOLDING: Tr. Ct. abused its discretion by denying D pretrial credit time. A D in jail on multiple charges accrues credit time towards each charge. But whether a D earns credit time for charges dismissed by a plea agreement turns on whether those charges and the charges on which the sentence is imposed are based on the same set of underlying facts. Here, on March 6, 2008, D was arrested on various charges. While in jail, the State filed additional, unrelated charges against D and, on April 10th, "arrested" D on these charges. On October 15, 2009, D was sentenced, pursuant to a plea agreement, to one of the April 9 charges, and in return, the State dismissed the other charges, including all of the March 6 charges. Because the April 9 charges were unrelated to the March 6 charges, D was not entitled to pretrial credit for time he served in jail prior to being arrested on the April 9 charges. But, D is entitled to pretrial credit time on the April 9 charges after he was arrested. Thus, while some of the charges- and the credit time accrued against those charges-were dismissed pursuant to a plea agreement, D nonetheless still accrued credit time towards his eventual sentence from April 10 to October 15. Held, judgment affirmed in part and reversed in part; Baker, C.J., dissenting in part on basis that D is not entitled to any pretrial credit because all the pretrial credit was accrued under a dismissed cause; Kirsch, J., dissenting in part on basis that D is entitled to pretrial credit for entire time served and asserting that where a Tr. Ct. is sentencing pursuant to a plea agreement that resolves multiple charges, including the charge for which the D is being held in jail, that credit time should be accorded against the sentence ultimately imposed in the absence of a provision in the plea agreement to the contrary.

RELATED CASES: Hall, 944 N.E. 2d 538 (Ind. Ct. App. 2011) (Brown did not hold that credit time must be given against each underlying sentence where a Tr. Ct. has exercised discretion to order that a sentence imposed in one county be served consecutive to a sentence imposed in another county).

TITLE: Buchanan v. State
INDEX NO.: E.12.a.
CITE: (10-24-11), 956 N.E.2d 124 (Ind. Ct. App. 2011)
SUBJECT: Credit restricted felon status applies to pretrial confinement
HOLDING: Ind. Code. 35-50-6-4(b) provides that a credit restricted felon "is initially assigned to Class IV." (Emphasis added). Ind. Code. 35-50-6-3 provides that a person assigned to Class IV earns one day of credit time for every six days the person is imprisoned for a crime or confined awaiting trial or sentencing.

Here, D agreed in his plea agreement that he will be designated a credit restricted felon pursuant to Ind. Code. 35-41-1-5.5, and on appeal argued that at time he committed his offenses, he did not meet definition of "credit restricted felon" as he had not yet been convicted of an offense described in Ind. Code. 35-41-1-5.5. Although D did not attain credit restricted felon status until the date of sentencing, Ind. Code. 35-38-3-2 dictates that a term of imprisonment begins on the date of sentencing and credit time earned is at that point calculated by the court and applied against that sentence. Thus, at sentencing, D was identified as a credit restricted felon and was assigned to Class IV, and his credit time was therefore calculated accordingly, at 1 to 6. Moreover, even if the court had granted D 2 for 1 good time credit, the Department of Correction possesses the power to modify his credit time, and indeed may have felt compelled to do so because of Ind. Code. 35-50-6-4(b). See Robinson v. State, 805 N.E.3d 783 (Ind. 2004). Held, judgment affirmed.

TITLE: Dewees v. State

INDEX NO.: E.12.a.

CITE: (1st Dist. 1/25/83), Ind. App., 444 N.E.2d 332

SUBJECT: Credit time - presentence; limitation

HOLDING: Presentence jail credit is determined by same method for Ds held on one or on multiple offenses. The credit will be the number of days D spent in confinement from date of arrest for offense to date of sentencing for that same offense. Dolan, App., 420 N.E.2d 1364 & cases cited therein. Here, D was arrested & confined to jail 8/12/81 on theft charge. He made bond on 9/1/81. On 9/3/81, he was arrested on new unrelated theft/burglary charges. Bond on first charge was never withdrawn. D remained in jail until 12/30/81 when he was sentenced upon a plea bargain for first charge. Plea agreement included dismissal of second charges. Tr. Ct. credited D with 21 days (8/12 to 9/1). Ct. rejects D's contention that credit should be from 8/12 to 12/30, finding D is not entitled to any credit which may have accrued on a separate charge. Held, no error in computing presentence credit time.

RELATED CASES: Muff, App., 647 N.E.2d 681 (Tr. Ct. erred its assignment of pre-trial credit time); Jenkins, 492 N.E.2d 666 (where conviction to which credit time was attributed is reversed, credit time should be attributed to remaining conviction).

TITLE: Dixon v. State
INDEX NO.: E.12.a.
CITE: (5th Dist., 9-16-97), Ind. App., 685 N.E.2d 715
SUBJECT: No pretrial good time credit for voluntary rehabilitation programs
HOLDING: Tr. Ct. did not err in denying D credit for time spent in in-patient rehabilitation program & half-way house prior to his conviction. Distinguishing Capes, 634 N.E.2d 1334, Ct. noted that participation in voluntary rehabilitation programs is not equivalent to serving time on home detention. D's freedom was much greater while participating in these programs than with home detention. Aside from Tr. Ct. granting permission for D's participation in these programs, there was no other evidence that Ct. had any direct supervision over D or monitored his movements during this period. Given their less restrictive & voluntary nature, voluntary rehabilitation programs do not constitute "confinement" within meaning of Ind. Code 35-50-6-3, & thus, do not qualify for good time credit. Held, no error.

TITLE: Emerson v. State

INDEX NO.: E.12.a.

CITE: (2d Dist. 10/28/86), Ind. App., 498 N.E.2d 1301

SUBJECT: Credit time - time served awaiting trial; consecutive sentences

HOLDING: Where D was arrested following escape from prison, time spent in jail awaiting trial on escape charge is credited to aggregate of both sentences, rather than to each sentence individually. Simms, App., 421 N.E.2d 698 (D who received consecutive sentences is entitled to presentence credit only against aggregate term of consecutive sentences). Ct. notes if D is granted presentence credit against sentence imposed for escape, presentence credit portion of D's sentence for escape would in effect be served concurrently with robbery sentence. To extent Burnett, App., 439 N.E.2d 174 implies otherwise, Ct. says it disagrees with implication. Held, no error.

RELATED CASES: Swihart, 71 N.E.3d 60 (Ind. Ct. App. 2017) (D not entitled to 229 days of credit time in Grant County case when that credit time was applied to consecutively served Madison County sentence); Hale, 992 N.E.2d 848 (Ind. Ct. App. 2013) (D was entitled to credit time which is credited against his aggregate suspended term, not divided into executed and suspended portions; see full review at E.13); Payne, App., 838 N.E.2d 503 (D would improperly receive "double or extra credit" if Ct. permitted full credit against both battery & criminal deviate conduct sentences from date of his "arrest" for criminal deviate conduct offense; D should receive credit only against aggregate of his battery & criminal deviate conduct sentences); Diedrich, App., 744 N.E.2d 1004 (regardless of whether it could be argued that D spent time incarcerated in DOC under Marshall County warrant, he was entitled to credit against only one of his sentences for period of incarceration in question); Stephens, App., 735 N.E.2d 278 (disagreeing with Muff, App., 647 N.E.2d 681, & holding that where D is out on bond when arrested for unrelated offense, D is not entitled to double presentence credit time); Grayson, App., 593 N.E.2d 1200 (where Tr. Ct. denied D any pre-trial detention credit time out of concern for improper double credit because Ct. did not know whether his probation on another charge would be revoked, such denial was possibly error. Because Ct. of Appeals lacked necessary information to determine whether D was entitled to credit on instant conviction, cause was remanded for appropriate determination); Bryant, App., 446 N.E.2d 364 (retroactive application of Simms, decided after D's original sentencing, does not constitute ex post facto law denying D due process; Simms did not change law regarding credit time calculations, but simply contradicted practice of Tr. Ct.; held no error).

TITLE: Groves v. State
INDEX NO.: E.12.a.
CITE: (2nd Dist., 03-22-05), Ind. App., 823 N.E.2d 1229
SUBJECT: Credit time classification & denial of pre-sentence time served
HOLDING: Tr. Ct. did not abuse its discretion by classifying D's credit time as Class III at sentencing, which pursuant to Ind. Code 35-50-6-3(c) would earn him no credit time. D was charged with intimidation for sending threatening letters to a woman while incarcerated. At his initial hearing on those charges, D threatened to kill the woman & State charged him with another count of intimidation. Ind. Code 35-50-6-7 allows an individual to be assigned to Class III if he is under the control of a county detention facility or the DOC & is charged with a new crime while confined. That was the case here.

However, Tr. Ct. abused its discretion by denying D credit for time served prior to sentencing. Ind. Code 35-38-3-2 requires a Tr. Ct. to separately include credit for time served prior to sentencing in its judgment of conviction. Robinson v. State, 805 N.E.2d 783 (Ind. 2004). This was not done in this case, but the PSI report indicated a jail credit of 207 days as of sentencing. Ind. Code 35-50-6-3(c) refers to good time credit, not for time served, when it provides that a person assigned to Class III earns no credit time. The Tr. Ct.'s classification of D's credit time to Class III does not address credit for time spent in confinement before sentencing & he should receive credit for pre-sentence time served. Held, judgment affirmed as to Tr. Ct.'s classification determination & reversed & remanded to determine credit for time served prior to sentencing.

TITLE: House v. State
INDEX NO.: E.12.a.
CITE: (2nd Dist., 02-24-09), 901 N.E.2d 598 (Ind. Ct. App. 2009)
SUBJECT: Credit time while in drug court - waivable as part of plea agreement
HOLDING: Tr. Ct. erred, in part, by not awarding D credit time for the time he was imprisoned during his participation in drug court. Ind. Code 35-50-6-3(a) provides that a person assigned to Class I earns one day of credit time for each day he is imprisoned for a crime or confined awaiting trial or sentencing. Pre-sentence imprisonment is a form of punishment and credit time statutes, as remedial legislation, should be liberally construed in favor of those benefitted by the statute. However, a D may waive rights, such as his right to appeal a sentence, in a plea agreement. Acceptance of the plea agreement containing the waiver is sufficient to indicate that, in Tr. Ct.'s view, the D knowingly and voluntarily agreed to the waiver. Thus, a D imprisoned due to violating the terms and conditions of a drug court is entitled to credit time. However, the D may waive credit time for any period of sanction imposed by the drug court by entering into a drug court agreement.

Here, D waived the earning of credit time in his agreement to participate in drug court. But, D did not sign the agreement and waiver until five months into his participation in drug court. D had been intermittently imprisoned for violations of drug court throughout his participation. Thus, D is entitled to credit time for the days of imprisonment incurred prior to, but not after, signing of the waiver. Held, judgment affirmed in part and reversed in part.

RELATED CASES: Perry, 13 N.E.3d 909 (Ind. Ct. App. 2014) (distinguishing House and holding that it is within the trial court's discretion to deny D credit time for electronic monitoring as part of a deferral drug court program); McAllister, 913 N.E.2d 778 (Ind. Ct. App. 2009) (although Tr. Ct. believed that the plea agreement did not provide for credit time for the county jail sentence, there was no such waiver in the plea agreement; Tr. Ct. who already accepted the plea agreement had no discretion to deny D pretrial credit time).

TITLE: James v. State

INDEX NO.: E.12.a.

CITE: (1st Dist., 08-29-07), Ind. App., 872 N.E.2d 669

SUBJECT: Pre-sentence credit time - dismissed & re-filing of related offense

HOLDING: Tr. Ct. improperly denied D's motion requesting credit for time he spent in jail while trial was pending on charges that stemmed from same incident that formed basis for his conviction & that were later dismissed. Determination of a D's pre-trial credit time depends on: 1) pretrial confinement, & 2) the pretrial confinement being a result of the criminal charge for which sentence is being imposed. Stephens v. State, 735 N.E.2d 278 (Ind. Ct. App. 2000). D is not entitled to credit for pre-sentence time served "on wholly unrelated offenses." Dolan v. State, 420 N.E.2d 1364 (Ind. 1981). No Indiana case has addressed the issue of whether a dismissed charge that was based on the same conduct as a subsequently filed charge for which the D is convicted & sentenced constitutes "the criminal charge for which sentence is being imposed."

Here, re-filed charge was based on same set of underlying facts as the dismissed charges for which D was incarcerated pending trial. Thus, giving D credit for his pre-trial incarceration is not giving him credit for a wholly unrelated offense. D was entitled to credit for his period of pre-trial incarceration & Tr. Ct. abused its discretion in denying it. Held, judgment affirmed in part & reversed in part.

TITLE: J.D v. State

INDEX NO.: E.12.a.

CITE: (09-12-06), Ind., 853 N.E.2d 945

SUBJECT: Time-served credit for juvenile's pre-sentence confinement

HOLDING: Juvenile court is not required to give credit for the time a juvenile D serves in confinement prior to sentencing. There are no references in Juvenile Code to credit time, & Ind. Code 31-32-1-1 specifies that in juvenile delinquency cases, the "procedures governing adult criminal trials" apply in all matters not covered by the Juvenile Code. Court agreed with Ct. App. that adult credit time statute, Ind. Code 35-50-6-3, provides substantive rights & is not, therefore, incorporated into the Juvenile Code by operation of Ind. Code 31-32-1-1.

Requiring credit for time a juvenile has spent in pre-disposition confinement would impermissibly impinge upon the juvenile court's broad authority to fashion a myriad of dispositional alternatives, e.g., probation, treatment, wardship to DOC, or confinement in juvenile detention center. Thus, a juvenile court's broad authority to fashion dispositional alternatives extends to discretion over how much, if any, of the time the juvenile has spent in pre-disposition confinement is entitled to credit. 1997 & subsequent enactment of juvenile "determinate sentencing" provisions (i.e., Ind. Code 31-37-19-10) do not affect Court's holding, because juvenile court judge has discretion whether to proceed under these provisions in the first place. The juvenile court is not required to utilize these determinate sentencing provisions, which distinguishes juvenile system from the adult--and makes credit for time served inapplicable. Held, transfer granted, Ct. App.' opinion at 826 N.E.2d 146 vacated, judgment affirmed. See also: A.E. v. State, 853 N.E.2d 950.

TITLE: Maciaszek v. State
INDEX NO.: E.12.a.
CITE: (4/10/2017), 75 N.E.3d 1089 (Ind. Ct. App. 2017)
SUBJECT: Denial of credit time reversed
HOLDING: Defendant was entitled to pre-sentencing credit for the time he was incarcerated pending resolution of his Indiana charges, even though he was also serving time for an unrelated conviction in New Hampshire.

In May of 2012, while Defendant was serving time in Florida on an unrelated conviction, he was charged in Kosciusko County with two counts of B felony Burglary and two counts of D felony theft. The next day, Indiana placed a hold on Defendant. Defendant was already subject to holds in New Hampshire and Maine. After Defendant served his time in Florida, he was transported to New Hampshire where he was convicted and sentenced. While serving time in New Hampshire, Defendant filed a request for disposition of his Indiana charges pursuant to the Interstate Agreement on Detainers. See Ind. Code § 35-33-10-4. Defendant was transported to Indiana where he was incarcerated. He pled guilty, but the Kosciusko Circuit Court awarded no credit time for Defendant's pre-sentencing incarceration. Once he was sentenced, Defendant was immediately returned to New Hampshire. In November of 2015, he filed a verified petition for credit for time served and good time credit.

Defendant was entitled to credit for the time served in Indiana while awaiting disposition of the Indiana charges, even though he was also serving time for a New Hampshire conviction. "If a person incarcerated awaiting trial on more than one charge is sentenced to concurrent terms for the separate crimes, he or she is entitled to receive credit time applied against each separate term. However, if the defendant receives consecutive terms, he or she is only allowed credit time against the total or aggregate of the terms." Payne v. State, 838 N.E.2d 503, 510 (Ind. Ct. App. 2005), *trans. denied*. Nothing in the record indicates that the trial court ordered Defendant to serve his Indiana sentence consecutively to his New Hampshire sentence. Neither the plea agreement nor the trial court's Amended Judgment of Conviction called for consecutive sentences. Thus, because Defendant's Indiana sentence is concurrent to his New Hampshire sentence, he is entitled to credit for time served from the date he was transported to Indiana to the date he was sentenced. See Ramirez v. State, 455 N.E.2d 609 (Ind. Ct. App. 1983). However, whether Defendant is also eligible for good time credit cannot be determined because the record does not indicate Defendant's credit class. Therefore, on remand, the trial court shall determine Defendant's credit class and award good time credit accordingly. Held, judgment reversed.

RELATED CASES: Weaver, 725 N.E.2d 945 (Ind. App.) (Tr. Ct. erred in denying D's motion for pretrial credit time based on principles of res judicata. D was entitled to pre-sentencing credit for time incarcerated while awaiting resolution of Indiana charges, even though he was also serving time for unrelated New Hampshire conviction; see full review, this section).

TITLE: McCoy v. State

INDEX NO.: E.12.a.

CITE: (2/28/2018), 96 N.E.3d 95 (Ind. Ct. App. 2018)

SUBJECT: Credit-restricted felon status reversed - D convicted of "fondling or touching" section of child-molesting statute

HOLDING: Indiana's credit-restricted felon statute, Ind. Code § 35-31.5-2-72(1), can apply only if the D has been convicted of an offense under subsection (a) of the child molesting statute (i.e., involving sexual intercourse, deviate or other sexual conduct). Here, D pleaded guilty to charges of child molestation by "fondling or touching" under Ind. Code § 35-42-4-3(b), not subsection (a), but evidence was presented at his guilty-plea and sentencing hearing that D's molestation of complaining witness (C.W.) included oral sex and penetration of C.W.'s vagina by an object. The fact that D was engaged in deviate/other sexual conduct does not mean that he was convicted of such conduct, which is what the credit-restricted-felon statute requires. Thus, Tr. Ct. erred in designating D a credit-restricted felon. Ind. Code § 35-38-1-7.8, which allows Tr. Ct.s to consider evidence from guilty-plea factual basis, is directed at "special circumstances" that must be found under credit restricted felon provision, but Tr. Ct. must first ensure that the D has a conviction under subsection (a) of child-molesting statute. Held, judgment reversed in part and remanded to remove credit-restricted-felon designation.

TITLE: Moon v. State

INDEX NO.: E.12.a.

CITE: (9/7/2018), 110 N.E.3d 1156 (Ind. Ct. App. 2018)

SUBJECT: Credit time calculation affirmed

HOLDING: Trial court did not err in calculating D's credit time for the time he actually served before trial and his good time credit. D claimed he spent 246 rather than 245 days in jail, but date of sentencing is not included in calculating number of days served prior to sentencing. See Ind. Code § 35-38-3-2(d). Trial court further correctly determined D 82 days of good time credit based on his Level 4 felony conviction and corresponding assignment to credit class B. See Ind. Code § 35-50-6-4(h)) (credit time class based on most serious conviction). Held, judgment affirmed; Crone, J., concurring in result.

TITLE: Neal v. State
INDEX NO.: E.12.a.
CITE: (12/29/2016), 65 N.E.3d 1139 (Ind. Ct. App. 2017)
SUBJECT: D adequately advised of consequences of credit restricted felon determination
HOLDING: Trial courts are required at sentencing to advise “credit restricted felons” of the credit time consequences of their status. Ind. Code § 35-38-1-7.8(c). There is no particular language that trial courts must use to satisfy Section 7.8(c). As long as the sentencing court’s advisement makes clear to the defendant that it is her status as a credit restricted felon that determines the calculation of her credit time, the court has satisfied the command of Section 7.8(c). In this case, trial court’s advisement that Defendant “is a credit restricted felon and should be treated as such for good-time credit, through the Department of Correction,” substantially complied with the statute. Held, judgment affirmed.

TITLE: Paul v. State
INDEX NO.: E.12.a.
CITE: (9/21/2021), 177 N.E.3d 472 (Ind. Ct. App. 2021)
SUBJECT: Credit time must be allocated to the first sentence in sequence of multiple sentences imposed
HOLDING: When a person has been simultaneously confined in connection with multiple causes and the court must impose consecutive sentences across those causes, Indiana law requires the trial court to (1) calculate credit time at the rate associated with the first sentence in the sequence of sentences and (2) allocate the time to that first sentence.

Defendant was incarcerated awaiting resolution of three causes simultaneously. The sentences in each cause were run consecutively. When the trial court calculated good time credit, it used the earning rate associated with the Third Cause. The court then applied that credit time to the Third Cause. Although the approach to credit time did not affect the aggregate length of the sentence, the approach prolonged the time it would take Defendant to satisfy the sentence in the First Cause. The Court of Appeals held that Indiana law contemplates a "first in, first out" approach under the circumstances. Therefore, when a person has been simultaneously confined in connection with multiple causes and the court must impose consecutive sentences across those causes, Indiana law requires the trial court to (1) calculate credit time at the rate associated with the first sentence in the sequence of sentences and (2) allocate the time to that first sentence.

TITLE: Purdue v. State
INDEX NO.: E.12.a.
CITE: (2/24/2016), 51 N.E.3d 432 (Ind. Ct. App. 2016)
SUBJECT: Credit time awarded where charges dismissed in plea agreement
HOLDING: D was entitled to credit time for pre-trial incarceration for two cases that were eventually dismissed via plea agreement where he pled guilty in a third, related case.

D was incarcerated for a total of 131 days but was awarded only three days of credit because those were the only days D was incarcerated for only the third case. The other 128 days were for charges dismissed via plea agreement. D was never formally arrested for the third case, but there was an open warrant in the case, which was never served because D was already incarcerated for the other two cases. D would not have been entitled to credit for the 128 days he was incarcerated on the dismissed cases if all three cases were "wholly unrelated." See Dolan v. State, 420 N.E.2d 1364, 1373 (Ind. Ct. App. 1981). However, the actions of the parties and the trial court showed that the cases were related. The trial court set all three cases for one trial; the pleadings referred to all three cases; and the State considered all three cases when negotiating the plea agreement.

Absent relief, D will never get credit for the 128 days he spent in pretrial confinement while awaiting trial on all three cases. See Ind. Code § 35-50-6-3.1. Under these facts, D was awaiting trial in the third case, and granting the 128 days of credit does not constitute "allow[ing] credit for time served on wholly unrelated offenses." Dolan, 420 N.E.2d at 1373. Held, judgment reversed.

RELATED CASES: Glover, 177 N.E.3d 884 (Ind. Ct. App. 2021) (distinguishing Purdue and affirming denial of D's request to put his credit time from previous dismissed charges toward current molest charge against different child; D was not detained on both dismissed charge & the charge for which was sentenced simultaneously, & "credit time does not work like store credit where it can be redeemed with the next crime").

TITLE: Robinson v. State
INDEX NO.: E.12.a.
CITE: (3-10-04), Ind., 805 N.E.2d 783
SUBJECT: Pre-sentence credit time - Tr. Ct. determination; recourse to challenge its omission
HOLDING: Ind. Code 35-38-3-2(b)(4) requires that Tr. Ct.'s sentencing judgment separately include both amount of time spent by D in confinement prior to imposition of sentence & also amount of credit time earned in accordance with D's credit time class. Thus, Tr. Ct. has jurisdiction & a statutory obligation to include credit time determination in its sentencing judgment for time spent in pretrial confinement, & Department of Correction (DOC) may thereafter modify such pre-sentence credit time determination. Ind. Code 11-11-5-3. In interests of facilitating fair & expeditious resolution of appellate litigation, Ct. held that sentencing judgments that report only number of days of confinement before sentencing & fail to expressly designate credit time earned shall be understood by Ct's. & DOC automatically to award number of credit time days equal to number of pre-sentence confinement days. In event of any pre-sentence deprivation of credit time, Tr. Ct. must report it in sentencing judgment. Because omission of designation of statutory credit time entitlement is thus corrected by this appellate presumption, such omission may not be raised as an erroneous sentence.

Ct. also held that use of statutory motion to correct erroneous sentence, Ind. Code 35-38-1-15, should be narrowly confined to claims apparent from face of sentencing judgment, which is not Tr. Ct.'s entries on DOC's abstract of judgment form. Claimed errors or omissions in abstract of judgment or claims that are not facially apparent & require consideration of proceedings before, during, or after trial may not be presented by way of motion to correct sentence. Such claims may be raised only on direct appeal &, where appropriate, by post-conviction proceedings. Here, actual judgment of conviction included fact that D had spent 187 days in confinement before sentencing & designated that he was entitled to credit time for these 187 days. Because D was seeking correction of abstract of judgment in his case, Tr. Ct. did not err in denying his motion to correct sentence. Held, transfer granted, Ct. App.' opinion at 789 N.E.2d 965 vacated, judgment of Tr. Ct. affirmed.

RELATED CASES: Bonds, 165 N.E.3d 1011, (Ind. Ct. App. 2021) (an allegation by an inmate that the trial court has not included credit time earned in its sentencing is the type of claim appropriately advanced by a motion to correct sentence); Rudisel, 31 N.E.3d 984 (Ind. Ct. App. 2015) (where sentencing judgment acknowledged 109 days D had served but did not expressly award credit for those days, it was proper to automatically credit her with 109 days); Lotaki, 4 N.E.3d 656 (Ind. 2013) (Ind. Code § 35-38-1-15 authorizes State appeals of illegal sentences; Hardley v. State, 905 N.E.2d 399, 402-03 (Ind. 2009); while court of appeals correctly noted that statute most commonly cited as authority for State appeals, Ind. Code § 35-48-4-2, does not authorize State appeals of illegal sentences, court nonetheless erred in dismissing appeal because another statute authorized State's appeal); Hardley, 905 N.E.2d 399 (State may challenge an erroneous sentence even though it is not facially invalid and may do so on appeal even without having filed a motion to correct erroneous sentence at the trial level; see full review at G.1.a.2); Jernigan, App., 894 N.E.2d 1044 (Tr. Ct. has no jurisdiction to rule on motion for good time credit while appeal of sentence is pending); Neff, 888 N.E.2d 1249 (clarifying procedure for challenging denial of credit time; (1) a prisoner who files a motion to correct an erroneous sentence for any reason must first demonstrate that he has exhausted the remedies available through the DOC offender grievance process; (2) "[w]hen an offender is sentenced and receives credit for time served, earned credit time, or both,

that time is applied to the new sentence immediately, before application of prospective earned credit time, in order to determine the D's earliest release date;" and (3) although it is preferred that all Tr. Ct.'s. issue judgments of convictions, where a court does not, it is appropriate to refer to the abstract of judgment); Pettiford, App., 808 N.E.2d 134 (Tr. Ct. did not err in denying D's motion to correct erroneous sentence, where abstract of judgment noted that D was entitled to 259 days of credit toward his sentence based on time served in jail awaiting sentencing); Portee, App., 806 N.E.2d 358 (where sentencing judgment indicated that D was confined prior to sentencing for 158 days, it is presumed that D received proper credit time from DOC); Jackson, 806 N.E.2d 773 (abstract of judgment is not subject to attack by motion to correct erroneous sentence; because D challenged his abstract of judgment, not his sentencing judgment, Tr. Ct. properly denied his motion to correct erroneous sentence); Crow, 805 N.E.2d 780 (Tr. Ct.'s entry that D "is entitled to 179 days of credit time" is sufficiently ambiguous so as to constitute erroneous sentence on face of judgment of conviction; judgment is unclear regarding length of time served by D before final judgment); Washington, 805 N.E.2d 795 (if D wishes to contest accuracy of sentencing judgment's declaration regarding number of days in pretrial confinement, such a claim would be outside face of sentencing judgment & he could not use motion to correct erroneous sentence to present such a claim).

TITLE: Sutton v. State

INDEX NO.: E.12.a.

CITE: (4th Dist. 11/27/90), Ind. App., 562 N.E.2d 1310

SUBJECT: Credit time - incarceration as condition of probation

HOLDING: Tr. Ct. did not err in refusing to give D credit for pre-trial incarceration against incarceration imposed as condition of probation. D was convicted of battery, class C felony, & received 8-year sentence. Tr. Ct. suspended this sentence, placing D on 8 years' probation, & then ordered D to serve "a term of imprisonment of 7 years consecutive time at an appropriate facility" as condition of probation. Tr. Ct. ordered that 352 days which D had served pre-trial should not apply to this term of imprisonment added as condition of probation. D objects to this denial of credit-time, arguing that total sentence exceeds 8 year maximum & is therefore illegal. Majority finds that sentence is proper. Tr. Ct. made clear that term of probation should end on same date as suspended sentence. Assuming that D remains in Class I, he will be actually imprisoned for less than 4 & 1/2 years, including 352 days served pre-trial. Ct. App. has held that Tr. Ct. may suspend sentence, place D on probation, & order term of imprisonment as condition of probation. McVey, App., 438 N.E.2d 770. No statute requires Tr. Ct. to credit time served pre-trial against probation, nor has legislature addressed question of whether it must be credited against imprisonment imposed as condition of probation. Absent statutory requirements, matter is within discretion of Tr. Ct., & Ct. App. finds no abuse of discretion. Held, sentence affirmed. Baker, J., DISSENTS, arguing that D earned Class I credit of 704 days for time served pre-trial, so that only 6 years & 26 days remained for Tr. Ct. to suspend.

RELATED CASES: Williams, App., 759 N.E.2d 661 (refusing to follow Sutton & holding that D is entitled to credit for pretrial incarceration against incarceration imposed as condition of probation; see full review this section).

TITLE: Swihart v. State
INDEX NO.: E.12.a.
CITE: (2/22/2017), 71 N.E.3d 60 (Ind. Ct. App. 2017)
SUBJECT: Credit time for consecutive sentences applied to aggregate sentence
HOLDING: Defendant was not entitled to 229 days of credit time in his Grant County case when that time was applied to a consecutively served Madison County sentence. "If a person is incarcerated awaiting trial on more than one charge and is sentenced to concurrent terms for the separate crimes, he is entitled to credit time applied against each separate term." Stephens v. State, 735 N.E.2d 278, 284 (Ind. Ct. App. 2000), *trans. denied*. However, "[w]here a defendant is convicted of multiple offenses and sentenced to consecutive terms, the jail credit is applied against the aggregate sentence." Shane v. State, 716 N.E.2d 391, 400 (Ind. 1999). Here, Defendant was incarcerated for 124 days before trial and 353 days before sentencing. The trial court imposed concurrent sentences for Defendant's two forgery convictions but ran those sentences consecutively to the Madison County sentence. The trial court awarded 124 days of credit time for pre-trial detention but properly denied Defendant's request for the additional 229 days as that time was already credited to his Madison County sentence. Held, judgment affirmed.

TITLE: Thompson v. State

INDEX NO.: E.12.a.

CITE: (3/15/2019), 120 N.E.3d 1066 (Ind. Ct. App. 2019)

SUBJECT: Pretrial home detainees entitled to accrued time actually served in addition to Class P good time credit

HOLDING: Tr. Ct. erred in denying D's motion to credit his sentence with 240 days that he served on pretrial home detention. Given D's Class P status, Tr. Ct. awarded him 60 days of good time credit for his pretrial home detention pursuant to Ind. Code § 35-50-6-3.1(f), which provides one day for every four days a person serves on home detention awaiting trial. However, Tr. Ct. erred in summarily denying D's request for additional credit for the 240 days that he actually served on home detention. Despite the statute's silence, every other credit time classification listed in Ind. Code § 35-50-6-3.1 earns accrued time in addition to good time credit. Legislature could not have intended absurd result of a D earning good time credit without also earning accrued time. And there is no indication that the legislature intended to treat pretrial and post-conviction home detainees differently under the current statutory scheme. Held, judgment reversed and remanded with instructions to credit 240 days accrued time to D's sentence.

TITLE: Tumbleson v. State

INDEX NO.: E.12.a.

CITE: (5th Dist., 2-23-99), Ind. App., 706 N.E.2d 217

SUBJECT: Erroneous denial of pretrial credit time - not within Tr. Ct.'s authority

HOLDING: Tr. Ct. improperly denied D two-for-one credit time on seventy-six days D served prior to sentencing. Person imprisoned awaiting trial or sentencing is initially assigned to Class I earning one day of credit time for each day he is imprisoned. Ind. Code 35-50-6-4(a); Ind. Code 35-50-6-3(a). Person may be reassigned to class earning less credit time if he or she violates rule of facility of DOC or of facility in which he or she is imprisoned. Also, before person may be reassigned, he or she must be granted hearing to determine guilt or innocence & whether reassignment is appropriate disciplinary action. Ind. Code 35-50-6-4(b). Here, Tr. Ct. gave D credit only for time served but deprived D of Class I credit time because D violated conditions of pretrial release, which is clearly not appropriate reason under statutes. In addition, no hearing was held as to whether D should be deprived of credit time. Thus, D should have received credit time for days spent incarcerated prior to sentencing. Held, judgment reversed & remanded to Tr. Ct. with instructions to give D seventy-six days credit time.

RELATED CASES: Robinson, 805 N.E.2d 783 (Tr. Ct. has jurisdiction & obligation to include pretrial credit time determination in sentencing judgment, & DOC may thereafter modify Tr. Ct.'s determination; see full review, this section).

TITLE: Upton v. State
INDEX NO.: E.12.a.
CITE: (2nd Dist., 04-23-09), 904 N.E.2d 700 (Ind. Ct. App. 2009)
SUBJECT: Application of credit restricted felon statute - ex post facto violation
HOLDING: Tr. Ct.'s application of 2008 credit restricted felons statute to D violated constitutional prohibition against ex post facto laws. At time D committed his child molesting offenses, he was eligible for Class I credit time, which would have allowed him to receive one day of credit time for each day he was confined awaiting sentencing, or Class II credit time, which would have allowed him to receive one day of credit for every two days he was confined awaiting sentencing. Ind. Code 35-50-6-3. However, under credit restricted felon statute, Ind. Code 35-50-6-4(b) (effective July 1, 2008), D is only entitled to one day of credit for every six days confined awaiting sentencing. Held, Tr. Ct.'s determination of credit time classification reversed, aggregate 90-year sentence for multiple counts of child molesting affirmed.

TITLE: Weaver v. State

INDEX NO.: E.12.a.

CITE: (1st Dist.; 3-29-00), Ind. App., 725 N.E.2d 945

SUBJECT: Pretrial credit time - principles of res judicata do not apply

HOLDING: Tr. Ct. erred in denying D's motion for pretrial credit time based on principles of res judicata. Ind. Code 35-50-6-3 sets forth in no uncertain terms that person confined awaiting trial or sentencing is statutorily entitled to one day of credit for each day he is so confined; therefore, pre-sentence jail time credit is matter of statutory right, not matter of judicial discretion. Also, it is well settled that where person incarcerated awaiting trial on more than one charge is sentenced to concurrent terms for separate crimes, Ind. Code 35-50-6-3 entitles him to receive credit time applied against each separate term. Bryant, App., 446 N.E.2d 364. Here, D was ordered to serve concurrent terms for separate crimes, but Tr. Ct. failed to give him pretrial credit on one of charges. When D asked Ct. to reconsider, Ct. summarily denied motion based on *res judicata*. Because Ct. has duty to correct illegal sentence at any time, Tr. Ct. should have addressed motion & granted credit time. Ct. held that any time D whose liberty has been restricted through imprisonment or confinement requests Tr. Ct. to reconsider its previous award of jail time credit, & D's motion in this regard identifies sufficient factual basis for his eligibility, Ct. must address merits of such motion. Held, judgment reversed.

RELATED CASES: Maciaszek, 75 N.E.3d 1089 (Ind. Ct. App. 2017) (D was entitled to pre-sentencing credit for time incarcerated while awaiting resolution of Indiana charges, even though he was also serving time for unrelated New Hampshire conviction; see full review, this section).

TITLE: Webster v. State
INDEX NO.: E.12.a.
CITE: (3/13/2018), 92 N.E.3d 626 (Ind. 2018)
SUBJECT: Dissent from denial of transfer; D not a credit restricted felon
HOLDING: Justice David, joined by Chief Justice Rush, dissented from the denial of D's petition to transfer, which argued there was no evidence to support the Tr. Ct.'s finding that he was a credit restricted felon; he claimed all the State's evidence showed he molested M.W. before July 1, 2008, the date the credit restricted felon statute went into effect. See Ind. Code § 35-50-6-4. The dissent agreed, although it did acknowledge that D's testimony raised the possibility that he molested M.W. after the statute went into effect. However, the dissent also noted "the magnitude of credible evidence indicating that the offense [occurred before July 1, 2008] is overwhelming." For instance, the charging information, the State's case-in-chief, including the victim's testimony, and the State's closing argument alleged that all acts of molestation occurred before July 1, 2008. The dissent concluded, therefore, that the State did not prove beyond a reasonable doubt that D was a credit restricted felon. Under these circumstances, the credit restricted felon finding violates the prohibition against ex post facto laws. The dissent concluded that, at the very least, the case should be remanded to the Tr. Ct. to clarify whether D did, in fact, molest M.W. after the credit restricted felon statute was in effect. Held, transfer denied, with two Justices dissenting, and judgment affirmed.

Note: The Court of Appeals decision was unpublished. See Webster v. State, No. 71A03-1610-CR-2319 (Ind. Ct. App. October 31, 2017);

TITLE: White v. State

INDEX NO.: E.12.a.

CITE: (02-08-12), 961 N.E.2d 54 (Ind. Ct. App. 2012)

SUBJECT: Credit restricted felon status for Class B felony child molesting affirmed

HOLDING: Pursuant to Ind. Code 35-41-1-5.5, a credit restricted felon includes a D who has been convicted of child molesting under Ind. Code 35-42-4-3(a) (i.e., sexual intercourse or deviate conduct with a child under fourteen years of age), which addresses both Class A and B felonies. Here, D faced two counts of Class A felony child molesting for having sexual intercourse with his stepdaughter, who was age 11 and 12 during the molestations. He pleaded guilty to Class B felony child molesting, was sentenced to 27 years in prison, and was classified as a credit restricted felon entitling him to one day of credit for every six days confined.

On appeal, D argued that his age, which elevated the charge to the Class A felony, was an element specifically bargained out of the offense to which he pleaded guilty thus the credit restricted felon statute should not apply. Court disagreed and held that Ind. Code 35-41-1-5.5 does not require the age of the person being sentenced to have been alleged and established as an element of the crime for which the D was convicted. In other words, Ind. Code 35-41-1-5.5(1) does not expressly limit application of the credit restricted felon statute to those convicted of child molesting as a class A felony based upon the D's age being at least twenty-one. In this case, because record clearly established that D was over the age of 21 when he committed the crime and his victim was under the age of 12, the credit restricted felon statute "plainly applies," "and "it is of no moment that [he] pleaded guilty to class B felony child molesting. Held, judgment affirmed.

RELATED CASES: McCoy, 2018 Ind. App. LEXIS 74 (Ind. Ct. App. 2018) (credit-restricted felon status reversed where D was convicted of "fondling or touching" section of child-molesting statute; see full review, this section).

TITLE: Williams v. State

INDEX NO.: E.12.a.

CITE: (12-12-01), Ind. App., 759 N.E.2d 661

SUBJECT: D entitled to pre-sentence time served when ordered to serve time as condition of probation

HOLDING: Sentence was excessive & illegal where D did not receive credit time for pre-sentence jail time served when Tr. Ct. sentenced him to seven years as condition of probation. D had pre-sentence jail credit time of 487 days which Tr. Ct. gave him when eight-year sentence was imposed. However, Tr. Ct. then suspended sentence & placed D on probation for eight years with seven years to be served in DOC as condition of probation. D was not given credit for 487 days. Although Sutton v. State, App., 562 N.E.2d 1310, held that pre-sentence jail time did not apply to term of imprisonment ordered as condition to probation, Ct. refused to follow Sutton. Tr.Cts. do not have discretion in granting or denying pre-sentence jail credit time, as it is not matter of judicial discretion, but of statutory right. Weaver v. State, App., 725 N.E.2d 945. In Albright v. State, App., 708 N.E.2d 15, under similar circumstances, Tr. Ct.'s sentencing order erroneously imposed term of probation that caused D to serve more than one year of combined imprisonment & probation for convictions. Here, failure of Tr. Ct. to credit D with time had effect of actually sentencing him to time that exceeded statutory maximum for crime. Held, judgment reversed & remanded.

TITLE: Willoughby v. State

INDEX NO.: E.12.a.

CITE: (5th Dist., 12-30-93), Ind. App., 626 N.E.2d 601

SUBJECT: Pretrial credit time - Probation violation (PV)

HOLDING: Tr. Ct. did not err in giving D pretrial credit time only from date he was returned to county on notice of PV, because credit is to be applied for confinement resulting from charge for which D is being sentenced. In 1987 D was sentenced in Marion County, including probationary period. On May 13, 1992, while on probation, he was arrested & charged in Hamilton County. Notice of PV was filed in Marion County on May 19, 1992, but warrant was not served on D until November 12, 1992, when he was returned to Marion County from incarceration on Hamilton County charges. Guilty plea to Hamilton County charges was basis of revocation of Marion County probation, which occurred on April 21, 1993. In revoking probation, Marion County Ct. gave D credit for pre-hearing time only from November 12, 1992, when he was returned.

Pretrial credit depends on pretrial confinement being result of criminal charge for which sentence is imposed, Ind. Code 35-50-6-3. Because D was not actually incarcerated on PV charge until November 12, 1992, Ct. found he was not entitled to credit for incarceration prior to that time. If he did not receive proper credit on Hamilton County charge, his remedy was to appeal that sentence. Ct. rejected argument that Grayson, App., 593 N.E.2d 1200, required that if Hamilton County did not sentence him on criminal recklessness conviction & credit his sentence for that confinement, Marion County must do so. Each Ct. is responsible only for crediting time in confinement as result of charge for which D is currently being sentenced. Held, sentence affirmed.

RELATED CASES: Bischoff, App., 704 N.E.2d 129 (Tr. Ct. in OWI case did not err in refusing to grant D jail time credit in OWI case for time served as result of incarceration for handgun case; D failed to demonstrate that time he spent confined in Wabash County handgun case after he was served with Huntington County arrest warrant for probation revocation on OWI case was result of OWI case); Ragon, App., 654 N.E.2d 906 (Tr. Ct. properly awarded credit time for D's pre-sentence detention against aggregate time of his consecutive sentences; D was not entitled to "double" credit time for period during which he was detained on multiple charges); Muff, App., 647 N.E.2d 681 (where D is confined during same period of time for multiple offenses for which he is convicted & sentenced to consecutive terms, credit is applied against aggregate sentence); Richeson, App., 648 N.E.2d 384 (Porter County Tr. Ct. did not err in refusing to grant jail time credit in Porter County for time served in Lake County; no evidence to show that Porter County detainer served as "hold" which would have caused Lake County to retain custody over D).

TITLE: Young v. State

INDEX NO: E.12.a.

CITE: (09-11-12), 973 N.E.2d 1225 (Ind. Ct. App. 2012)

SUBJECT: Credit restricted felon - insufficient evidence C.W. was less than 12

HOLDING: Tr. Ct. erred in finding D to be a credit restricted felon because State did not prove he engaged in sexual intercourse with complaining witness (C.W.) when she was less than 12 years old. See IND. CODE 35-31.5-2-72 (for crimes of child molestation and deviate sexual conduct, victim must be "less than twelve (12) years of age"). Here, C.W. turned twelve years old on October 22, 2009, but acts alleged in charging information and C.W.'s testimony at trial *clarified* that acts occurred in 2010. Held, classification of credit restricted felon reversed and remanded for recalculation of D's credit time.

HOLDING: Martinez, 192 N.E.3d 1021 (Ind. Ct. App. 2022) (affirming Tr. Ct.'s determination that the molestation occurred after C.W.'s twelfth birthday and therefore D did not qualify as a credit restricted felon).

E. SENTENCING

E.12. Credit time (Ind. Code 35-50-6-3 et seq)

E.12.b Time served on probation/parole hold (Ind. Code 35-50-6-1 and 6)

TITLE: Dishroon v. State

INDEX NO.: E.12.b.

CITE: (1st Dist.; 1-24-00), Ind. App., 722 N.E.2d 385

SUBJECT: Credit time - time served on home detention as condition of probation

HOLDING: Tr. Ct. erred in denying D credit for time he served on home detention as condition of probation. "Credit time," as used in Indiana statutes, means good time credit, not credit for time served. Purcell v. State, 721 N.E.2d 220 (Ind. 1999). Person imprisoned for crime earns credit time irrespective of degree of security to which he is assigned. However, person does not earn credit time while on probation. Ind. Code 35-50-6-6. Here, Tr. Ct. ordered D to serve suspended portion of his sentence on home detention. D served 198 days on home detention before violating conditions. According to I.C 35-50-6-6, D was not entitled to good time credit for time he served in home detention while on probation. However, D was restricted of his liberty while in home detention, & thus, regardless of whether home detention was condition of probation or part of his ordered sentence, D was entitled to one day credit for each that he actually served on home detention. Ct. disagreed with Wharff, App., 691 N.E.2d 205 & Kuhfahl, App., 710 N.E.2d 200, on basis that both Wharff & Kuhfahl were decided before Indiana S.Ct.'s clarification in Purcell of distinction between credit time & credit for time actually served. Held, judgement reversed.

RELATED CASES: Stith, App., 766 N.E.2d 1266; Via, App., 738 N.E.2d 684 (D was not entitled to credit for time he spent on probation).

TITLE: Haslam v. State

INDEX NO.: E.12.b.

CITE: (8/30/2022), Ind. Ct. App., 194 N.E.3d 144

SUBJECT: Credit time awarded for home detention sentence served concurrently with probation does not reduce the length of probation, but only length of home detention

HOLDING: In March of 2022, Defendant entered into a plea agreement with the State that specified "probation for seven (7) years, home detention to be a term of probation for five (5) of those years" and that Defendant would "receive good time credit for time spent on home detention." At the sentencing hearing the court reviewed the terms, stating "you would serve five years on home detention concurrently with probation" and "then you would have two years remaining after the five years of home detention." The trial court also agreed that with the good time credit applied to the term of home detention, the actual time in home detention would be just two and a half years.

Defendant filed a Motion to Clarify Sentencing Order for Probation which requested the trial court show a projected completion of probation date of 2026, rather than the projection of 2029 and the trial court denied the motion. The Court of Appeals noted that there is no statutory provision which provides that the good time credit which a person earns while confined on home detention affects or reduces the length of the person's probation. The trial court's sentencing order states that Defendant be "placed on supervised probation for a period of 7 years" and the Court of Appeals found no error in denying the motion. Held, affirmed.

TITLE: Martin v. State

INDEX NO.: E.12.b.

CITE: (8-28-02), Ind., 774 N.E.2d 43

SUBJECT: Credit time - time served as condition of probation

HOLDING: On transfer, reversing Ct. App.' decision at 748 N.E.2d 428, Ct. held that 2001 amendments to Ind. Code 35-38-2-3 & 35-38-2.5-5, providing credit for time served on home detention as condition of probation, should be applied retroactively to D. Remedial statutes, intended to cure a defect or mischief that existed in a prior statute, will be applied retroactively to carry out their legislative purpose unless to do so violates a vested right or constitutional guaranty. Prior to amendments at issue here, there was conflict in authority in Ct. App. regarding availability of credit for time served on home detention as condition of probation. Legislature *clarified* law by passing remedial statutes intended to cure defect that existed in prior statutes, namely: silence concerning whether D was entitled to credit for time served on home detention as condition of probation. Because amendments do not violate vested right or constitutional guaranty, Ct. applied them retroactively to D in order to carry out their legislative purpose of providing credit for time served on home detention as condition of probation. Held, transfer granted, Ct. App.' decision vacated, judgment reversed.

See also: Palmer v. State, 774 N.E.2d 46 (amendments should be applied retroactively to D).

TITLE: Peterink v. State
INDEX NO.: E.12.b.
CITE: (07-27-12), 971 N.E.2d 735 (Ind. Ct. App. 2012)), *sum. aff'd*, 982 N.E.2d 1009 (Ind. 2013)
SUBJECT: Credit time - home detention as a condition of probation
HOLDING: Tr. Ct. abused its discretion by denying D credit time for home detention as a condition of probation. It is a cardinal rule of criminal justice that penal statutes are to be strictly construed against the State and that ambiguities therein are to be resolved in favor of the accused. Here, Ind. Code 35-50-6-6 provides that "except as set forth under IC 35-38-2.5-5, a person does not earn credit time while on parole or probation." Ind. Code 35-38-2.5.5 provides, "a person confined on home detention as a condition of probation earns credit for time served." Whereas Ind Code 35-50-6-6 speaks in terms of credit time, Ind. Code 35-38-2.5-5 provides that a person "earns credit" for "time served." Thus, an ambiguity exists as to whether the statutes permit a person on home detention as a condition of probation to earn good-time credit. Resolving the ambiguity in the D's favor, D is entitled to credit time while on home detention as a condition of probation. Held, judgment reversed and remanded for new sentencing.

NOTE: Majority of Court also refused to revisit Jennings v. State, 956 N.E.2d 203 (Ind. Ct. App. 2011), *trans. pending*, and held that D's sentence of one year suspended with one year of probation including six months of home detention was illegal. Barnes, J., dissenting on the basis that Jennings was wrongly decided.

E. SENTENCING

E.12. Credit time (Ind. Code 35-50-6-3 et seq)

E.12.d. Time served in other jurisdictions/extradition hold

TITLE: Carneal v. State

INDEX NO.: E.12.d.

CITE: (1st Dist., 01-17-07), Ind. App., 859 N.E.2d 1255

SUBJECT: Credit time - effect of plea agreement from another state

HOLDING: Trial Ct. did not abuse its discretion by refusing to grant credit time for time served in Illinois despite an Illinois plea agreement that the Illinois sentence was to run concurrent with the Indiana sentence. Credit is to be applied for confinement time that is a result of the charge for which the D is being sentenced. In essence each Ct. is responsible only for crediting time in confinement as a result of the charge for which the Ct. is sentencing the D. Willoughby v. State, 626 N.E.2d 601 (Ind. Ct. App. 1993).

Here, D was sentenced for a crime in Illinois which also served as a basis for a probation revocation in Monroe County, Indiana. The Illinois Ct. ordered the Illinois sentence concurrent with any time to be received on Indiana probation revocation. However, after D completed his Illinois sentence, trial Ct. sentenced D in Indiana & refused to give him any credit time for the time served in Illinois. Although the decision not to award credit for the Illinois time served conflicts with the Illinois plea agreement, neither the State of Indiana nor Monroe Circuit Ct. was a party to the Illinois plea agreement, & neither were bound by its terms. Held, judgment affirmed; Sullivan, J., dissenting on the basis that, pursuant to the principle of judicial comity, Indiana must give effect to the Illinois plea agreement.

TITLE: Nutt v. State

INDEX NO.: E.12.d.

CITE: (2d Dist. 7/11/83), Ind. App., 451 N.E.2d 342

SUBJECT: Credit time - "hold" for extradition

HOLDING: D is entitled to credit on IN sentence for time spent in TX jail on unrelated charges from date Ind. authorities filed "hold" with TX authorities. Here, warrant issued 11/19/80 for D (failure to appear). D was arrested in TX on unrelated charges 2/13/81. On 2/14/81, IN filed hold on D TX charges were dismissed 6/9/81, but D remained in custody in TX on IN hold. D was returned to IN 1/25/82. Ct. employs 2-step analysis of Dolan, App., 420 N.E.2d 1364: (1) was D confined/imprisoned, & (2) was confinement/imprisonment result of criminal charge for which sentence is now imposed? Place where D is imprisoned is irrelevant under Ind. Code 35-50-6-3(a). To disallow credit for presentence time spent in confinement while resisting extradition would penalize D for exercising right to contest extradition (Ind. Code 35-33-10-3). "Hold" is equivalent of arrest for purpose of determining credit time. Held, remanded for resentencing.

RELATED CASES: Bertucci, App., 528 N.E.2d 90 (Crim L 1216.1(6); D is not entitled to credit time for out-of-state confinement not directly resulting from IN burglary charge); Dorsey 490 N.E.2d 260 (Crim L 1216.1(3,6); Ct. distinguishes case from Nutt; here D did not sustain burden of establishing that out-of-state confinement was direct result of criminal charges filed by IN).

E. SENTENCING

E.12. Credit time (Ind. Code 35-50-6-3 et seq)

E.12.e. Time served in institutions other than jail/prison

TITLE: Arthur v. State

INDEX NO.: E.12.e

CITE: (06-08-11), 950 N.E.2d 343 (Ind. Ct. App. 2011)

SUBJECT: Credit time for home detention not limited to non-suspendible sentences

HOLDING: Tr. Ct. erred in ordering that D was not eligible for 2 for 1 credit time while serving his suspendible sentence on a direct commitment to home detention. Ind. Code 35-38-2.6-6(a) was amended in 2010 to give credit time for people directly committed to home detention. Tr. Ct. relied on Ind. Code 35-50-2.6-1, which provides that direct placement to community corrections applies to a person sentenced for an offense "whenever any part of the sentence therefore may not be suspended. Court held it would be "illogical to interpret the statute so as to allow the offender to earn credit time when placed on a home detention community corrections program only if it is a direct placement of an offender who has committed an offense for which no portion of the sentence may be suspended." Court found that a reasonable construction of the statute, as amended, and consistent with its purpose is that D may earn credit time during his placement on home detention. Held, judgment reversed.

RELATED CASES: Peterink, 971 N.E.2d 735 (Ind. Ct. App. 2012) *sum. aff'd.*, 982 N.E.2d 109 (Ind. 2013) (D receives 2 for 1 credit on home detention as a condition of probation).

TITLE: Campbell v. State

INDEX NO.: E.12.e.

CITE: (5th Dist.; 6-30-99), Ind. App., 714 N.E.2d 678

SUBJECT: Two-for-one-credit time - direct commitment to work release

HOLDING: D who was ordered to serve sentence in community corrections' work release program was entitled to two-for-one day credit for time he spent in program prior to his revocation & placement in DOC. Person who is placed in community corrections program is entitled to earn credit time under Ind. Code 35-50-6. Ind. Code 35-38-2-2.6-6(a). When D violates terms of his placement, Ct. may, after hearing: (1) change terms of placement; (2) continue placement; or (3) revoke placement & commit person to department of corrections for remainder of person's sentence. Ind. Code 35-38-2.6-5. DOC may deprive prisoner of earned credit time under Ind. Code 35-50-6- 5(a) as disciplinary action for violating rules of DOC or penal facility after holding hearing on matter. Ind. Code 11-11-5-3. Here, Tr. Ct. ordered D to serve two years of his sentence in community corrections' work release program. D was eventually revoked from work release program, & Ct. ordered D to serve remainder of his two-year sentence in DOC but denied D any credit time for period he was in work release program. Because Indiana's statutory scheme reveals that legislature did not intend to invest Tr. Ct. with responsibility of denying or restoring credit time but rather gave DOC such authority, & community corrections statutes did not specifically give Tr. Ct. authority to deny D credit time, Tr. Ct. exceeded its authority by denying D credit for time spent in work release program. Held, judgment affirmed in part & reversed in part; Riley, J., dissenting on basis that DOC is separate entity from community corrections programs & should not determine denial of credit time for individuals in community corrections programs.

RELATED CASES: Robinson, 805 N.E.2d 783 (Campbell *overruled* to extent it held credit time should be determined by DOC, not Tr. Ct.).

TITLE: Capes v. State

INDEX NO.: E.12.e.

CITE: (05-26-94), Ind., 634 N.E.2d 1334

SUBJECT: Credit for pre-trial home detention

HOLDING: D was entitled to credit for time served on pretrial home detention (reversing decision at 615 N.E.2d 450). After arrest D was released OR but placed on home detention. After conviction he was given no credit for those 309 days. Ct. noted Ind. Code 35-50-6-4(a) provides that person "imprisoned awaiting trial or sentencing is initially assigned to Class I," & Ind. Code 35-50-6-3(a) provides that those persons are entitled to one day of credit time for each day they are "confined awaiting trial or sentencing."

Because in State ex rel. Kahn v. Woodward, (1889), 23 N.E. 968, "imprison" was defined as "to confine, to incarcerate, to shut up or restrain one of his liberty," & Ct. assumed legislature was aware of meaning when drafting credit time statutes; Ct. found D on home detention was "imprisoned awaiting trial" & qualified for Class I membership. Ct. rejected holding of Ct. App. that reasons for allowing credit time in jail did not apply to those in pretrial home detention; finding those reasons also did not apply in other situations where credit time is allowed, i.e., work release & community corrections. Ct. found no good reason for making distinction & determined D on home detention was "confined" for purposes of calculating credit, & it was error to deny pretrial credit time. **Note:** Ind. Code 35-38-2.6-6 was amended to deny credit time to post- conviction home detainees.

RELATED CASES: Martin, 774 N.E.2d 43 (2001 amendments to Ind. Code 35-38-2-3 & 35-38-2.5-5, providing credit for time served on home detention as condition of probation, should be applied retroactively to D); Palmer, 774 N.E.2d 46; Dishroon, App., 722 N.E.2d 385 (D was entitled to credit for time actually served on home detention as condition of probation); Purcell, 721 N.E.2d 220 (FN 6 adopting Ct. App. opinion in Capes, 615 N.E.2d 450, holding that home detention is not confinement for purposes of pretrial credit time); Franklin, 685 N.E.2d 1062 (D was ineligible for credit for time served on pre- trial home detention, as amendment to post-conviction home detention statute evinces legislative intent that credit time can no longer be awarded to pretrial home detainees).

TITLE: Cottingham v. State

INDEX NO.: E.12.e.

CITE: (07-26-12), 971 N.E.2d 82 (Ind. 2012)

SUBJECT: Credit time for home detention - application of 2010 amendment

HOLDING: Tr. Ct. did not abuse its discretion by not giving D good time credit for the time he spent on home detention prior to the effective date of the 2010 amendment. As of July 1, 2010, a person who is placed in a community corrections program, including home detention, is entitled to earn credit time. Ind. Code 35-38-2.6-6. Here, in June 2009, D was sentenced to one-and-one-half years on home detention and one-and-one half years on probation. On July 12, 2010, Tr. Ct. revoked all of D's suspended sentence for a probation violation, and only gave him day-for-day credit for the time he had already served on home detention. Tr. Ct. did not give him good time credit under the 2010 statute. Because the 2010 amendment states that a person who "is placed" in a community corrections program is entitled to good time credit, only those who are being placed in a program after July 1, 2010 can benefit from the amendment. See, e.g., Arthur v. State, 950 N.E.2d 343, 346 (Ind. Ct. App. 2011). If the Legislature intended for the amendment to apply to persons who had already been placed on home detention, it would have used language to include such persons- language like "a person who has been placed" or even "a person who is in community corrections." Thus, D who was placed in the program before July 1, 2010, was not entitled to good time credit for his time on home detention. Held, transfer granted, Court of Appeals' opinion at 952 N.E.2d 245 vacated, judgment affirmed.

TITLE: Hickman v. State
INDEX NO.: E.12.e.
CITE: (8/1/2017), 81 N.E.3d 1083 (Ind. Ct. App. 2017)
SUBJECT: No credit for time served in halfway house
HOLDING: D was not entitled to credit for his time in a halfway house because his liberty was not sufficiently restricted such that he was “confined.”

In 2012, D pled guilty to three counts of burglary and admitted a probation violation. In 2015, he was released to probation, which required him to complete Grant County’s reentry-court program, which placed him in a halfway house. D violated the terms of the program and was ordered to execute his four-year suspended sentence. He sought credit time for his time in the halfway house; the Tr. Ct. denied the request. Several factors determine whether a D’s stay at a halfway house entitles him to accrued time against his sentence, including: whether placement is requested by D or is otherwise voluntary; the degree of freedom of movement; the degree of direct supervision by DOC, court, or other state actor; and the degree of autonomy and privacy enjoyed by the D in the conduct of his everyday life. Oswalt v. State, 749 N.E.2d 612, 615 (Ind. Ct. App. 2001); Dixon v. State, 685 N.E.2d 715, 718 (Ind. Ct. App. 1997); Reed v. State, 844 N.E.2d 233, 225 (Ind. Ct. App. 2006). D has failed to show that, under these factors, he was confined for purposes of being awarded accrued time, which is necessary to obtain credit toward his sentence. See Capes v. State, 634 N.E.2d 1334, 1335 (Ind. 1994) (if a person is “shut up or restrain[ed] . . . of his liberty” “under the control” of law enforcement or corrections authorities, he may be “confined” or “imprisoned” within the meaning of the statutory language). Held, judgment affirmed.

TITLE: Meadows v. State
INDEX NO.: E.12.e.
CITE: (1/29/2014), 2 N.E.3d 788 (Ind. Ct. App. 2014)
SUBJECT: Pretrial diversion drug program - no credit time
HOLDING: Tr. Ct. did not abuse its discretion by denying D's request for credit time for the time he spent on electronic monitoring during a drug court program. Sentencing decisions not mandated by statute are within the discretion of the Tr. Ct. and will be reversed only upon a showing of abuse of that discretion.

Here, D entered a plea agreement in which Tr. Ct. deferred entry of judgments of conviction upon Defendant's plea and, with his consent, would place him in the county drug court program. If he successfully completed the drug court program, the charges to which he had pleaded guilty would be dismissed. During his time in the program, D spent time on electronic monitoring. When his placement in the program was revoked, he requested credit time for the electronic monitoring. But there is no statute which requires such credit time. Ind. Code 35-38-2.5-5 requires credit time for home detention as a condition of probation, and Ind. Code 35-38-2.6-6 requires credit time for placement in a community corrections program. But, here, D was neither on probation nor serving a sentence. Thus, both statutes are inapplicable. To allow credit time to a person who fails to comply with deferral conditions diminishes the value of such programs in that the incentive to comply is undermined by the reward of failure. D was not entitled to credit time. Held, judgment affirmed.

TITLE: Oswalt v. State

INDEX NO.: E.12.e.

CITE: (6-4-01), Ind. App., 749 N.E.2d 612

SUBJECT: No credit time for days spent at substance abuse treatment program

HOLDING: D was not entitled to credit for time served against his sentence for 180 days he spent in substance abuse treatment program where completion of program was condition of his probation. D was not committed to custody of Department of Corrections & failed to show that he would have been considered an escapee if he had left treatment facility. Ct. rejected D's argument that time at treatment facility was similar to home detention. There was not evidence that Tr. Ct. monitored or restricted D's movements while he remained at facility. As with other terms of probation, D was free to disregard Ct.'s order & incur risk that State would seek to revoke probation. Though placement at facility was not entirely voluntary, D requested rehabilitation services as part of his sentence. Held, judgment affirmed.

TITLE: Roberts v. State

INDEX NO.: E.12.e.

CITE: (11/27/2013), 998 N.E.2d 743 (Ind. Ct. App. 2013)

SUBJECT: Credit time -pretrial home detention

HOLDING: Tr. Ct. did not abuse its discretion by awarding D only day-for-day credit for actual time served on pre-trial home detention. There is no basis in statute or case law for awarding day-for-day or credit time for pre-trial home detention. Thus, it is within the Tr. Ct.'s discretion to determine whether to grant two-for-one credit time, day-for-day credit or no credit time at all for pretrial home detention. Here, D served 611 days on pretrial home detention. The Tr. Ct. elected to award day-for-day time, but not credit time for the 611 days. The Tr. Ct. halved the actual time served on pre-trial home detention to 305 days with the expectation that the DOC would award D good time credit for each day, thus having the practical effect of giving him day-for-day credit for 610 days, rather than 611 days. Although it was within Tr. Ct.'s discretion to deny credit time for the pre-trial home detention, the proper method of doing so was to have granted D 611 days actually served against his sentence and expressly denied him any credit time under Ind. Code 35-50-6-3 for those days. Alternately, should Tr. Ct. wish to deny even day-for-day credit, it can do so but needs to report such denial in its sentencing judgment. Held, judgment affirmed in part, reversed in part and remanded.

TITLE: Ryan v. State

INDEX NO.: E.12.e.

CITE: (8/26/2015), 42 N.E.3d 1019 (Ind. Ct. App. 2015)

SUBJECT: D not entitled to credit time while on appeal bond

HOLDING: In addressing an issue of first impression, Court held that Appellate Rule 18 and IC 35-33-9-5(c) forbid granting credit time to a person released on an appeal bond. After the Court reversed D's convictions for sexual misconduct with a minor, D sought an appeal bond with the Tr. Ct., which granted the request. D spent 429 days under the conditions of the appeal bond, supervised by Marion County Community Corrections (MCCC), before the Indiana Supreme Court reversed the Court's decision and reinstated D's convictions. Tr. Ct. refused to grant D's request for credit time for the 429 days he was supervised by MCCC.

D's claim that he is entitled to credit time because the terms of his appeal bond were especially onerous misses the mark. Because upon the granting of an appeal bond the judgment "shall be stayed," the Tr. Ct. had no discretion to grant the request for credit time and "was required to simply apply the mandate of IC 35-33-9-5(c)." See also Ind. Appellate Rule 18 and Molden v. State, 750 N.E.2d 448, 449 (Ind. Ct. App. 2001). Held, judgment affirmed.

TITLE: Shepard v. State
INDEX NO.: E.12.e.
CITE: (10/20/2017), 84 N.E.3d 1171 (Ind. 2017)
SUBJECT: Community corrections program director had no authority to take away earned credit time
HOLDING: Because the community corrections director lacked authority to deprive Defendant of good time credit he had earned, the trial court's determination as to Defendant's good time credit was reversed.

Defendant pleaded guilty to Class B felony dealing in cocaine and was sentenced him to eleven years of incarceration. In 2015, the trial court granted Defendant's petition to modify and ordered him to serve the balance of his sentence in the Vigo County work release program. While in the program, Defendant committed several violations. In each case, program officials held administrative hearings and repeatedly took away portions of Defendant's earned credit time, depriving him, in total, of 225 earned good time credit days. The trial court revoked Defendant's probation and ordered him to serve the balance of his sentence at DOC. In calculating Defendant's earned good time credit, the trial court determined Defendant was not entitled to any good time credit for his time served in the work-release program because the community corrections director had deprived Defendant of more good time credit days than he was entitled to receive.

The trial court erred because in absence of rules promulgated by DOC (see Ind. Code § 35-38-2.6-6(d)), the program director had no authority to take away Defendant's credit time. Indiana Code section 35-38-2.6-5 gives a program director the power to (1) change the terms of the offender's placement; (2) continue the placement unchanged; (3) reassign the offender to a different program; or (4) request that the trial court revoke the offender's placement. The program director here was authorized to use any of these options in disciplining Defendant but instead chose to deprive Defendant of earned good time credit. He had no statutory or regulatory authority to do so. Held, transfer granted, Court of Appeals opinion vacated, judgment reversed, and remanded to trial court with instructions to recalculate Defendant's credit time.

TITLE: Wilson v. State
INDEX NO.: E.12.e.
CITE: (2nd Dist., 5-13-97), Ind. App., 679 N.E.2d 1333
SUBJECT: Credit time - time spent in psychiatric hospital prior to sentencing
HOLDING: If D's stay in psychiatric hospital prior to sentencing hearing was ordered by Tr. Ct. as another form of imprisonment, & if she was not free to leave hospital or faced return to prison upon completion of her treatment there, she was "confined" within meaning of Indiana's credit time statute, & would therefore be entitled to credit time. Ind. Code 35-50-6-3(a) provides that individuals earn one day of credit time for each day of imprisonment for crime or confinement awaiting trial or sentencing. Term "confinement" within context of credit time statute is not limited to actual imprisonment, Capes, 634 N.E.2d 1334, & should not be strictly limited to conventional penal detention situations. Record in this case did not make clear whether D was released from supervision & control of State when she first entered hospital, or if restriction upon her liberty imposed as result of her pending criminal charges was to continue during period of her hospitalization. Held, remanded for Tr. Ct. to determine whether D's time at hospital was "confinement" within meaning of credit time statute.

E. SENTENCING

E.12. Credit time (Ind. Code 35-50-6-3 et seq)

E.12.f. Earned credit time (Ind. Code 35-50-6-33)

TITLE: Bradford v. State

INDEX NO.: E.12.f.

CITE: (05-22-23), 211 N.E.3d 36 (Ind. Ct. App. 2023)

SUBJECT: Petitioner not entitled to habeas relief after DOC's calculation of educational credit time in Case Plan Credit Time agreement

HOLDING: Appeal from the denial of a petition for habeas corpus. During a four-year term of incarceration, Petitioner opted into a Case Plan Credit Time (CPCT) agreement (the Agreement) with the DOC to earn educational credit time. The agreement provided that the amount of educational credit time available would be capped at the lesser of two years or one-third of the person's total available credit time. After executing the Agreement, Petitioner completed a "building trades" program. After three CPCT reviews, the DOC awarded Bradford a total of 119 days of credit time, which represented completing the building trades program, receiving satisfactory DOC reports, and satisfying other goals adopted by the DOC on or after January 1, 2022. In her habeas petition, Petitioner asserted that the DOC should have awarded her sixteen months of educational credit time, i.e., one-third of her four-year sentence, under the Agreement, the relevant statutes, and the DOC's policy. If DOC had done so, she would already be released. The trial court denied the petition, and the Court of Appeals affirmed. I.C. § 35-50-6-3.3 does not set forth a minimum amount of credit time that may be earned, nor is there a guarantee of educational credit for meeting case plan goals or completing a program. Eligibility to earn credit time does not equate to an actual award of credit time. Nothing in the educational credit time statute automatically grants the statutory maximum to each offender who opts into the CPCT. Therefore, Petitioner was entitled to an amount of credit determined by the DOC, which is what she received. The Court also held that DOC's policies regarding offenders who opt into the CPCT program did not violate the ex post facto clauses of the United States and Indiana Constitutions. Implementation of CPCT enhanced, not reduced, Petitioner's ability to seek release from prison. Held: judgment affirmed.

TITLE: Budd v. State
INDEX NO.: E.12.f.
CITE: (10-08-10), 935 N.E.2d 746 (Ind. Ct. App. 2010)
SUBJECT: Difference between calculation of credit time - no equal protection violation
HOLDING: The fact that education credit time is calculated differently for D convicted of criminal deviate conduct and who earned a college degree prior to July 1, 1999, than for those who are not convicted of sex offenses or who earned their degree after July 1, 1999, is not a violation of equal protection. A prisoner has no constitutional right to receive credit time; therefore, a rational basis test is used to assess the constitutionality of the statute.

Here, in 1984, a jury convicted D of murder and criminal deviate conduct. In 1998, D received one year of credit time for earning an associates degree. Under the then-existing statute, all credit time was subtracted from the sentence imposed by the Tr. Ct., and thus, his projected release date was adjusted by six months. In 1999, Ind. Code. 35-50-6-3.3 was amended so that educational credit time of a person who completed a degree after June 30, 1999, was subtracted from the release date, but educational credit time of a person who completed a degree before July 1, 1999, still was subtracted from the sentence imposed by the sentencing court. This distinction does not violate equal protection because it is rational to apply the 1999 amendment to Ind. Code. 35-50-6-3.3 prospectively. In 2003, Ind. Code. 35-50-6-3.3(h) was again amended to provide that those who completed their degree before July 1, 1999 too should have their educational credit time subtracted from their release date unless they were convicted of a sex offense. As the D concedes, there is a rational reason to treat sex offenders differently with credit time, *i.e.*, they pose a high risk of recidivism. Because under all versions of the statute, D's credit time is to be subtracted from the actual sentence ordered by the Tr. Ct., there is no increase in punishment leading to an ex post facto problem. Moreover, there exists rational reasons for the distinctions in calculation of credit time. Held, judgment denying D's successive petition for post-conviction relief affirmed.

Note: Rehearing was granted to clarify that the 2010 amendment to Ind. Code. 35-50-6-3.3 excludes only sex offenders who committed their offense while required to register as a sex offender from earning education credit time. Budd v. State, 937 N.E.2d 867 (Ind. Ct. App. November 19, 2010).

RELATED CASES: Hawkins, 973 N.E.2d 619 (Ind. Ct. App. 2012) (no violation of federal and state constitutional rights where effect of statutory amendment was to deny education credit to D and not allow him to finish the remaining 50% of his course work but inmates with only one class remaining were allowed to complete their degrees; even though statute was amended after D had completed two classes, there was no ex post facto violation because amendment applied prospectively, did not increase Ds sentence or alter definition of his criminal conduct; moreover, amendment did not deny equal protection of laws; see full review at J.2.b).

TITLE: Denney v. State

INDEX NO.: E.12.f.

CITE: (8-13-02), Ind. App., 773 N.E.2d 300

SUBJECT: Educational credit time - six months maximum credit allowed for vocational programs

HOLDING: Post-conviction Ct. properly denied D's petition for educational credit time for completion of second vocational program. D received six months credit on prison term for completion of vocational graphic communications course. Subsequently, D sought additional credit for completion of vocational building maintenance course, which was denied. Ind. Code 35-50- 6-3.3(5) states that person can earn no more than total of six months of credit, as determined by Department of Correction (DOC), for completion of one or more vocational education programs approved by DOC. Because D had earned maximum six month credit time for first vocational education program, he was not entitled to any more credit time for completion of subsequent vocational programs. Held, judgment affirmed. Sullivan, J., concurring with separate opinion.

TITLE: Diaz v. State

INDEX NO.: E.12.f.

CITE: (8-9-01), Ind. App., 753 N.E.2d 724

SUBJECT: Educational/substance abuse treatment credit time - meaning of "pattern consistent with rehabilitation"

HOLDING: Demonstrating a "pattern consistent with rehabilitation" pursuant to Ind. Code 35-50-6-3.3 means, at the least, that an inmate's record has remained free of disciplinary convictions while the inmate participated in an education or substance abuse program. Ind. Code 35-50-6-3.3 provides for credit time for completion of substance abuse programs & educational degrees so long as the inmate has also demonstrated a pattern consistent with rehabilitation. Here, D had been convicted of attempted battery while completing both his substance abuse program & GED, & therefore had not demonstrated a pattern consistent with rehabilitation. D argued that his single act of bad conduct should not be held against him because of his mental illness. Ct. rejected the argument because: 1) there is no support for D's claim that he cannot be held responsible for his actions during his incarceration because he is mentally ill, & 2) he did not raise his mental illness as a defense to the attempted battery charge. Held, summary denial of petition for post-conviction relief affirmed.

RELATED CASES: Wilson, App., 799 N.E.2d 51 (fact that D had no disciplinary convictions during time he worked on a degree does not compel a post-conviction Ct. to find D demonstrated a pattern consistent with rehabilitation); Wilson, App., 785 N.E.2d 1152 (Tr. Ct. erred in denying D's petition seeking educational credit time before State was given reasonable time to file answer. D's Motion should have been treated as petition for post-conviction relief & as such, State should have had 30 days to respond to petition).

TITLE: Fuller v. Meloy

INDEX NO.: E.12.f.

CITE: (1st Dist., 06-16-06), Ind. App., 848 N.E.2d 1172

SUBJECT: Denial of additional educational credit time affirmed

HOLDING: Ind. Code 35-50--6-3.3(d)(5) provides that inmates may earn up to a total of six months of credit for the completion of vocational education programs "as determined by the department of correction." Appellants in this case completed an approved vocational program & received a three-month credit toward their individual sentences. Believing they were to receive more than three months credit, they jointly petitioned Tr. Ct. for additional credit time, which was denied. Concluding that Tr. Ct. properly denied Appellants' joint petition for additional credit time, Ct. noted that subsection (5) of statute explicitly places determination of amount of credit time to be awarded within discretion of department of correction while limiting amount of credit time to be awarded to a total of six months. If legislature had wanted a specific, mandated amount of credit time to be awarded to inmates who successfully completed vocational programs, it simply could have stated so, as it did for other educational programs available in department of correction. See Ind. Code 35-50-6-3.3(d)(1), (2), (3) & (4) (providing specific amounts of credit time for completion of GED, high school, associate's degree, & bachelor's degree). Held, judgment affirmed; Darden, J., dissenting, believes that due process requires some showing to Tr. Ct. that DOC has a written policy in place with objective criteria that determines credit to be awarded for various vocational education programs approved by Department.

TITLE: Indiana Department of Correction v. Bogus
INDEX NO.: E.12.f.
CITE: (8-9-01), Ind. App., 754 N.E.2d 27
SUBJECT: Educational credit time - not used to reduce fixed sentence
HOLDING: Educational credit time was inappropriately used to reduce D's sentence. Ind. Code 35-50-6-3.3 provides that, in addition to any credit time a person earns & in addition to any reduction of sentence a person receives, a person earns credit time for obtaining educational degrees. Distinguishing Rodgers v. State, 705 N.E.2d 1039 (Ind. Ct. App. 1999) & Renfro v. Parke, 736 N.E.2d 797 (Ind. Ct. App. 2000), Ct. noted that: 1) D was not on probation & 2) "in addition to any credit time" means that educational credit time should be treated as any other credit time, although it is a separate class of credit time that does not displace, but is to be added to, any other credit time a D earns. Further, credit time "is earned toward release on parole for felons & does not diminish the fixed term or affect the date on which the felony offender will be discharged." Boyd v. Broglin, 519 N.E.2d 541 (Ind. 1988). Here, D had earned both associate & bachelor degrees & was given credit time which was used to give him an earlier parole date. The credit time D had left over could not be used now to reduce his fixed sentence, so he lost that time. Thus, although credit time can get a D out of prison in less time than his or her actual sentence, if parole is violated the balance of the actual sentence still remains. Held, grant of post-conviction relief reversed & remanded with instructions for DOC to re-calculate D's release date.

TITLE: Indiana Dep't of Correction v. Haley
INDEX NO.: E.12.f.
CITE: (06-09-10), 928 N.E.2d 840 (Ind. Ct. App. 2010)
SUBJECT: Educational credit time - bachelor's degree & "literacy"
HOLDING: Tr. Ct. erred in denying DOC's motion to correct error, which claimed the bachelor's degree D earned while incarcerated did not entitle him to six months of education credit for completing a literacy and life skills program. An administrative agency's interpretation of a statute it enforces is entitled to great weight. Thus, Court deferred to DOC's interpretation of Ind. Code 35-50-6-3.3 that obtaining a bachelor's degree does not satisfy literacy requirement as literacy "does not refer to improving upon or using skills already acquired and performing satisfactorily." Court found merit in D's argument that even though the meaning of "literacy" does not include a bachelor's degree, it reflects the need for higher education. However, because subsection (C) of Ind. Code 35-50-6-3.3 says that a "person may not earn credit time under both subsections (a) [credit for bachelor's degree] and (b) [credit for literacy and basic life skills program] for the same program of study[,]" and because the requirements for each are, in fact, listed in different subsections of 35-50-6-3.3, DOC's interpretation is not inconsistent with the statute.

However, D was possibly entitled to two years of education credit time because of the bachelor's degree. Nothing in record shows that he has applied for or been awarded such credit time. Held, judgment reversed.

TITLE: Jones v. State
INDEX NO.: E.12.f.
CITE: (3/2/2017), 71 N.E.3d 412 (Ind. Ct. App. 2017)
SUBJECT: When probation revoked, no duty to advise D about earliest release date
HOLDING: The trial court did not err in failing to inform Defendant of her release date. Defendant pled guilty to battery and was sentenced to three years, with two on home detention and one suspended to probation. Defendant violated the terms of her home detention and later violated the terms of her work release, so the State asked the trial court to revoke her home detention. The trial court granted the request and ordered Defendant to serve two years in the DOC and one year on probation. During discussion of her credit time, Defendant asked the trial court what her release date would be, but the trial court declined to answer her question, saying DOC would give her that information. Contrary to Defendant's argument, Ind. Code § 35-38-1-1 does not require a trial court to advise a person about their release date; that statute applies only "[w]hen the trial court pronounces sentence," not when it is revoking probation. See id., § (b). Held, no error but judgment reversed on other grounds.

TITLE: Jones v. State

INDEX NO.: E.12.f.

CITE: (2nd Dist.; 05-4-06), Ind. App., 847 N.E.2d 190

SUBJECT: No credit time for contempt; Right to jury trial for contempt

HOLDING: A 200-day "flat" sentence, which was commuted to 102 days, for contempt finding based on Jones' failure to appear at a deposition was appropriate, reasonable & did not violate statutory provisions awarding a D good time credit. A person imprisoned for a crime or imprisoned awaiting trial or sentencing is initially assigned to Class I. Ind. Code 35-50-6-4. A person assigned to Class I earns one (1) day of credit time for each day he is imprisoned for a crime or confined awaiting trial or sentencing. Ind. Code 35-50-6-3(a). Here, Jones was incarcerated for committing an act of indirect criminal contempt under the civil code, & not imprisoned for a crime as contemplated by Ind. Code 35-50-6-4. Because Jones was not imprisoned for a crime, Ind. Code 35-50-6-3 & 35-50-6-4 do not apply to her, & the "flat" sentence did not violate the statutes.

"[T]he power to punish contempt is limited by reasonableness." In re Gardner, 713 N.E.2d 346, 347 (Ind. Ct. App. 1999). It is unclear whether Indiana Appellate Rule 7(b), providing inappropriate standard of sentence review, applies to sentences for contempt. However, a sentence exceeding six months cannot be imposed absent a jury trial or waiver thereof. Holly v. State, 681 N.E.2d 1176 (Ind. Ct. App. 1997). Considering that Jones not only failed to appear at her scheduled deposition, but also evaded authorities for approximately one year, 102 day sentence was reasonable & appropriate. But, Tr. Ct. initially improperly sentenced Jones to a term exceeding 180 days without providing her right to a jury trial. Held, judgment affirmed.

TITLE: Lacy v. Keith Butts

INDEX NO.: E.12.f.

CITE: (9/27/2017), 2015 U.S. Dist. LEXIS 132678 (U.S. District Court, S. Ind. 2017)

SUBJECT: SOMM program violates 5th Amendment privileged against compelled self-incrimination

HOLDING: The requirement of the Indiana SOMM program that incarcerated sex offenders admit their guilt for both the offense for which they were convicted and other uncharged crimes - or lose earned credit time and be assigned to a less favorable credit class - violates their Fifth Amendment right to be free from compelled self-incrimination.

The petitioners filed a habeas class action. They are Indiana inmates who have lost earned credit time and/or been demoted in credit earning class based on their refusal to participate in the SOMM program.

In 2014, the Indiana Supreme Court agreed that the disclosure requirements create a risk of self-incrimination. See Bleeke v. Lemmon, 6 N.E.3d 907 (Ind. 2014). Indeed, requiring such disclosures is “starkly incriminating.” See United States v. Antelope, 395 F.3d 1128, 1138 (9th Cir. 2005). However, because good time credits are not “constitutionally required,” Bleeke ruled that taking away credit time does not violate the privilege against compelled self-incrimination; the adverse consequences an inmate faces for not participating in the SOMM program “are related to the program’s objectives and do not constitute significant hardships in relation to the ordinary incidents of prison life.” See McKune v. Lile, 536 U.S. 24, 37-38 (2002).

Bleeke was wrong to conclude that deprivation of credit time is not a significant hardship. Taking away credit time, and foreclosing the opportunity to earn credit time in the future, poses a significant hardship; it greatly increases the term of an inmate’s incarceration. Further, depriving inmates of credit time impinges on their liberty interest in credit time. This is a liberty interest because credit time is a matter of statutory right; a trial court has no discretion to deny credit time to a person who is in a credit-eligible class. Held, petitioners’ motion for summary judgment granted and Department of Correction must vacate disciplinary actions against the petitioners.

TITLE: McGee v. State

INDEX NO.: E.12.f.

CITE: (5th Dist., 7-2-03), Ind. App., 790 N.E.2d 1067

SUBJECT: Educational credit time - diploma from out-of-state school

HOLDING: Educational credit time statute, Ind. Code 35-50-6-3.3, does not preclude a person from earning credit time for a diploma granted by an out-of-state school as long as standards of instruction for earning that diploma are substantially similar to those in Indiana. Here, D received his high school diploma from a school in Illinois, & submitted supporting documentation to the DOC. The DOC, *citing* a policy dating from March 1998 to disallow credit for out-of-state diplomas, denied him any credit time for earning diploma. Ind. Code 35-50-6-3.3(a)(3)(B) unambiguously provides that a person is entitled to one year of credit time if he obtains a high school diploma. There is no basis in either language of statute or purpose behind it for DOC's policy of denying credit time for a high school diploma not earned in Indiana, assuming that requirements for earning out-of-state diploma are similar to Indiana's requirements. Tr. Ct.'s denial of D's petition for education credit time is contrary to law. Held, judgment reversed & remanded.

Note: Ct. also held that Tr. Ct. may review DOC credit time determinations. It is not inconsistent with Post-Conviction Rule 1 to allow post-conviction review of credit time determinations when immediate release is not relief sought.

RELATED CASES: Stevens, App., 895 N.E.2d 418 (Ct. remanded with instructions to send case to DOC for a review and determination of D's entitlement to credit on grounds enumerated in Ind. Code 35-50-6-3.3(a), i.e., whether Florida-based internet school is "an approved institution of higher learning").

TITLE: Miller v. Walker
INDEX NO.: E.12.f.
CITE: (8-25-95), Ind., 655 N.E.2d 47
SUBJECT: Calculation of credit time for education programs
HOLDING: Department of Corrections properly deducted education credit time from inmates' fixed terms of sentences rather than earliest possible release dates. Inmates completed education programs entitling them to receive credit under Ind. Code 35-50-6-3.3. Construing language found in 1993 version of statute Ct. held that phrase "in addition to" means that educational credit does not supplant any good time credit already earned. Ct. noted passage of 1995 amendment to Ind. Code 35-50-6-3.3, which specifically provides that educational good time credit is "subtracted from the period of imprisonment imposed on the person by the sentencing Ct." Held, Ct. App. decision at 642 N.E.2d 1000 summarily affirmed, judgments of Tr. Ct.'s reversed; Sullivan & DeBruler, JJ., dissenting.

TITLE: Murphy v. State
INDEX NO.: E.12.f.
CITE: (03-10-11), 942 N.E.2d 818 (Ind. 2011)
SUBJECT: Erroneous denial of educational credit time on jurisdictional grounds
HOLDING: Tr. Ct. is the proper authority to determine whether a D who completes an educational degree before sentencing is entitled to educational credit time. It is the Tr. Ct. that initially determines a D's sentence; thus, the Tr. Ct. determines the amount of credit time to which a D is entitled as of the time of sentencing. Further, a Tr. Ct. is in a better position than the DOC to determine whether education credit should be granted for a degree earned before sentencing because such a D does not earn a degree under DOC supervision and any dispute about whether a D has behaved in a manner consistent with rehabilitation would normally be resolved with input from the local jail. Here, Tr. Ct. erred in ruling it could not consider D's request for education credit for a GED he earned before sentencing until D exhausted all DOC remedies. Held, transfer granted, Court of Appeals' opinion at 930 N.E.2d 630 adopted in full, reversed and remanded for proceedings consistent with Court of Appeals' opinion.

RELATED CASES: Robinson, 18 N.E.3d 1026 (Ind. Ct. App. 2014) (see full review this section).

TITLE: Parks v. Madison County

INDEX NO.: E.12.f.

CITE: (4th Dist., 12-31-02), Ind. App., 783 N.E.2d 711

SUBJECT: Deprivation of credit time - filing frivolous lawsuits

HOLDING: Ind. Code 35-50-6-5(a)(4), which provides that a person may be deprived of any part of earned credit time for filing a frivolous, unreasonable, or groundless civil claim, is not unconstitutional. Ct. rejected Petitioner's argument that statute violates equal protection, due process, First Amendment, & that it is open to arbitrary retaliatory enforcement due to unconstitutional vagueness. Although "frivolous, unreasonable, or groundless" cannot be defined with mathematical accuracy, such is not required. Petitioner's case does not approach hypothetical situation that might demonstrate vagueness. Statute was clearly intended to discourage prisoners such as Petitioner from filing repetitive & meritless actions that burden judicial resources. It was only after Petitioner attempted to resurrect previous claims that had already been rejected that Tr. Ct. determined his action was frivolous. Rejecting Petitioner's overbreadth claim, Ct. noted that there is no constitutionally protected right to file frivolous lawsuit. Finally, statute advances legitimate State interest of preserving valuable judicial & administrative resources, thus does not violate due process or equal protection. Held, denial of motion to correct error affirmed.

TITLE: Pollard v. State

INDEX NO.: E.12.f.

CITE: (5/23/2017), 78 N.E.3d 663 (Ind. Ct. App. 2017)

SUBJECT: Educational credit time cannot be applied to future incarceration for parole violation

HOLDING: Entitlement to education credit time accrues immediately upon completion of the degree. Rodgers v. State, 705 N.E.2d 1039, 1042 (Ind. Ct. App. 1999). Here, Defendant's earned educational credit could not be applied to reduce his sentence for dealing in cocaine because he earned the credit within 45 days of his release date. See Ind. Code § 35-50-6-3.3(j). Had Defendant obtained his bachelor's degree earlier, or if the time remaining until his release date had been longer, some or all of the credit earned could have been applied to his earlier incarceration. But nothing in Rogers suggests that Defendant should be able to "bank" credit time to be used toward a future incarceration due to a parole violation. Thus, Tr. Ct. properly denied Defendant's request to apply the educational credit time earned for his 2011 completion of a bachelor's degree to his reincarceration for a parole violation. Held, judgment affirmed.

RELATED CASES: Randolph, 956 N.E.2d 38 (Ind. Ct. App. 2011) (Tr. Ct. properly denied D's request to apply the educational credit time earned for his 2011 completion of a bachelor's degree to his reincarceration for a parole violation; see full review, this section)

TITLE: Randolph v. Buss

INDEX NO.: E.12.f.

CITE: (07-26-11), 956 N.E.2d 38 (Ind. Ct. App. 2011)

SUBJECT: D not entitled to unused days of educational credit time

HOLDING: IDOC did not wrongly withhold a portion of educational credit time D earned pursuant to Ind. Code 35-50-6-3.3. In 2007, D violated parole and returned to prison. He asked that the remaining 127 days of his educational time credit be applied to the time he had to serve for the parole violation, but the IDOC refused his request. Court held that Renfro v. Park, 736 N.E.2d 797 (Ind. Ct. App. 2000) and IDOC v. Bogus, 754 N.E.2d 27 (Ind. Ct. App. 2001) no longer apply to credit time after parole violations due to a 1995 amendment to Ind. Code 35-50-6-3.3, which gives discretion to the DOC whether to deprive prisoners of credit time earned. The amendment dictates that credit time is to be subtracted from the release date that otherwise applies to the person after subtracting all other credit time earned by the person. Ind. Code 35-50-6-3.3(e). In this case, D's credit time was subtracted from the release date that would otherwise apply, which permitted him an earlier release to parole. Thus, D received the benefit of his educational credit time. Held, judgment affirmed.

RELATED CASES: Pollard, 78 N.E.3d 663 (Ind. Ct. App. 2017) (Tr. Ct. properly denied D's request to apply the educational credit time earned for his 2011 completion of a bachelor's degree to his reincarceration for a parole violation; see full review, this section).

TITLE: Renfroe v. State

INDEX NO.: E.12.f.

CITE: (1st Dist.; 10-19-00), Ind. App., 736 N.E.2d 797

SUBJECT: Educational credit time - can be applied upon reincarceration after revocation

HOLDING: Even though D earned his GED month before his earliest release date, DOC was still required to credit D's sentence with six months. Credit time earned under educational credit time statute is subtracted from period of imprisonment imposed on person by sentencing Ct. Ind. Code 35-50-6-3.3(b)(1)(c). Moreover, prisoner's entitlement to education credit time accrues immediately upon his or her completion of degree, regardless of subsequent parole violations or parole status. Rodgers, App., 705 N.E.2d 1039. Here, D earned GED on July 1, 1996, which was less than month before earliest release date. Thus, he only benefitted from twenty-five days of six-month credit he earned by obtaining GED. Subsequently, D violated parole twice & was returned to DOC twice. D contends that DOC miscalculated his new release date by failing to include balance of six-month credit he earned by obtaining his GED. Because D's fixed term should have been reduced from three years to two & one-half years immediately upon date D earned his GED, July 1, 1996, D has served maximum sentence & should not be compelled to serve any more time, either in prison or on parole. Held, denial of post-conviction relief reversed.

Note: *Aff'd on reh'g* at 743 N.E.2d 299 (when determining whether D gets education credit time subtracted from earliest release date or sentence imposed by Ct., version of Ind. Code 35-50-6-3.3 that was in effect either at time of conviction or at time D earned GED, and not current version, controls).

RELATED CASES: Budd, 935 N.E.2d 746 (Ind. Ct. App. 2010) (although different versions of Ind. Code 35-50-6-3.3 over the years has provided that some inmates subtract their credit time from their earliest release dates while others subtract from the sentence imposed by the Tr. Ct., there exists rational reasons for the distinctions; thus, the statute does not violate equal protection); Paul, App., 888 N.E.2d 818 (application of revised law on educational time credit for associate's degrees violated D's constitutional protections against ex post facto laws).

TITLE: Robinson v. State

INDEX NO.: E.12.f.

CITE: (10-01-14) 18 N.E.3d 1026 (Ind. Ct. App. 2014)

SUBJECT: Trial court must consider D's request for educational credit time if serving sentence through community corrections

HOLDING: Trial court erroneously believed it could not award educational credit time to Defendant serving his sentence on home detention. In September 2013, Defendant pleaded guilty to forgery and was ordered to serve four years on home detention. In December 2013, Robinson was awarded a GED. In 2014, trial court revoked his community corrections placement and ordered him to serve the balance of his sentence at DOC. Defendant contended trial court erred in denying his motion for educational credit time when revoking his placement and ordering he serve the remainder of his sentence at DOC. Court concluded the trial court, in consultation with county-based community corrections program, is the proper authority to determine whether Defendant was entitled to the credit time he seeks. However, trial court has not yet addressed whether Defendant met the requirements for educational credit time. Thus, Court remanded for further proceedings to determine whether Defendant had demonstrated a pattern consistent with rehabilitation.

TITLE: Rodgers v. State

INDEX NO.: E.12.f.

CITE: (1st Dist., 2-16-99), Ind. App., 705 N.E.2d 1039

SUBJECT: Erroneous deprivation of education credit time

HOLDING: Inmate earns right to credit time under education credit statute, Ind. Code 35-50-6-3.3(a), when inmate successfully completes requirements for degree as long as inmate has, until that point, demonstrated pattern consistent with rehabilitation. Here, D completed requirements for GED diploma while he was in community corrections work release program. His entitlement to education credit time accrued immediately upon his completion of degree. Although Ind. Code 35-50-6-6 prohibits person from earning credit time while on parole or probation, that restriction does not apply where person is in community corrections program. Ind. Code 35-38-2.6-6.

Ct. rejected State's argument that D should be denied credit time because after being released on home detention, he violated his probation & did not demonstrate pattern consistent with rehabilitation. At time D violated his probation, he had already earned credit time for his GED. Plain language of education credit statute limits time period for evaluating inmate's behavior to time period before he receives his diploma or degree. Therefore, Tr. Ct. could not deny D credit time based on his subsequent probation violations. Because there was no evidence in record that D did not demonstrate pattern consistent with rehabilitation while he was working toward his GED diploma in community corrections program, D was entitled to receive credit time pursuant to Ind. Code 35-50-6-3.3. Held, judgment reversed & remanded with instructions to subtract six months education credit from period of imprisonment originally imposed by sentencing Ct.

TITLE: Samuels v. State

INDEX NO.: E.12.f.

CITE: (5th Dist.; 06-21-06), Ind. App., 849 N.E.2d 689

SUBJECT: Educational credit time – failure to exhaust DOC administrative remedies prerequisite to PCR

HOLDING: Because D failed to show that he exhausted administrative remedies through Department of Corrections, Ct. App. dismissed his appeal from denial of his petition for post-conviction relief. It is the DOC's responsibility to deny or restore credit time. Moreover, offender grievances arising out of administrative acts that affect an offender are to be resolved through departmental grievance procedure meeting the requirements set forth in Ind. Code 11-11-1-2. Here, D is claiming that DOC wrongfully denied him educational credit time for receiving his high school diploma from an unaccredited school in Florida. Because D's argument did not entitle him to immediate release, his claim did not fall under the list of instances in which PCR is available under Indiana Post-Conviction Rule 1(1)(a). Because his grievance is with DOC, D must exhaust all of his administrative remedies with DOC before resorting to judicial system. It is apparent D has failed to exhaust his available remedies. Held, appeal dismissed; Sullivan, J., dissenting on basis that because D's claim involved interpretation of State statute, it was non-grievable complaint & should be heard by Ct., & Ind. Code 35-50-6-3.3 does not require D to obtain high school diploma from accredited school.

RELATED CASES: Robinson, 18 N.E.3d 1026 (Ind. Ct. App. 2014) (because D was not serving his sentence through the DOC, but through a county-based community corrections program, Tr. Ct., in consultation with community corrections, is in the better position to determine whether D is entitled to educational credit time); Burks-Bey, 903 N.E.2d 1041 (Ind. Ct. App. 2009) (Tr. Ct. must determine that D has failed to exhaust administrative remedies before dismissing case for lack of subject matter jurisdiction); Young, 888 N.E.2d 1255 (in order a Tr. Ct. to have jurisdiction over a petition for education credit time, the petitioner must present all evidence of his diploma and credentials of the school that awarded it, that he meets each requirement of any necessary statute and that he exhausted the DOC grievance procedures along with evidence of the DOC grievance procedures; the petitioner must also comply with the post-conviction rules); Watkins, App., 869 N.E.2d 497 (because there is no indication that D ever sought, let alone exhausted, his administrative remedies from DOC in pursuing his claim for credit time, post-conviction Ct. was not appropriate entity from which to seek relief).

TITLE: Sander v. State

INDEX NO.: E.12.f.

CITE: (3rd Dist., 10-14-04), Ind. App., 816 N.E.2d 75

SUBJECT: Educational credit time - must make application to DOC or jailing authority

HOLDING: Application for educational credit time must be made to & the initial ruling thereon made by the Department of Correction (DOC) when the educational achievement was accomplished after sentencing, & by the jailing authority in cases where degree was earned while confined prior to sentencing. Post-conviction Ct.'s role is limited to merely reviewing such decisions after they have been made by DOC. Here, D allegedly received a high school diploma or its equivalent while he was serving sentence. Thus, his application for credit time pursuant to Ind. Code 35-50-6-3.3 should have been directed to DOC. Tr. Ct., not possessing all of the facts necessary to rule on D's petition, did not err in denying motion for educational credit time. Held, judgment affirmed.

RELATED CASES: Ellis, 58 N.E.3d 938 (Ind. Ct. App. 2015) (remanded to determine if D exhausted administrative remedies on petition for credit time); Robinson, 18 N.E.3d 1026 (Ind. Ct. App. 2014) (because D was not serving his sentence through the DOC, but through a county-based community corrections program, Tr. Ct., in consultation with community corrections, is in the better position to determine whether D is entitled to educational credit time); Stevens, App., 895 N.E.2d 418 (D exhausted his administrative remedies by filing a grievance with DOC after denial of education credit time and appealing from classification action); Members, App., 851 N.E.2d 979 (legislature has specifically determined that offender grievances arising out of administrative acts that affect an offender, e.g., the denial of educational credit time, are to be resolved through a DOC grievance procedure. See Ind. Code 11-11-1-2; because D failed to exhaust his available remedies with the DOC, post-conviction ct. lacked subject matter jurisdiction to entertain his education credit time complaint &, thus, judgment must be set aside & appeal dismissed).

TITLE: State v. Eckhardt

INDEX NO.: E.12.f.

CITE: (5th Dist., 10-31-97), Ind. App. 687 N.E.2d 374

SUBJECT: Computation of education credit time

HOLDING: "[T]otal applicable credit time," as used in Ind. Code § 35-50-6-3.3(e), refers to both credit time earned for good behavior & credit time earned for completing education. Prisoner may earn credit time in addition to good time if he completes requirements for various types of diplomas or degrees. Ind. Code § 35-50-6-3.3(a). Maximum amount of educational credit time inmate may earn is lesser of four years or one-third of prisoner's total applicable credit time. Ind. Code § 35-50-6-3.3(e). When legislature does not define word, Ct. attributes to word its common & ordinary meaning, unless doing so would deprive statute of its purpose or effect. If statute is ambiguous, Ct. seeks to ascertain & give effect to legislature's intent.

First, Black's Law Dictionary defines "total" as "[w]hole, not divided, lacking no part, entire, full, complete, whole amount." Second, legislature's use of "in addition to good time" in Ind. Code § 35-50-6-3.3(a) & "total" in Ind. Code § 35-50-6-3.3(e) illustrate that total applicable credit time means all credit time available to prisoners. Third, in Miller v. Walker, 655 N.E.2d 47, Ind. S.Ct. illustrated computation of educational credit time which was consistent with total applicable credit time, including credit time earned for both education & good behavior. Thus, due to D's education while in prison, D was entitled to additional credit time equal to one-third of credit time earned for both education & good behavior. Held, grant of post-conviction relief affirmed.

TITLE: State v. Mason & Walker

INDEX NO.: E.12.f.

CITE: (5th Dist., 11-22-94), Ind. App., 642 N.E.2d 1000

SUBJECT: Calculation of credit time for education programs

HOLDING: Tr. Ct's erred in calculating education credit time from earliest possible release date instead of fixed terms of executed sentences. Ds completed education programs entitling them to receive credit under Ind. Code 35-50-6-3.3. Department of Correction deducted education credit from their fixed terms, & Ds filed Petitions for Writ of Habeas Corpus, contending that credit should instead be deducted from their earliest possible release date. Tr. Ct's. ruled in favor of prisoners & ordered release. Ct. found statute clear & unambiguous, rejecting affidavit of sponsoring legislator that his intent was that education credit be deducted from earliest release date. Considering legislative intent behind enactment would amount to impermissible interpretation of statute, & intent of sponsoring legislator is not determinative of intent of entire legislative body. Ct. also noted that adopting D's interpretation would effectively change plain meaning of good time credit statute, Ind. Code 35-50-6-3 & 4. Reduction in sentence (days served) for education credit has corresponding reduction in number of good time credit days prisoner can earn because prisoner is not serving that time & will therefore not receive good time credit for that period. Held, reversed & remanded.

TITLE: Tumbleson v. State

INDEX NO.: E.12.f.

CITE: (5th Dist., 2-23-99), Ind. App., 706 N.E.2d 217

SUBJECT: Education credit time - demonstrating pattern consistent with rehabilitation

HOLDING: Tr. Ct. erred in not giving D education credit time for obtaining his GED while he was incarcerated prior to sentencing. There is subjective component involved in granting of educational credit, i.e., demonstrating pattern of behavior consistent with rehabilitation, & merely completing requirements for degree does not automatically entitle D to credit. However, in this case, Tr. Ct. failed to make any finding that D's behavior was inconsistent with rehabilitation; rather, Tr. Ct. stated that it took into account D obtaining GED in determining D's sentence. Yet, fact that Tr. Ct. ordered maximum sentences does not take into account educational credit time. Thus, D was entitled to education credit time given under Ind. Code 35-50-6-3.3 for obtaining his GED while incarcerated. Held, judgment reversed & remanded with instructions to give D six months educational credit time.

E. SENTENCING

E.13. Modification/correction of sentence

TITLE: Greenlaw v. United States

INDEX NO.: E.13.

CITE: 554 U.S., 128 S.Ct. 2559, 171 L.Ed.2d 399 (2008) 06/23/2008

SUBJECT: *Sue sponte* increase of sentence inappropriate pursuant to cross-appeal rule

HOLDING: Majority held absent a government appeal or cross-appeal, the Eighth Circuit could not, on its own initiative, order an increase in Petitioner's sentence. The district court made an error in calculating Petitioner's sentence imposing a 10-year sentence on a count that carried a 25-year mandatory minimum term, which the government objected to at the time. Petitioner appealed his total sentence, but the government did not address the error by the district court in its appeal. The Eighth Circuit, on its own, increased Petitioner's sentence by 15 years. Majority noted, in both civil and criminal cases, in the first instance and on appeal, courts follow the principle of party presentation, *i.e.*, the parties frame the issues for decision and the courts generally serve as neutral arbiters of matters the parties present. To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a *pro se* litigant's rights. The cross-appeal rule, pivotal in this case, is both informed by, and illustrative of, the party presentation principle. Under that rule, it takes a cross-appeal to justify a remedy in favor of an appellee. The Court has called the rule "inveterate and certain" and has in no case ordered an exception to it, with no exception being warranted here. The Eighth Circuit held that the plain-error rule, Fed. Rule Crim. Proc. 52(b), authorized it to order the sentence enhancement *sua sponte*, but nothing in the text or the history of the rule or in the Court's decisions suggests that the plain-error rule was meant to override the cross-appeal requirement. Breyer, J., filed a concurring opinion. Alito, J., filed a dissenting opinion, in which Stevens, J., joined, and in which Breyer, J., joined as specific parts.

TITLE: Hale v. State

INDEX NO.: E.13.

CITE: (8/6/2013), 992 N.E.2d 848 (Ind. Ct. App. 2013)

SUBJECT: Habeas Corpus & credit time - erroneous "clarification" of sentencing order

HOLDING: Tr. Ct. abused its discretion when it entered an order clarifying D's sentence on a class B felony possession of methamphetamine charge by adding a year to the time he was ordered to serve on community corrections. Pursuant to a plea agreement which capped executed time at six years, Tr. Ct. initially sentenced D to a term of ten years suspended with five years of probation, noting that D would serve two years on work release followed by one year of home detention. Over one year later, D filed his verified petition for writ of habeas corpus, claiming that his continued detention in Fulton County Jail was illegal. Judge erroneously *clarified* sentence based upon his own recollection of what sentence he intended to impose, rather than examining the sentencing order and determining from it whether D was being detained illegally.

Court analyzed Tr. Ct.'s sentencing order of ten-year term, all of which was to be served as suspended time. Upon D's completion of two years on work release, he will have accumulated four years of good-time credit against his 10-year suspended sentence, transition to home detention for one year and be placed on probation thereafter. Held, judgment reversed and remanded to order sheriff to administer sentence consistent with this opinion. Bradford, J., dissenting, believes D met his burden of showing that he is being illegally detained in the Fulton County work release program and is entitled to immediate release because with credit time he had completed his two-year term of confinement in the program.

TITLE: Pannarale v. State

INDEX NO.: E.13.

CITE: (8/16/94), Ind., 638 N.E.2d 1247

SUBJECT: Sentencing -- role of Ct.; sentence modification

HOLDING: Ct. retains authority to modify sentence so long as modified sentence could not have violated plea agreement had it been sentence originally imposed. D made plea agreement with prosecutor. In exchange for State's dismissal of some of pending charges, D pled guilty to dealing in cocaine & prosecutor agreed to recommend sentence not exceeding ten years. Ct. imposed sentence of ten years. Three years later, D petitioned to reduce his sentence pursuant to sentence reduction statute, Ind. Code 35-38-1-23. Tr. Ct. denied D's petition because while Tr. Ct. may not impose sentence greater or lesser than that contained in plea agreement, it does not lose any discretion it possessed at time of initial sentencing when subsequent petitions for modification are presented. Held, cause remanded to Tr. Ct. to consider merits of D's petition.

RELATED CASES: Rivera, 20 N.E.3d 857 (Ind. Ct. App. 2014) (Tr. Ct.'s decision to sentence D to time served for technical violation of community corrections was not a sentence modification, but a consequence of violation of his initial sentence and fell within Tr. Ct.'s discretion; see full review at E.6.k); Fulkrod, 753 N.E.2d 630 (sentencing judge cannot circumvent plain provisions of sentence modification statute, Ind. Code 35-38-1-17(b), simply by declaring that he or she reserves right to change sentence at any future time).

TITLE: Robinett v. State
INDEX NO.: E.13.
CITE: (3rd Dist., 11-14-03), Ind. App., 798 N.E.2d 537
SUBJECT: Denial of motion to modify sentence without hearing or notice to prosecutor - no error
HOLDING: Tr. Ct. did not abuse its discretion by summarily denying a prisoner's motion to modify sentence under Ind. Code 35-38-1-17(b), without providing prosecuting attorney time to respond to motion. Indiana law does not require Tr. Ct. to hold a hearing or give notice to prosecutor prior to denying a motion under this statute. Reichard v. State, 510 N.E.2d 163 (Ind. 1987). Further, Tr. Ct. had no authority to modify sentence adduced through plea agreement to a specific number of years. "Once [the Tr. Ct.] has accepted a plea agreement recommending a specific sentence ... the terms of the agreement constrain the discretion the Ct. would otherwise employ in sentencing." Pannarale v. State, 638 N.E.2d 1247, 1248 (Ind. 1994). Held, judgment affirmed.

TITLE: Sargent v. State

INDEX NO.: E.13.

CITE: 158 N.E.3d 783 (Ind. Ct. App. 2020) (10/21/2020)

SUBJECT: Motion to participate in Purposeful Incarceration Program does not count as a request for sentence modification under statute's two-motion limit

HOLDING: Defendant's pro se motion to participate in the Purposeful Incarceration Program does not count as a request for sentence modification under Ind. Code § 35-38-1-17(j), which limits the filing of sentence modification petitions to one per year and no more than two during any consecutive period of incarceration without the consent of the prosecuting attorney. Here, Defendant filed a pro se motion to participate in Purposeful Incarceration Program and then subsequently filed two motions for sentence modification. The trial court erroneously concluded that it lacked statutory authority to consider the merits of Defendant's current petition for modification because he had already filed two such petitions during his consecutive period of incarceration. Because Defendant's pro se request to participate in the Purposeful Incarceration Program was not a request for sentence modification, Defendant had only made one prior motion to modify his sentence.

TITLE: State v. Fulkrod

INDEX NO.: E.13.

CITE: (8-23-01), Ind., 753 N.E.2d 630

SUBJECT: Sentence modification - lack of jurisdiction; judge reserves right to modify sentence

HOLDING: Sentencing judge cannot circumvent plain provisions of sentence modification statute, Ind. Code 35-38-1-17(b), simply by declaring that he or she reserves right to change sentence at any future time. Here, Tr. Ct. lacked jurisdiction to modify D's sentence because more than 365 days had expired from date D began to serve his sentence to date D filed his petition for sentence modification & prosecutor refused to approve of sentence modification. Plea agreement left Tr. Ct. with discretion to select sentence from range of fifteen to forty years. At sentencing, Tr. Ct. imposed maximum sentence of forty years but reserved right to modify it after receiving report from Department of Corrections. Over four years later, over prosecutor's objection, D's sentence was modified to twenty-five years, with fifteen years executed & ten years on probation.

Ind. Code 35-38-1-17(b) provides that if more than 365 days have elapsed since D began serving sentence, Tr. Ct. may reduce or suspend sentence subject to approval of prosecuting attorney. Where, as here, prosecuting attorney opposes petition for sentence modification under this statute, Tr. Ct. has no authority to modify sentence. Marts v. State, 478 N.E.2d 63 (Ind. 1985). Fact that sentencing judge particularly reserved right to modify sentence is of no moment. Tr. Ct. was seeking to reserve power that it did not possess beyond 365-day limit. Held, transfer granted, opinion of Ct. App. at 735 N.E.2d 851 summarily affirmed, sentence modification reversed.

Note: In plea agreement, D can procure prosecutor's consent to sentence modification after 365 days. See State ex rel. Goldsmith v. Marion County Superior Ct., 275 Ind. 545, 419 N.E.2d 109 (1981). Also, statute has been amended to allow Ct. to modify sentence without prosecutor's consent to place person in community corrections program, if Ct. could have placed D in community corrections program rather than DOC.

E. SENTENCING

E.13. Modification/correction of sentence

E.13.a. Shock probation/modification of sentence (Ind. Code 35-38-1-17)

TITLE: Ames v. State

INDEX NO.: E.13.a.

CITE: (4th Dist. 11/26/84), Ind. App., 471 N.E.2d 327

SUBJECT: Shock probation - D not entitled to hearing on petition

HOLDING: Neither Ind. Code 35-38-1-17 nor due process require Tr. Ct. to hold hearing on D's petition for shock probation. Plain language of statute requires hearing only if Ct. tentatively determines to shock D. Galloway, App., 422 N.E.2d 1290 (interpreting identical predecessor statute, Ind. Code 35-4.1-4-18). Hearing provides opportunity for prosecutor to object to shock probation. Due process does not require that convicted person be conditionally released before expiration of valid sentence. Greenholtz v. NE Penal Inmates (1979), 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668. Because D has not recognized liberty interest (no right to shock probation), no hearing is required. Galloway. Held, no error.

RELATED CASES: Manley, App., 868 N.E.2d 1175 (hearing is not required before Tr. Ct. can rule upon a request for sentence modification under Ind. Code 35-38-1-17(b), where a prosecutor has refused to approve the request).

TITLE: Banks v. State

INDEX NO.: E.13.a.

CITE: (3rd Dist.; 5-26-06), Ind. App., 847 N.E.2d 1050

SUBJECT: Sentence modification- denial without considering DOC report

HOLDING: Tr. Ct. did not err in denying D's Motion for Sentence Modification without ordering or considering a DOC progress report. Ind. Code 35-38-1-17 requires the Ct. to conduct a hearing with the D present, give notice to the prosecutor & obtain a report from the Department of Corrections when the D moves for a sentence modification within 365 days of sentencing. However, Ind. Code 35-38-1-17(e) states that the Ct. may deny a request to suspend or reduce a sentence without making written findings & conclusions. Here, the Ct. denied the D's request for sentence modification without considering a DOC progress report. Held, judgment affirmed in part & reversed in part, on failure to determine the D's ability to pay public defender fees.

TITLE: Barber v. State

INDEX NO.: E.13.a.

CITE: (12/5/2018), 115 N.E.3d 508 (Ind. Ct. App. 2018)

SUBJECT: Sentence modification not available to parolees no longer serving executed portion of sentences

HOLDING: Addressing a matter of first impression, Court held that Indiana's sentence modification statute (Ind. Code § 35-38-1-17) is available only to convicted persons who are, at the time of the filing of their petition, currently executing a sentence. To hold otherwise would interfere with the jurisdiction of the Parole Board, which "is not subject to the supervision or control of the Courts." White v. Ind. Parole Bd., 713 N.E.2d 327, 328 (Ind. Ct. App. 1999). Here, after completing the executed portion of his sentence, D sought to have charges for which he was sentenced reduced or suspended so that he could be discharged from parole. Express language of the statute does not provide for such relief. Held, denial of modification affirmed.

TITLE: Carter v. State
INDEX NO.: E.13.a.
CITE: (8/31/84), Ind., 467 N.E.2d 694
SUBJECT: Shock probation - sentence must be suspendible
HOLDING: Denial of shock probation was not error where, notwithstanding any alleged deficiency in charging instrument, Tr. Ct. could reasonably find offense resulted in serious bodily injury, thus making offense nonsuspendible under Ind. Code 35-50-2-2. A Ct. may not grant shock probation (Ind. Code 35-4.1-4-18, now Ind. Code 35-38-1-17) if suspension is not permitted under Ind. Code 35-50-2-2. Here, charging information read "bodily injury;" however, robbery victim was shot 3 times by D/co-D. Ct. rejects D's contention that omission of word "serious" made offense suspendible. Held, no error.

TITLE: Chavez-Meza v. United States
INDEX NO.: E.13.a.
CITE: (6/18/2018), 138 S.Ct. 1959 (U.S. 2018)
SUBJECT: Boilerplate form gave sufficient explanation for federal D's sentence reduction
HOLDING: Because the record shows that the judge had a reasoned basis for his decision to reduce D's federal sentence, the judge's explanation for reducing D's sentence, under 18 U. S. C. §3582(c)(2), to the middle rather than the bottom of the amended federal guidelines was adequate.

D pleaded guilty to possessing methamphetamine with intent to distribute. The judge reviewed the Guidelines, determined the range to be 135 to 168 months, and imposed a sentence at the bottom of the range. The Sentencing Commission later lowered the range to 108 to 135 months, and D sought a sentence reduction under §3582(c)(2). D asked the judge to reduce his sentence to the bottom of the new range, but the judge reduced petitioner's sentence to 114 months instead. The order was entered on a two-page boilerplate form – called an AO-247 – which certified that the judge had “considered” D's “motion” and had “tak[en] into account” the §3553(a) factors and the relevant Guidelines policy statement. On appeal, D argued the sentencing judge did not adequately explain why he rejected petitioner's request for a 108-month sentence. The Court of Appeals affirmed.

The judge's explanation was sufficient to allow appellate review. When a judge imposes a sentence within the Federal Sentencing Guidelines range, generally no lengthy explanation is necessary. Rita v. United States, 551 U. S. 338 (2007). The dissenting Justices expressed frustration over the “terse” AO-247 form, with its preprinted language stating that the judge has “considered” a D's motion for a reduced sentence. Such forms give Ds little information about why the new sentence is not at the bottom of the new sentencing range. And appellate courts are left to speculate as to why a “proportional” reduction was not imposed. The dissenters suggested two modifications to the form: (1) require the district judge to add a sentence or two to the form's “Additional Comments” box; or (2) rewrite the form to insert new boxes that provide “the reason or reasons for choosing a particular sentence.” Held, cert. granted and opinion at 854 F.3d 655 affirmed. BREYER, J., joined by ROBERTS, C. J., and THOMAS, GINSBURG, and ALITO, JJ; KENNEDY, J., dissenting, joined by SOTOMAYOR and KAGAN, JJ; GORSUCH, J., did not participate.

TITLE: Davis v. State
INDEX NO.: E.13.a.
CITE: (10-28-2010), 935 N.E.2d 1215 (Ind. Ct. App. 2010)
SUBJECT: No error in denying motion to amend motion to correct erroneous sentence
HOLDING: Tr. Ct. did not err in denying D's motion to amend motion to correct erroneous sentence

because provision in Ind. Trial Rule 15(A) allowing a party to amend a pleading once as a matter of right before a responsive pleading is served applies to civil suits, "not criminal proceedings such as this."

Even if D could amend his motion, his claim lacks merit. A motion to correct erroneous sentence may be filed only to address a sentence that is facially erroneous. Neff v. State, 888 N.E.2d 1249, 1251 (Ind. 2008). Claims requiring review of more than the sentencing judgment are best addressed on direct appeal and later on post-conviction review. Robinson v. State, 805 N.E.2d 783, 787 (Ind. 2004).

Here, D challenged his conviction for corrupt business influence, which required the State to show that D, through a pattern of racketeering activity, knowingly or intentionally acquired or maintained an interest in or control of property or an enterprise. Ind. Code 35-45-6-2(2). However, D's other convictions, altering an identification number and receiving stolen auto parts, are not listed in Ind. Code 35-45-6-1(e) as offenses that constitute racketeering activity.

However, determining whether D was erroneously convicted and sentenced would require Court to look beyond the face of the sentencing judgment and at least examine the charging information to determine how D acquired or maintained an interest in property. Instead of listing the receiving stolen auto parts statute, the charging information may have referred to the more general theft statute, which is listed in Ind. Code 35-45-6-1(e) as an offense that constitutes racketeering activity. Held, judgment affirmed.

TITLE: Hawkins v. State

INDEX NO.: E.13.a.

CITE: (07-18-11), 951 N.E.2d 597 (Ind. Ct. App. 2011)

SUBJECT: Sentence modification - 365-day period applies only to sentence originally imposed, does not restart when D is resentenced

HOLDING: Successful appeal of a sentence under Appellate Rule 7(B) does not restart the 365-day period to file for sentence modification under Ind. Code 35-38-1-17(a). Statute provides that if more than 365 days have elapsed since the D began serving sentence, Tr. Ct. may reduce or suspend the sentence subject to the approval of the prosecuting attorney. Here, D had a several month window in which he could have filed for a sentence modification, but he waited until more than one year had passed since he was originally sentenced. D's 365-day period to file his sentence modification petition did not restart upon resentencing. The 365-day period begins when D begins serving his sentence, and since D had been serving his sentence since it was originally imposed, the revised sentence has no bearing on the time calculation. Tr. Ct. had no authority to grant D's motion to modify since prosecutor opposed motion. Court suggested that to avoid running of the 365-day period, the D might stay his direct appeal to allow Tr. Ct. to first consider and rule on a petition for sentence modification. Held, judgment affirmed. Robb, C.J., dissenting, believes that D's resentencing is in effect a new imposition of sentence and thus, a new trigger date that restarts the 365-day clock; statute needs legislative clarification on this point "to provide a clear, workable rule."

TITLE: Hogan v. State

INDEX NO.: E.13.a.

CITE: (3/5/2018), 95 N.E.3d 181 (Ind. Ct. App. 2018)

SUBJECT: Remand to amend abstract of judgement to allow Purposeful Incarceration

HOLDING: The Tr. Ct. should have granted D's request to issue an amended abstract to include language to clarify that D was eligible for Purposeful Incarceration. D pled guilty to two counts of robbery and criminal confinement, both as Class B felonies. At sentencing, the Tr. Ct. clearly intended to make D eligible for Purposeful Incarceration, a program where a judge agrees to consider a sentence modification if an inmate completes a DOC therapeutic program. See www.in.gov/idoc/2798.htm. To be eligible for Purposeful Incarceration, an abstract of judgment must include the following language: "Upon successful completion of the clinically appropriate substance abuse treatment program as determined by IDOC, the court will consider a modification to this sentence." See <https://secure.in.gov/idoc/files/PI%20FAQ%20Updated%2012.15.pdf>. The abstract of judgment did not include this language. Thus, D asked the Tr. Ct. to issue and amended the abstract of judgment to include this language. A new judge reviewed the request and denied it, finding that D was asking the Tr. Ct. to modify his sentence. In so finding, the Tr. Ct. was wrong. D simply asking the Tr. Ct. to amend the abstract of judgment to conform to the original judge's clear desire to let D participate in Purposeful Incarceration. Held, judgment reversed and remanded to the Tr. Ct. to issue an amended abstract of judgment.

TITLE: Jaco v. State

INDEX NO.: E.13.a.

CITE: (12/31/2015), 49 N.E.3d 171 (Ind. Ct. App. 2015)

SUBJECT: Amended sentence modification statute not retroactive

HOLDING: Based on Hobbs v. State, 26 N.E.3d 983 (Ind. Ct. App. 2015), subsequent cases, and language of the savings clause found at Ind. Code § 1-1-5.5-21, the 2014 amendment eliminating the requirement of prosecutor approval for sentence modifications filed over 365 days after sentencing does not apply retroactively. Thus, the version of Ind. Code § 35-38-1-17 which became effective July 1, 2014, does not apply to Petitioner's motion for modification of his 2011 aggravated battery sentence.

Court noted Petitioner would not be and is not entitled to file a petition for modification of his sentence under the 2015 version of the modification statute without prosecutorial consent, because he was convicted of aggravated battery, rendering him a "violent criminal" pursuant to Ind. Code § 35-38-1-17(c). Ind. Code § 35-38-1-17(k) (eff. May 5, 2015) provides that, after the lapse of the 365-day period, a violent criminal may not petition for sentence modification without the prosecuting attorney's consent. Held, denial of motion for sentence modification affirmed.

TITLE: Johnson v. State

INDEX NO.: E.13.a.

CITE: (4th Dist., 8-9-95), Ind. App., 654 N.E.2d 788

SUBJECT: Sentence modification - proportionality claim based on revised statutes

HOLDING: Post-conviction Ct. did not err in denying D's petition for sentence modification. D was convicted of kidnapping & rape & was sentenced to life imprisonment for each count. In amended PCR petition filed approximately 18 years later, D argued that imposition of two life sentences, with no possibility for parole, was disproportionate & unreasonable when compared to sentencing for comparable crimes under revised criminal statutes. Ct. noted that proportionality in sentencing involves consideration of nature of offense & character of offender, not comparison of sentence with subsequent enactment of lesser statutory penalty. Davis v. State (1983), Ind., 446 N.E.2d 1317. Here, reasonable person could find life sentence appropriate for rape & kidnapping of 10-year-old girl. In denying sentence modification as post-conviction relief, P-C Ct. properly relied on Ind. S.Ct. decision in Beard v. State (1981), Ind., 428 N.E.2d 772. Held, judgment affirmed.

TITLE: Johnston v. State

INDEX NO.: E.13.a.

CITE: (11-22-00), Ind., 739 N.E.2d 121

SUBJECT: Sentence modification - indeterminate life sentences to term of years

HOLDING: State & D seeking post-conviction relief (PCR) had authority to agree to modify two life sentences to two consecutive 40-year terms, even though sentence was not provided for by statute when D committed his 1964 crimes. Although law in effect at time D committed crime generally controls his or her sentencing, this rule does not prohibit Tr. Ct. from considering agreement tendered jointly by State & D that, among other things, includes sentence different than that imposed at trial. Here, State should be held to agreement it made with D because: 1) affirming agreement facilitates resolution of meritorious, difficult-to-defend & otherwise complex post-conviction issues; making efficient use of limited resources; & promoting judicial economy; 2) as part of agreement, D dismissed his claim for PCR with prejudice & reviving claim ten years after agreement would be highly problematic for all concerned; 3) original life sentences had been imposed under indeterminate sentencing regime that expressly provided for later review; 4) practice under indeterminate sentencing system regularly authorized parole from life sentences after periods of time much less than revised sentence in this case; & 5) sentence provided for in agreement corresponds to consecutive presumptive terms under sentencing regime in effect at time agreement was approved. Held, transfer granted, portion of Ct. App.' opinion denying victim's family's legal standing to intervene adopted & incorporated by reference; Tr. Ct.'s acceptance of 1989 agreement between State & D affirmed; Shepard, C.J., dissenting.

RELATED CASES: Hernandez, 910 N.E.2d 213 (Ind. 2009) (to the extent that Johnston held that a life sentence was indeterminate and that a prisoner serving a life sentence was eligible for consideration for parole, it is *overruled*).

TITLE: Kurtz v. State
INDEX NO.: E.13.a.
CITE: (3rd Dist., 3-15-95), Ind. App., 647 N.E.2d 692
SUBJECT: Sentence modification - plea agreement silent on sentencing
HOLDING: Tr. Ct. erred in denying D's petition for modification of sentence, where plea agreement contained no provisions regarding sentencing or subsequent modification thereof. Tr. Ct. denied petition on grounds that plea agreement lacked reservation of authority to grant sentence reduction, relying on Pannarale decision at 627 N.E.2d 828. Ind. S. Ct. reversed appellate decision & held that specific reservation of authority is unnecessary when plea agreement is silent as to sentencing. Pannarale v. State, 638 N.E.2d 1247. Here, Tr. Ct. retained authority to consider D's sentence modification petition. Held, reversed & remanded.

TITLE: Lewis v. State

INDEX NO.: E.13.a.

CITE: (9-10-01), Ind. App., 754 N.E.2d 1019

SUBJECT: Sentence modification - 365-day limit doesn't run until executed portion of sentence

HOLDING: Since D did not earn credit for time served while on home detention as condition of probation, she had not begun serving sentence for purposes of Ind. Code 35-38-1-17, which allows trial Ct. to reduce or suspend sentences within 365 days after D begins serving sentence. Notwithstanding petitions filed by Ds, Ct's. lose further jurisdiction over Ds upon expiration of 365-day limit insofar as the alteration of sentences are concerned. Schweitzer v. State, 700 N.E.2d 488 (Ind. Ct. App. 1998). Here, D was sentenced to two years on home detention followed by two years of executed time. The 365 days did not begin to run until executed portion of sentence began being served. Held, judgment denying motion for modification of sentence reversed.

TITLE: Liggin v. State

INDEX NO.: E.13.a.

CITE: (5-20-96), Ind. App., 665 N.E.2d 618

SUBJECT: Authority to grant sentence modification

HOLDING: Because D had not yet begun serving his sentence at time Tr. Ct. purported to modify it, Tr. Ct. was without authority to grant shock probation. Conditions of Ind. Code 35-38-1- 17(a), which allows Tr. Ct. to modify sentence after D begins serving his sentence, were not present in this case. Held, State's motion to correct errors properly granted.

TITLE: Merkel v. State

INDEX NO.: E.13.a.

CITE: (12/14/2020), 160 N.E.3d 1139 (Ind. Ct. App. 2020)

SUBJECT: Authority to review placement of non-violent offenders due to Covid-19 does not override substantive Indiana law on sentence modifications

HOLDING: Defendant pleaded guilty to being a serious violent felon in exchange for the State's agreement to dismiss the habitual offender enhancement. 366 days after the guilty plea, Defendant filed an emergency petition for release from custody based on the Covid-19 pandemic and motion to modify sentence. The State filed an objection, and the trial court denied the petition. The Court of Appeals held that under Indiana Code 35-38-1-17(d)(14), the trial court's authority to consider a modification without the consent of the prosecutor ended on day 365 and the trial court was without the authority to consider the petition. Even though Defendant is older and has diabetes, which places him in a high-risk category for contracting COVID-19, he would still be high risk if released to the community. Also, the Indiana Supreme Court's Administrative Rule 17 Emergency Relief order dated April 3, 2020, gave authority to trial courts to review county-jail and direct placement community corrections sentences of non-violent inmates, but it did not override substantive Indiana law on sentence modifications and was inapplicable to Defendant because he was not placed in a county jail and was convicted of a violent offense.

TITLE: Moore v. State

INDEX NO.: E.13.a.

CITE: (4/22/2015), 30 N.E.3d 1241 (Ind. Ct. App. 2015)

SUBJECT: Amended sentence modification statute governed petition

HOLDING: Tr. Ct. erred in finding it lacked authority to review D's petition to modify sentence under the 2014 amendment to I. C. § 35-38-1-17, which dispensed with the requirement of prosecutorial consent to any modification requested more than 365 days after a person began serving their sentence. D was sentenced before the 2014 amendment. However, that date does not control because the revised statute "implemented a procedural change to a procedural statute," did not change a Tr. Ct.'s power over a sentence, and simply "lifted a procedural barrier, [prosecutorial consent,] that prevented petitions from reaching the Tr. Ct. for review." See Willis v. State, 567 N.E.2d 1170, 1172 (Ind. Ct. App. 1991). State's argument that D seeks retroactive application of amended statute rests on erroneous assumption that date of D's conviction and sentence controls. Because the revised statute defines the process to modify a sentence, the date of the petition controls. Neither does the savings clause in the 2014 overhaul of the criminal code – in which the revised statute is found – mandate review of D's petition under the pre-2014 modification statute. The savings clause says the new version of the criminal code: 1) does not affect "penalties incurred; crimes committed, or proceedings begun" before July 1, 2014 and that 2) the doctrine of amelioration does not apply. D's request does not affect the penalties incurred or crimes committed because it is filed under a statute defining the process to seek modification. The doctrine of amelioration does not apply because an ameliorative amendment to a statute is one that reduces the maximum penalty for a crime, see Palmer v. State, 679 N.E.2d 887, 892 N.4 (Ind. 1997), which the revised statute does not do.

Despite the Tr. Ct.'s error, D nonetheless is not entitled to relief on the merits of his petition to modify. While Tr. Ct. found it had no authority to consider the petition, it also found that even if it did, it would have denied the petition because of the seriousness of D's crimes and his criminal history. This is in accord with the Tr. Ct.'s discretion. Held, judgment affirmed. Robb, J., dissenting, finding that the amended statute is not procedural but substantive because it gives a Tr. Ct. a power it previously lacked: unilateral authority to modify a sentence at any time. Thus, because the revised statute is not procedural or remedial, the general rule against retroactivity applies. Also, the savings clause bars application of the revised statute to D's petition. Thus, the Tr. Ct. correctly found that because the prosecutor did not consent to the modification, it had no authority to consider D's petition. But see Jaco v. State, 49 N.E.3d 171 (Ind. Ct. App. 2015); and Ellis v. State, this section.

RELATED CASES: Vazquez, 37 N.E.3d 962 (Ind. Ct. App. 2015) (although the amended sentence modification statute applies to D, who committed his drug dealing offenses in 2005, the statute does not entitle him to relief because his petition for modification was untimely and it exceeded the authorized number of filings); Hobbs, 26 N.E.3d 983 (Ind. Ct. App. 2015) (amended sentence modification statute did not apply retroactively if offense committed before July 1, 2014; neither does doctrine of amelioration apply); Carr, 33 N.E.3d 358 (Ind. Ct. App. 2015) (pre-July 1, 2014 version of sentence modification statute applied to D's petition to modify his sentence for murder; thus, prosecutor's consent was required); Ellis, 29 N.E.3d 792 (Ind. Ct. App. 2015); Johnson, 36 N.E.3d 1130 (Ind. Ct. App. 2015) (pre-July 1, 2014 version of sentence modification statute, 35-18-1-17, applied to convictions and sentences entered in 1997); Swallows, 31 N.E.3d 544 (Ind. Ct. App. 2015) (amended sentence modification statute did not apply retroactively if offense committed before July 1, 2014; neither does doctrine of amelioration apply).

TITLE: Newman v. State

INDEX NO.: E.13.a.

CITE: (10/29/21), Ind. Ct. App., 177 N.E.3d 888

SUBJECT: No racial disparity in denial of sentence modification for black defendant.

HOLDING: Trial court did not abuse its discretion in denying a black defendant's petition to modify a 30-year sentence for Class A felony dealing in cocaine. In late 2020, at Defendant's request, the DOC filed a progress report with the trial court. The report indicated that he had completed MRT and Project Echo, DOC programs meant to address his attitude and employability, among other things. The progress report also indicated Defendant was enrolled in PLUS Character 2.0, was a mentor in the prison's SNAP program, had been employed while incarcerated, and had not received any conduct violations during his commitment. Defendant filed a petition to modify his sentence, attaching the report and letters from community members attesting his good character. The State objected to modification, and the trial court denied the petition without a hearing. The Court of Appeals affirmed, noting that a trial court may still decline to modify a defendant's sentence even with plentiful evidence of rehabilitation efforts. And because the trial court was not considering a modification, it was not required to hold a hearing on Defendant's petition. The Court rejected Defendant's argument that racial disparity existed in denying his motion to modify. Defendant pointed out that the drug dealer, who is white and the original target of the sting operation that ensnared Defendant, was granted a sentence modification, and released from prison to probation after serving fewer than three years of his 35-year sentence for dealing cocaine. The Court held the argument was "improperly raised" for the first time in a motion to reconsider and unsupported because the record on appeal did not indicate the white dealer's race. The Court further rejected the existence of racial disparity, reasoning that—unlike Defendant—the white dealer had pleaded guilty under an agreement which contemplated the possibility of modification and Defendant was not necessarily less culpable for his role in the controlled buy.

TITLE: Osborne v. State

INDEX NO.: E.13.a.

CITE: (8/15/85), Ind., 481 N.E.2d 376

SUBJECT: Sentence modification

HOLDING: Post-conviction Ct. does not have jurisdiction to modify a sentence. Marts, 478 N.E.2d 63. Here, D was sentenced to life for kidnapping & 15 years consecutive for armed felony (robbery). At PCR hearing, victim, trial counsel & D's family members testified that 5-year term already served was sufficient punishment. PSI report stated life sentence was too long & recommended 4-10 year sentence range. Ct. finds D's argument essentially presents equitable grounds to support sentence modification, over which PCR Ct. has no jurisdiction. Held, Ct. remands for sentence corrections on other grounds.

TITLE: Owens v. State

INDEX NO.: E.13.a.

CITE: (3rd Dist., 05-13-08), Ind. App., 886 N.E.2d 64

SUBJECT: Plea agreement - waiver of State's right to approve sentence modification

HOLDING: Tr. Ct. erred in concluding that it lacked authority under terms of plea agreement to modify D's forty-year sentence pursuant to Ind. Code 35-38-1-17(b). Statute provides that if more than 365 days have elapsed since D began serving sentence, Tr. Ct. may reduce or suspend sentence subject to approval of prosecuting attorney. In this case, State waived its right to give approval, because plea agreement stated that it "consents and approves" D filing petitions to modify her sentence after one year. Agreement also stated that "nothing in this agreement shall foreclose the State of Indiana from objecting to any modification of sentence." If State did not forfeit something in stating that it "consents and approves" D filing petitions to modify her sentence after one year, then it would not have been necessary for State to establish its right to object to such modification. Held, judgment reversed and remanded for Tr. Ct. to decide whether to grant D's petition for sentence modification; May, J., dissenting, believes Tr. Ct. cannot modify sentence until State declines to object to one of D's motions.

RELATED CASES: Holloway, 980 N.E.2d 331 (Ind. Ct. App. 2012) (Tr. Ct. abused its discretion by granting D's motion for sentence modification where D earlier entered into a plea agreement in which he agreed "that the sentence recommended and/or imposed is the appropriate sentence to be served pursuant to this agreement the D hereby waives any future request to modify the sentence under Ind. Code 35-38-1-17.").

TITLE: Redmond v. State

INDEX NO.: E.13.a.

CITE: (2nd Dist, 01-28-09), Ind. App., 900 N.E.2d 40

SUBJECT: Sentence modification - time limit

HOLDING: Tr. Ct. did not err in denying D's motion to modify sentence where prosecutor objected to modification. "Within 365 days after a convicted person begins serving the sentence imposed on the person . . . the court may reduce or suspend the sentence." Ind. Code 35-38-1-17(a) (emphasis added). If more than 365 days have elapsed, the court may reduce or suspend the sentence only with the approval of the prosecuting attorney. Although Court of Appeals in Liggin v. State, 665 N.E.2d 618 (Ind. Ct. App. 1996), held that a D who was ordered to serve consecutive sentences does not begin serving his second sentence until he is finished with his first sentence, in 2005, the legislature amended Ind. Code 35-38-1-17(a) to include the words "imposed on him" to modify sentence. Thus, the introductory clause, "within 365 days after a convicted person begins serving the sentence imposed" on him, means within 365 days after a convicted person begins serving the entire sentence imposed on him (and not individual sentences under the same cause number).

Here, on September 25, 1998, D was sentenced to eight years for one count of Class C felony battery to be served consecutively to twenty years for two counts of robbery. After completing his twenty-year sentence on the robbery convictions, on February 5, 2008, D filed a motion to modify his sentence. Because more than 365 days have passed and D did not have the prosecutor's permission, Tr. Ct. did not have authority to modify the sentence. Held, judgment affirmed.

RELATED CASES: Hawkins, 951 N.E.2d 597 (Ind. Ct. App. 2011) (365-day clock does not restart after D is re-sentenced; see full review, this section).

TITLE: Rodriguez v. State

INDEX NO.: E.13.a.

CITE: (8/7/2019), 129 N.E.3d 789 (Ind. S. Ct. 2019)

SUBJECT: Trial courts may not modify sentences entered pursuant to fixed term plea agreements

HOLDING: The Indiana Supreme Court put to rest possible interpretations of recent amendments to the sentence modification statute (Ind. Code § 35-38-1-17), holding that when a Defendant enters into a fixed plea where the trial court has no discretion, the Defendant cannot later ask the trial court to modify the sentence when the trial court did not have discretion when accepting the plea agreement. "Trial courts are bound by the terms of a plea agreement and may only modify a sentence in a way that would have been authorized at the time of sentencing." (*citing Pannarale v. State*, 638 N.E.2d 1247, 1249 (Ind. 1994); and Ind. Code § 35-35-3-3(e) ("If the court accepts a plea agreement, it shall be bound by its terms.")).

RELATED CASES: State v. Stafford, 128 N.E.3d 1291 (Ind. 2019) (companion case to Rodriguez reaffirming that trial courts are bound by the terms of a plea agreement and may only modify a sentence in a way that would have been authorized at the time of sentencing).

TITLE: Schweitzer v. State

INDEX NO.: E.13.a.

CITE: (5th Dist., 10-14-98), Ind. App., 700 N.E.2d 488

SUBJECT: Sentence modification - prosecutorial consent; constitutionality

HOLDING: Ind. Code 35-38-1-17, which limits sentence modification by Tr. Ct. to 365 days after D begins serving his sentence absent prosecutorial consent, is constitutional. Ct. rejected D's argument that statute violates Article I, §§ 16 & 18 of Indiana Constitution, which require criminal justice system to provide D with opportunity for rehabilitation "where reasonably possible." Fointno, 487 N.E.2d 140. D erroneously equated opportunities for rehabilitation with opportunities for sentence modification. Record showed that D was offered & took full advantage of numerous opportunities for rehabilitation while incarcerated. Statute's 365-day time limit applies strictly to Tr. Ct.'s unfettered authority to modify D's sentence, not to extinguishing of D's rehabilitation rights.

Ct. has previously held that statute does not violate Article 3 § 22 & Article 7 § 1 with respect to separation of powers & judicial powers, nor does it violate D's rights to due process, equal protection of laws, & equal access to Cts. Beanblossom, App., 637 N.E.2d 1345. D's arguments in this case strongly echo separation of powers issue addressed in Beanblossom. Tr. Ct. did not err in ruling that it had no jurisdiction on D's motion for sentence modification. Held, judgment affirmed; Sullivan, J., concurring.

RELATED CASES: Reed, App., 796 N.E.2d 771 (Ct. rejected D's challenge to constitutionality of statute & reliance on concurring opinion in Schweitzer; see full review at J.12).

TITLE: State ex rel. Abel v. Vigo Circuit Ct.

INDEX NO.: E.13.a.

CITE: (4/19/84), Ind., 462 N.E.2d 61

SUBJECT: Shock probation - time period is jurisdictional

HOLDING: Original action. Tr. Ct. erred in granting D's petition for shock probation where although D filed petition within 180 days, Ct. did not grant petition within 180 days. Tr. Ct. loses jurisdiction over D so far as alteration of sentence is concerned upon expiration of 180 days. Held, petition for writ granted; Tr. Ct. ordered to vacate shock probation & reinstate executed sentence.

RELATED CASES: Christakis, App., 493 N.E.2d 471 (Crim L 982.3(2); Judgmt 486(1); grant of shock probation beyond 180 days was void; void judgments can be attacked directly or collaterally at any time).

TITLE: State v. Harper

INDEX NO.: E.13.a.

CITE: (5/14/2014), 8 N.E.3d 694 (Ind. 2014)

SUBJECT: Prosecutor's conduct constituted approval of sentence modification

HOLDING: Where prosecutor did not expressly consent to sentence modification, nonetheless, his conduct established consent, meeting requirement of IC 35-38-1-17(b) where a person seeks modification more than 365 after they were sentenced.

Tr. Ct. acknowledged it lacked authority to grant petition to modify without prosecutor's consent. Even so, Tr. Ct. said it was inclined to grant the petition but wouldn't if the prosecutor would appeal the granting of modification. The Tr. Ct. asked the deputy prosecutor to check with his boss and report back within a week if the prosecutor would, in fact, appeal; if so, the Tr. Ct. would deny the petition. Five weeks later, the deputy prosecutor had yet to report his boss's position, so the judge granted the petition to modify.

"We find that, in the context of the interactions and communications between the Tr. Ct. and the prosecutor in this case, the prosecutor's conduct satisfied the 'approval' requirement of the statute." Cf. Hawkins v. State, 951 N.E.2d 597, 599 (Ind. Ct. App. 2011), *trans. denied*. (if petition is filed outside 365-day period "but the prosecutor acquiesces in the motion, the decision to grant or deny the motion is within the Tr. Ct.'s discretion."); cf. also Keys v. State, 746 N.E.2d 405, 407 (Ind. Ct. App. 2001). Held, judgment affirmed, transfer granted, and vacating Court of Appeals memorandum decision.

NOTE: (effective July 1, 2014, IC 35-38-1-17 no longer requires consent from a prosecutor for petitions filed by non-violent criminals more than 365 days after sentencing; "violent criminal" is defined at Ind. Code § 35-38-1-17(b)).

RELATED CASES: Mance, 163 N.E.3d 367 (Ind. Ct. App. 2021) (lack of response from prosecutor does not constitute consent to modify sentence absent indication prosecutor's office received letter).

TITLE: State v. Porter

INDEX NO.: E.13.a.

CITE: (1st Dist.; 5-19-00), Ind. App., 729 N.E.2d 591

SUBJECT: Sentence modification - change in placement

HOLDING: Tr. Ct. erroneously modified D's sentence without prosecutor's approval. Tr. Ct. only retains such continuing jurisdiction as permitted by judgment or granted to Ct. by statute or rule. Schweitzer, App., 700 N.E.2d 488. If more than 365 days have elapsed since D began serving sentence & after hearing at which convicted person is present, Ct. may reduce or suspend sentence subject to approval of prosecuting attorney. Ind. Code 35-38-1-17(b). Here, D filed his petition for sentence modification well beyond 365 day limit, & prosecuting attorney expressly opposed petition. Although D was seeking transfer from DOC to community corrections program, statute still required prosecuting attorney's consent. Ind. Code 35-38-1-17 grants rather than limits Ct.'s authority to modify sentence. Held, judgment reversed; Sullivan, J., concurring.

RELATED CASES: Harper, 8 N.E.3d 694 (Ind. 2014) (even where prosecutor does not expressly agree to sentence modification, prosecutor's conduct may constitute consent for modification) Morris, 936 N.E. 2d 354 (Ind. Ct. App. 2010) (in order to modify placement after 365 days without the prosecutor's approval, the sentencing hearing must have occurred after June 30, 2001). Keys, App., 746 N.E.2d 405 (since D did not file request for change in placement within 365 days of the day he began serving his sentence, he was required to obtain prosecuting attorney's approval prior to filing his motion).

TITLE: Terry v. U.S.
INDEX NO.: E.13.a.
CITE: (06/14/2021), U.S., 141 S. Ct. 1858
SUBJECT: Defendant ineligible for sentence reduction for his 2008 federal crack cocaine conviction
HOLDING: An offender convicted of a crack cocaine offense is eligible for a sentence reduction under the Fair Sentencing Act (which addressed the crack: powder disparity) and the First Step Act (which made the Fair Sentencing Act retroactive) only if that prior conviction triggered a mandatory minimum sentence. Offenders such as Terry, whose offense did not trigger a mandatory minimum, do not qualify.

TITLE: Willis v. State

INDEX NO.: E.13.a.

CITE: (1st Dist. 03/12/91), Ind. App., 567 N.E.2d 1170

SUBJECT: Modification of Sentence, retroactivity of statute

HOLDING: Although D was convicted & sentenced prior to amendment of Ind. Code 35-38-1-17(b) which allowed for modification of sentence after 180 days in some circumstances, he was entitled to petition for modification well after 180 days because modification of sentence amendment fell outside of general rule that law in effect at time crime was committed controls sentencing. D was convicted of Robbery & Conspiracy to Commit Robbery as Class B felonies & was sentenced in 2/85 to 2 consecutive 20-year terms. In 2/89, D filed pro se motion for modification of sentence. Ct. of Appeals recognized that general rule is that law in effect at time of commission of crime controls sentencing. However, Ct. distinguished Watford, 384 N.E.2d 1030, Holtsclaw, 384 N.E.2d 1026, & Terrell, 390 N.E.2d 208, as involving situations where Ds sought to obtain newly enacted, more lenient sentences, & here D sought only to modify his sentence based on procedural & ameliorative statute amendment. Ct. also distinguished Crocker, 385 N.E.2d 1143, because it dealt with substantive change in Ind. Code 35-7-1-1 which gave the Ct. new powers, *i.e.*, to reduce as well as suspend a sentence. Here, version of Ind. Code 35-38-1-17(b) in effect at sentencing already permitted sentencing Ct. to reduce or suspend, & amendment of 6/1/85, only extended time for modification & was merely procedural. Ct. noted that it did not imply that D should be granted modification, only that he was eligible to petition for it. Held, reversed & remanded on this issue & affirmed on other issue. Judge Robertson dissenting.

RELATED CASES: Swallows, 31 N.E.3d 544 (Ind. Ct. App. 2015) (amended sentence modification statute did not apply retroactively if offense committed before July 1, 2014; neither does doctrine of amelioration apply); Moore, 30 N.E.3d 1241 (Ind. Ct. App. 2015) (Tr. Ct. erred in finding it lacked authority to review D's petition to modify sentence under 2014 amendment to Ind. Code 35-38-1-17, which dispensed with requirement of prosecutorial consent; D was sentenced before amendment went in effect but filed petition after; new statute applied because it was one of procedure, not substance; savings clause and doctrines of retroactivity and amelioration did not require application of old modification statute; *see* full review, this section;); Ellis, 29 N.E.3d 792 (Ind. Ct. App. 2015) (neither doctrine of amelioration nor retroactivity apply to new sentencing statutes).

TITLE: Wilson v. State

INDEX NO.: E.13.a.

CITE: (3rd Dist., 12-11-97), Ind. App., 688 N.E.2d 1293

SUBJECT: Sentence modification - restitution

HOLDING: Having failed to enter restitution order at same time of original sentence, Tr. Ct. lacked authority to enter restitution order after appeal & remand. Tr. Ct. does not have inherent power to modify sentence. Beanblossom, App., 637 N.E.2d 1345. Requirement that D pay restitution is as much part of criminal sentence as fine or any other penalty. Here, D was convicted of theft & burglary & was ordered to pay restitution as part of sentence for burglary. However, burglary conviction was later vacated & Tr. Ct. entered order to pay restitution as part of theft sentence. Because Tr. Ct. entered final judgment with respect to D's theft conviction two years earlier & order did not purport to retain any continuing jurisdiction over D, Tr. Ct. lost its authority to modify D's sentence. In addition, unlike habitual offender determination which may be attached to any felony conviction where there have been multiple simultaneous felony convictions, order of restitution cannot be transferred from one conviction to another because there is close correlation between restitution order & underlying crime to which it is attached. Thus, Tr. Ct. lacked authority to enter restitution order based on D's theft conviction. Held, judgment affirmed in part & reversed in part; Garrard, J., dissenting.

RELATED CASES: W.L., App., 707 N.E.2d 812 (juvenile Ct. was without jurisdiction to rule upon State's motion to reopen for restitution; see full review at U.12.a).

TITLE: Wilson v. State

INDEX NO.: E.13.a.

CITE: (06/22/2022), Ind. Ct. App., 189 N.E.3d 231

SUBJECT: Trial court lacks authority to modify sentence while defendant is on parole

HOLDING: Defendant was placed on parole after he finished serving his executed sentence. He then filed a motion seeking a sentence modification to allow him to be released from parole and placed on probation instead. The trial court denied the modification, reasoning it did not have the authority to modify a sentence after it was already fully executed. Under Indiana Code section 35-38-1-17(e), a trial court may modify a defendant's sentence any time "after . . . a convicted person begins serving the person's sentence." The Court of Appeals acknowledged that while it is true that parole occurs after a convicted person begins serving the person's sentence, the legislature chose to exclude the word "parole" from the plain language of the statute. It concluded, therefore, that the legislature intended for the trial court's authority to modify a sentence to extend only until the sentence had been served and not while the person is on parole. Further, only the Indiana Parole Board has the power to discharge a person from parole. Therefore, the appropriate place for Defendant to request modification would be the Parole Board, not a trial court. Held: affirmed.

TITLE: Woodford v. State
INDEX NO.: E.13.a.
CITE: (8/5/2016), 58 N.E.3d 282 (Ind. Ct. App. 2015)
SUBJECT: Petitions to modify sentence filed before 2015 do not count toward 2-petition limit
HOLDING: For persons who petition for sentence modification under the 2015 amended version of Ind. Code § 35-38-1-17, any petitions filed before July 1, 2015, do not count toward the two-petition limit.

In 2000, D was convicted of dealing cocaine, possessing a controlled substance, and was adjudicated a habitual offender, which resulted in a 70-year aggregate sentence. In 2009 and 2014 he filed petitions to modify, which the Tr. Ct. denied. In September of 2015, he filed another petition to modify but this one under the 2015 version of the statute, which allowed non-violent offenders, like D to twice seek modification without first getting permission from the prosecutor. Tr. Ct. granted the petition in part by letting D serve the final twelve years of his sentence in community corrections on in-home detention.

The State erroneously argues that the Tr. Ct. lacked jurisdiction to entertain D's petition because the petitions he filed in 2009 and 2014 count against his two-petition limit under Ind. Code § 35-38-1-17(j)(2). The State is wrong, as it essentially argues D exhausted his two bites of the apple before the two-bite limitation was even enacted. The statute does not provide for retroactive application of the two-petition limit, and reading the statute that way would produce an absurd result: it would deny D the opportunity for sentence modification under the new statutory terms, even though Section 35-38-1-17(a) explicitly extends the new scheme to persons like D who were convicted and sentenced before July 1, 2014. It would also undermine the legislative goal of letting long-incarcerated but non-violent offenders like D seek review on the merits of their requests to modify sentence and letting Tr. Ct.s determine whether scarce prison resources could be better used. Held, judgment affirmed.

RELATED CASE: Schmitt v. State, 108 N.E.3d 423 (Ind. Ct. App. 2018) (because Tr. Ct. mentioned State's objection to modification in its order, Ct. reversed denial and remanded for review of D's petition on its merits).

E. SENTENCING

E.13. Modification/correction of sentence

E.13.b. Correction of erroneous sentence (Ind. Code 35-38-1-15)

TITLE: Beliles v. State

INDEX NO.: E.13.b.

CITE: (2nd Dist., 4-15-96), Ind. App., 663 N.E.2d 1168

SUBJECT: Correction of erroneous sentencing order did not violate due process

HOLDING: Where original sentencing order contained clerical error which reflected more lenient sentence than that which should have been imposed under plea agreement, Tr. Ct. appropriately corrected errors in judgment by nunc pro tunc entries. Tr. Ct.'s failure to send notice or copies of corrected sentencing order to Department of Correction or to D did not violate due process because it did not result in tangible detriment or concrete injury to D's substantive rights. D's sentence was corrected before he had completed incorrectly imposed 6-year sentence & before he had been released from prison. Ct. concluded that equitable principles that required prisoner's discharge in Woods v. State, 583 N.E.2d 1211 (Ind. 1992), were not triggered here, because D did not show prejudice beyond frustrated expectation of windfall of shorter executed sentence. Held, denial of post-conviction relief affirmed.

TITLE: Collier v. State

INDEX NO.: E.13.b.

CITE: (6/11/91), Ind. App., 572 N.E.2d 1299

SUBJECT: Correction of erroneous sentence; presence of D

HOLDING: D convicted of robbery, confinement, & of being habitual offender. After his conviction was affirmed on direct appeal, he filed petition for post-conviction relief. D contends that he was denied statutory right to be present at Tr. Ct.'s correction of his sentence pursuant to order of S. Ct. Ct. agreed & held that proper remedy for denial of D's statutory right to be present at correction of his sentence was to remand case to Tr. Ct. with instructions to re-impose order correcting sentence in D's presence. Held, affirmed in part, remanded in part for hearing on sentence correction.

TITLE: Dillman v. State
INDEX NO: E.13.b.
CITE: (8/29/2014), 16 N.E.3d 445 (Ind. Ct. App. 2014)
SUBJECT: Erroneous release of cash bond did not create illegal sentence or fundamental error
HOLDING: Although the Tr. Ct. erred in releasing D's cash bond to pay costs and fees, this not constitute an illegal sentence and fundamental error that would allow the Court to review D's appeal on the merits despite his failure to timely appeal the Tr. Ct.'s order. Although the Tr. Ct. made its statement regarding costs and fees at sentencing, this order was not part of his sentence.

"In 2005, when D was sentenced, Ind. Code 33-37-2-2(a) provided: '[c]osts in a criminal action are not a part of the sentence' Also, 'fees' . . . are costs." Ind. Code 33-37-2-5 (2005). Thus, the Tr. Ct.'s order regarding D's costs and fees was not a part of his sentence, so his sentence was not illegal. Because the sentence was not illegal and did not constitute fundamental error, D has waived review of his claim regarding the release of his cash bond. Held, judgment affirmed.

TITLE: Fisel v. State

INDEX NO.: E.13.b.

CITE: (10/28/2022), Ind. Ct. App., 198 N.E.3d 696

SUBJECT: Trial court permitted to modify home detention sentence not authorized by statute

HOLDING: After pleading guilty to operating as HTV, Defendant admitted to the habitual offender enhancement and was sentenced to a total of 1,642 days in the DOC, with all suspended except for 732 days executed as a direct placement on home detention. The State filed a motion to correct error, in which it alleged that the trial court's sentencing order was contrary to law because a direct commitment to home detention was not provided for by statute for the offense or enhancement. The trial court granted the motion and ordered the 732 days originally suspended to instead be served at the DOC. Defendant appealed, arguing that the original sentence was authorized under IC 35-38-2-6.3 and the trial court had no authority to modify it. The Court of Appeals disagreed with both of the arguments. First, IC 35-38-2.6-3(a) only authorizes placement on home detention as an alternative to commitment to the DOC when the sentence is nonsuspendible under IC 35-50-2-2.1 or 35-50-2-2.2. Neither applied to Defendant's sentence, as the habitual enhancement was nonsuspendible under IC 35-50-2-8(i). Second, the power and duty of trial courts to correct illegal sentences has long been recognized. A motion to correct error is a proper device to raise errors in a sentence and to permit the trial court to correct that sentence. Here, the trial court did not reweigh aggravating and mitigating factors to resentence defendant, but only modified the portion of his sentence it found unauthorized. Defendant argued the trial court lacked jurisdiction to resentence him to a harsher sentence, but the Court of Appeals said it was "obvious" that an unauthorized sentence cannot stand merely because it is more lenient than what the law allows. Held: judgment affirmed.

TITLE: Gaddie v. State

INDEX NO.: E.13.b.

CITE: (02/13/91), Ind., 566 N.E.2d 535

SUBJECT: Correction of Erroneous Sentence - required procedure

HOLDING: Where D's Motion for Correction of Erroneous Sentence (MCES) did not present issues showing sentence was erroneous on its face, i.e., error that would be fundamental, it was not error for Tr. Ct. to summarily deny such motion without hearing. D filed pro se MCES & memorandum under Ind. Code 35-42-1-3, claiming primarily that sentencing judge failed to state any specific reasons for enhancing D's presumptive 10-year sentence by additional 8 years. Ct. noted that claim didn't raise issue of fact requiring evidentiary hearing & that judge had all necessary materials in hand to rule without hearing. Ct. also found D was not entitled to have counsel appointed, *citing* to Gee, 508 N.E.2d 787. As to merits of D's claim of erroneous sentence, Ct. found Tr. Ct.'s decision was based on proper identification of aggravating factors balanced against mitigators. Held, denial of D's MCES affirmed.

RELATED CASES: Funk, App., 714 N.E.2d 746 (where pertinent jury instructions were attached to motion to correct erroneous sentence, there was no need for evidentiary hearing).

TITLE: Godby v. State

INDEX NO.: E.13.b.

CITE: (10/10/2012), 976 N.E.2d 1235 (Ind. Ct. App. 2012)

SUBJECT: Motion to correct erroneous sentence not proper channel to challenge court costs

HOLDING: Procedures to correct an erroneous sentence under Ind. Code 35-38-1-15 should be limited to those fundamental sentencing errors where sentences have been entered in violation of express statutory authority or an erroneous interpretation of a statutory penalty provision. Beliles v. State, 663 N.E.2d 1168 (Ind. Ct. App. 1996). Here, D claimed Tr. Ct. erred when imposing court costs following his murder trial because it did not include in judgment of conviction the amount of court costs, whether D was indigent, and the method of satisfying the court costs as required by Ind. Code 35-38-3-2(b)(93). This error was clearly apparent on the face of the sentencing judgment. However, Ind. Code 33-37-2-2 makes clear that costs imposed in a criminal action "are not part of the sentence." Thus, D's belated attempt to correct the error through a pro se motion to correct erroneous sentence is not proper. Held, judgment affirmed.

TITLE: Golden v. State
INDEX NO.: E.13.b.
CITE: (1st Dist. 5/7/90), Ind. App., 553 N.E.2d 1219
SUBJECT: Double jeopardy (DJ) - correction of illegal sentence after commencement
HOLDING: Remand to Tr. Ct. to attach 30-year habitual offender (HO) sentence to one of 2 concurrent forgery sentences as enhancement does not violate DJ, even though D has completely served 5-year forgery sentence. Ct. of Appeals affirms denial of D's PCR petition to have separate HO sentence set aside, but remands with instructions to impose it as enhancement. D argues that re-sentencing would violate DJ, since he has already served 5-year forgery sentence. However, separate HO sentence was illegal, & there is no DJ prohibition against correcting illegal sentence even if it results in increased penalty. See also Niece, App., 456 N.E.2d 1081; Bozza v. US (1947), 330 U.S. 160, 67 S.Ct. 645, 91 L.Ed.2d 818; Stuckey v. Stynchcombe (CTA 5 1980), 614 F.2d 75; Thompson v. US (CTA 1 1974), 495 F.2d 1304. Held, remanded for resentencing.

TITLE: Griffin v. State
INDEX NO.: E.13.b.
CITE: (7/6/89), Ind., 540 N.E.2d 1187
SUBJECT: Correction of erroneous sentence - direct appeal available to D who pleads guilty
HOLDING: Ct. of Appeals erred in dismissing D's direct appeal of denial of motion to correct erroneous sentence. D pled guilty to 4 counts of assisting a criminal & received consecutive sentences. D moved for correction of erroneous sentence, alleging that Tr. Ct. erred by ordering consecutive sentences, & that double jeopardy precluded sentencing on all 4 counts. Ct. of Appeals dismissed D's appeal, reasoning that since D had pled guilty, he could challenge his convictions only through PCR proceedings. While PCR is preferred method for presenting such issues, D may use Ind. Code 35-38-1-15 to seek correction of erroneous sentence. Gee, 508 N.E.2d 787. Held, transfer granted; reversed & remanded for resentencing.

Note: See Gee, cited above. Indigent D must choose between PCR with state public defender or filing direct appeal pro se.

TITLE: Hatchett v. State
INDEX NO.: E.13.b.
CITE: (4th Dist., 8-29-03), Ind. App., 794 N.E.2d 544, *overruled* in part by 805 N.E.2d 783
SUBJECT: Failure to specify credit time in abstract of judgment did not render sentence facially erroneous

HOLDING: Although Tr. Cts. are to specify amount of pre-sentencing credit time earned in judgment of conviction, failure to do so does not render sentence facially erroneous. D was sentenced for convictions of unlawful possession of firearm by serious violent felon & carrying handgun without a license [handgun conviction vacated at Hatchett v. State, 740 N.E.2d 920 (Ind. Ct. App. 2000)]. In its abstract of judgment, Tr. Ct. recorded that D had been confined 193 days prior to sentencing. D filed a motion to correct erroneous sentence, complaining that the sentencing Ct. failed to award him credit time in addition to actual time served. Someone at Tr. Ct. indicated on his motion that it was denied because DOC gives credit time based on actual time served, & D appealed pro se.

Ct. agreed with D that those detained pre-trial are initially assigned to Class I for purposes of credit time & that they are entitled to “good-time” credit for this period. Ct. also agreed that Ind. Code § 35-38-3-2(b)(4) requires that Tr. Ct.’s judgment of conviction include credit time earned as well as actual time incarcerated. Nevertheless, Ct. found Tr. Ct. committed at most a ministerial omission that did not render his sentence facially erroneous or deprive him of credit time. Because D’s sentence was not facially erroneous, he was not entitled to relief & denial of motion to correct erroneous sentence was not error.

RELATED CASES: Bonds, 165 N.E.3d 1011 (Ind. Ct. App. 2021) (an allegation by an inmate that the trial court has not included credit time earned in its sentencing is the type of claim appropriately advanced by a motion to correct sentence); Robinson, 805 N.E.2d 783 (while a motion to correct erroneous sentence may be used to address facial errors in sentencing judgment, it is not available to challenge entries or omissions in abstract of judgment; DOC’s abstract of judgment form is not “judgment of conviction”; Hatchett *overruled* to extent it holds otherwise; see full review at E.12.a); Osborn, App., 919 N.E.2d 1228 (Tr. Ct. did not abuse its discretion in summarily denying D’s motion to correct erroneous sentence regarding his habitual offender enhancement, because D did not claim his sentence was erroneous on its face but claimed that State failed to prove commission and conviction dates for underlying predicate offenses)

TITLE: Hobbs v. State

INDEX NO.: E.13.b.

CITE: (2/15/2017), 71 N.E.3d 46 (Ind. Ct. App. 2017)

SUBJECT: Erroneous sentence claim restricted to facial review of sentence

HOLDING: Defendant's claim that his crimes constituted a single criminal episode and that this entitled him to a sentence reduction was not reviewable because the scope of his appeal was restricted to an erroneous sentencing claim, not plenary review of his sentence. In 1994, Defendant was sentenced to an aggregate sentence of 120 years for class A felony rape, two counts of class A criminal deviate conduct, and one count of class B felony burglary. Years later, Defendant prevailed in an appeal where he argued that his 50-year sentences on the class A felonies exceeded the statutory maximum. On remand the trial court made the appropriate adjustments, yet it ran Defendant's sentences consecutively, once again yielding an aggregate sentence of 120 years. Here again, Defendant argues that his sentence is erroneous but by claiming his crimes constituted one criminal episode. However, because erroneous sentence arguments are restricted to facial review of a sentence, Defendant's claim lies outside the scope of this appeal as it would require plenary review of the entire record. See Davis v. State, 978 N.E.2d 470, 472 (Ind. Ct. App. 2012) (request for sentence relief because crimes allegedly constituted just one criminal episode was inappropriate in the context of motion to correct erroneous sentence because reviewing the claim would require court to do more than conduct a facial review of sentence). Held, judgment affirmed.

TITLE: Molina-Martinez v. United States
INDEX NO.: E.13.b.
CITE: (4/20/2016), 136 S. Ct. 1338 (U.S. 2016)
SUBJECT: Relief from improper sentencing range did not require additional evidence

HOLDING: Where D was sentenced under an incorrect range under the federal guidelines, the Fifth Circuit erred in requiring D to identify additional evidence in the record to show that his substantial rights were affected.

D pled guilty to being unlawfully present in this country after having been deported. In preparing a sentencing recommendation, the probation office mistakenly found that the appropriate range for D's sentence was 77-96 months, when, in fact, it was 70-87 months. D was sentenced to 77 months. D failed to object to his sentence, so he was entitled to relief only upon showing that the error was plain and affected his substantial rights, made more difficult because even though, as the Eleventh Circuit acknowledged, he was sentenced under the wrong sentencing range, his 77-month sentence still fell within the proper range of 70-87 months.

The Court of Appeals denied relief, holding that D failed to show that the incorrect range affected his substantial rights and reasoning that when a correct sentencing range overlaps with an incorrect range, the reviewing court "do[es] not assume, in the absence of additional evidence, that the sentence [imposed] affects a D's substantial rights." 588 Fed. Appx. 333, 335 (CA5 2014) (Emphasis added). "The mere fact that the [district] court sentenced [D] to a low-end sentence," the Court of Appeals said, was "insufficient on its own to show that [D] would have received a similar low-end sentence [of 70 months] had the district court used the correct Guidelines range." 588 Fed. Appx., at 335.

The Court of Appeals erred in requiring D to make a further showing of prejudice. When a D shows that a district court applied the wrong sentencing range, he will have demonstrated a reasonable probability that the district court would have imposed a different sentence. Held, cert. granted, Fifth Circuit's opinion at 588 Fed. Appx. 333 vacated, judgment reversed, and matter remanded for further proceedings. Kennedy, J., joined by Roberts, C.J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ; Alito, J., concurring in part and concurring in the judgment, joined by Thomas, J.

TITLE: Newsom v. State

INDEX NO.: E.13.b.

CITE: (2nd Dist., 08-11-06), Ind. App., 851 N.E.2d 1287

SUBJECT: Motion to correct erroneous sentence cannot be used to challenge juvenile ct.'s disposition

HOLDING: Juvenile ct. did not abuse its discretion by denying D's motion to correct erroneous sentence challenging juvenile ct.'s dispositional order entered after he violated his probation & suspended commitment. Over four years after D completed his juvenile wardship with DOC, he filed a motion to correct erroneous sentence under Ind. Code 35-38-1-15 to challenge dispositional order. Ind. Code 35-38-1-15 provides a remedy for a convicted person who is sentenced erroneously. Because D is not a "convicted person" & juvenile ct.'s disposition does not constitute a "sentence," Ct. concluded that Ind. Code 35-38-1-15 is not available to D as a means to challenge his juvenile disposition. Jordan v. State, 512 N.E.2d 404, 408-409 (Ind. 1987). Therefore, juvenile ct. properly denied D's motion to correct erroneous sentence. Held, judgment affirmed.

Note: Trial Rule 60 may be the appropriate method for challenging an erroneous disposition.

TITLE: Niece v. State

INDEX NO.: E.13.b.

CITE: (2d Dist. 12/14/83), Ind. App., 456 N.E.2d 1081

SUBJECT: Correction of erroneous sentence

HOLDING: Tr. Ct. has power to vacate original sentence where that sentence is illegal; such action does not violate double jeopardy. Here, D pled guilty & received 5-year sentence with all but 30 days suspended. D had prior unrelated felony conviction; thus, suspended sentence was illegal. Ind. Code 35-50-2-2. Tr. Ct. granted state's MCE, vacated D's guilty plea & sentence & set case for trial. Tr. Ct. has power to correct erroneous sentence. Palmer, 386 N.E.2d 946; Williams, 119 N.E.2d 547. Neither partial execution nor double jeopardy bar vacation of illegal sentence & imposition of proper one (even if longer than original sentence). Bozza v. US (1947), 330 U.S. 160, 67 S.Ct. 645, 91 L.Ed. 818; Stuckey v. Stynchcombe, (CA5 1980), 614 F.2d 75; (other citations omitted). D is not put in jeopardy by void judgment & thus may be reprobsecuted. Slack v. Grigsby, 97 N.E.2d 145. Held, affirmed in part, reversed in part, remanded.

RELATED CASES: Ennis, App., 806 N.E.2d 804 (Tr. Ct. properly corrected D's judgment of conviction by modifying judgment from a Class D felony failure to pay child support to a Class C felony after it had accepted plea agreement; Tr. Ct. failed to provide its reasons for lowering conviction from Class C to D felony in accordance with Ind. Code 35-50-2-6(b)).

TITLE: Poore v. State

INDEX NO.: E.13.b.

CITE: (2nd Dist., 05-18-93), Ind. App., 613 N.E.2d 478

SUBJECT: Motion to Correct Erroneous Sentence (MCES) vs. Post-Conviction Relief (PCR)

HOLDING: MCES under Ind. Code 35-38-1-15 is appropriate only when sentence is facially defective in that it violates express statutory authority at time sentence is pronounced to attack habitual offender (HO) enhancement where prior conviction is subsequently vacated use PCR, not MCES. D was found to be HO, but later one of prior felonies was vacated by PCR. Tr. Ct. denied D's MCES because it was not proper way to challenge HO when underlying convictions were vacated. Tr. Ct. also denied MCES asking alternatively for motion to be dismissed. In Thompson, 389 N.E.2d 274, Ct. allowed attack on sentence through either MCES or PCR, but noted PCR was better procedure because it provided for finality. In Jones, 544 N.E.2d 492, Ct. held MCES should be limited to instances where sentence was erroneous on its face, i.e., errors considered fundamental, including illegal sentences in violation of express statutory authority or involving erroneous interpretation of penalties. See, also Reffett, 571 N.E.2d 1227.

Ct. determined facially defective sentence is one "that violates express statutory authority at the time the sentence is pronounced." Ct. found this definition had advantage of providing expeditious procedure for those only wishing to question propriety of sentence based on statutory authority at time of sentence, while promoting policy of finality by requiring all other attacks to be raised via PCR. Ds attacking their sentences for any reason other than facial invalidity at time of sentencing must use PCR petition & include any other alleged defects or face waiver. While MCES inappropriate, Ct. remanded for dismissal of motion without prejudice so D could still proceed with PCR.

RELATED CASES: State v. Arnold, 27 N.E.3d 315 (Ind. Ct. App. 2015) (Tr. Ct. should have treated D's "motion to set aside habitual offender enhancement" as a petition for PCR); Robinson, 805 N.E.2d 783 (use of MCES should be narrowly confined to claims apparent from face of sentencing judgment; see full review at E.12.a); Powell, 574 N.E.2d 331 (improper to allege violation of First Amend. rights or denial of constitutional right to even-handed application of law; those issues are PCR petitions); Edwards, 518 N.E.2d 1137 (D's activity & behavior subsequent to sentencing not appropriate considerations under MCES; evidence of this type may only be addressed under motion requesting reduction or suspension of sentence pursuant to Ind. Code 35-38-1-17); Gressel, App., 653 N.E.2d 139 (sentence for violating terms of restricted license was facially defective; see card at K.9.i).

TITLE: Rodgers v. State
INDEX NO.: E.13.b.
CITE: (8/7/2015), 40 N.E.3d 969 (Ind. Ct. App. 2015)
SUBJECT: D didn't waive review claim about Victim-Offender Reconciliation
HOLDING: D's failure to object did not waive review of claim that Tr. Ct. should not have ordered him to, in lieu of conducting a restitution hearing, participate in Victim-Offender Reconciliation Program. "[A]ppellate courts will review a Tr. Ct.'s restitution [order] even where the D did not object based on the rationale that a restitution order is part of the sentence, and it is the duty of the appellate court to bring illegal sentences into compliance." Rich v. State, 890 N.E.2d 44, 48 (Ind. Ct. App. 2008) (internal citations omitted). Held, appeal reviewed on merits and judgment reversed.

TITLE: Rosalez-Mireles v. United States

INDEX NO.: E.13.b.

CITE: (6/18/2018), 138 S.Ct. 1897 (U.S. 2018)

SUBJECT: Federal D entitled to resentencing where incorrect Guidelines range was used

HOLDING: When a federal district court sentences a D under an incorrect Sentencing Guidelines range, the D ordinarily is entitled to a resentencing. This presumption of relief applies even when the actual sentence falls within the correct range. D pled guilty to illegal reentry into the United States. In calculating the Guidelines range, the presentence report mistakenly counted a state misdemeanor conviction twice. Thus, the report yielded a Guidelines range of 77 to 96 months, when the correct range was 70 to 87 months. D did not object, and the District Court relied on the miscalculated Guidelines range and sentenced D to 78 months. On appeal, D challenged the incorrect range for the first time. The Fifth Circuit found the Guidelines error was plain and that it affected D's substantial rights because there was a reasonable probability he would have received a lower sentence but for the error. Even so, the Fifth Circuit declined to remand for resentencing because D's sentence did not "shock the conscience." A D may attack such an error through Federal Rule of Criminal Procedure 52(b), assuming (1) the error was not intentionally relinquished, (2) the error is plain, and (3) the error "affected the D's substantial rights." See United States v. Olano, 507 U. S. 725 (1993) and Molina-Martinez v. United States, 136 S.Ct. 1388 (2016). If those conditions are met, the appellate court should use its discretion to correct the forfeited error if the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." Id., at 1343.

The Fifth Circuit's "shocks-the-conscience" standard has especially severe results here. An error resulting in a higher range than the Guidelines provide usually establishes a reasonable probability that a D will serve a prison sentence greater than necessary to fulfill the purposes of incarceration, 18 U. S. C. §3553(a). And that is the case here. "In broad strokes, the public legitimacy of our justice system relies on procedures that are 'neutral, accurate, consistent, trustworthy, and fair,' and that 'provide opportunities for error correction.' Bowers & Robinson, Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility, 47 Wake Forest L. Rev. 211, 215–216 (2012). In considering claims like [D's], then 'what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?' United States v. Sabillon-Umana, 772 F. 3d 1328, 1333–1334 (10th Cir. 2014) (Gorsuch, J.)." Accordingly, D is entitled to resentencing. Held, cert. granted, opinion at 850 F. 3d 246 reversed, and remanded for resentencing. SOTOMAYOR, J., joined by ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, KAGAN, and GORSUCH, JJ. THOMAS, J., dissenting, joined by ALITO, J.

TITLE: Sizemore v. State

INDEX NO.: E.13.b.

CITE: (12/7/88), Ind., 531 N.E.2d 201

SUBJECT: Correction of sentence after vacation of habitual offender (HO) enhancement - cannot extend to

HOLDING: Tr. Ct. erred in resentencing D on Counts I, II, & III following vacation of HO enhancement on theft charge. D was originally sentenced to 8 years each on Counts I - III, to run concurrently. He was also sentenced to 4 years on theft charge, enhanced by 30 years because of HO status, to run consecutive to other 3 counts. After vacation of prior felony conviction which served as basis for HO enhancement, D moved for correction of erroneous sentence. Tr. Ct. vacated HO enhancement, then proceeded to resentence D on Counts I - III, ordering 8 year sentences on each count to run consecutively. On appeal, D argues that his sentences on Counts I - III have been served & satisfied & cannot be subject to resentencing. See Coble, 523 N.E.2d 228. Sole jurisdiction of Tr. Ct. at resentencing was to resentence D on theft charge, in accordance with statutes concerning Class D felonies. Id. Held, reversed & remanded. DeBruler, J., CONCURS & DISSENTS, arguing Tr. Ct. is limited not only by sentencing statutes, but by length of original sentence imposed, although D here was already sentenced to statutory maximum.

RELATED CASES: Jackson, 88 N.E.3d 1106 (Ind. Ct. App. 2017) (Where the Court's original opinion vacated D's criminal gang enhancement, the Court *clarified* on rehearing that Tr. Ct. has no authority on remand to resentence D; see full review, this section).

TITLE: State v. Casiano

INDEX NO.: E.13.b.

CITE: 282 Conn. 614, 922 A.2d 1065 (Conn. 2007) 05/29/2007

SUBJECT: Statute provides indigents right to counsel for motion to correct illegal sentence

HOLDING: Connecticut Supreme Court held state statute that affords indigent Ds a right to have counsel appointed "in any criminal action" entitles an indigent offender to have a lawyer appointed to help determine whether he has a sound basis for filing a motion to correct an illegal sentence and, if so, to help him file such a motion and represent him in a direct appeal from its denial. Although the statute does not define "any criminal action," Court in Gipson v. Commissioner of Correction, 778 A.2d 121 (Conn. 2001), took a broad view of the term, saying that "any criminal action" includes all appeals, both discretionary and appeals as of right. In light of that opinion, Court found the language of the statute broad enough to include a motion to correct an illegal sentence and any direct appeal from a denial of that motion, noting that a motion to correct an illegal sentence is a "narrow exception" to the rule that a sentencing court no longer has jurisdiction to modify a sentence once it has begun to run. "The evidence nexus between a motion to correct an illegal sentence and the original sentencing hearing, coupled with the fact that a criminal D is constitutionally entitled to the assistance of counsel at that original hearing . . . provides strong support for the D's claim that a motion to correct an illegal sentence falls within the purview of 'any criminal action' for purposes" of the statute.

TITLE: Sweet v. State

INDEX NO.: E.13.b.

CITE: (1/25/89), Ind., 533 N.E.2d 137

SUBJECT: Sua sponte correction of sentence - mistake of fact

HOLDING: Order setting aside lesser sentence was valid because done pursuant to appellate Ct. order to recite reasons for aggravated sentence, & because done in mistaken belief D & State had agreed to that sentence. [No authority cited.] D's conviction for dealing in Class I & II controlled substances was affirmed on appeal, with remand to prepare sentencing statement which supports initial sentencing determination of 32 years or to impose presumptive or mitigated sentence. Sweet, 498 N.E.2d 924, at 930. Tr. Ct. signed an order directing that D serve 10 years on Class B felonies, & 2 years on Class C felonies, all sentences to be served concurrently, & entered judgment, on belief Ct. was implementing an agreement of defense & prosecution. When prosecutor complained, Ct. set aside revised order, & entered judgment on 32-year sentence, justifying same by reciting aggravating & mitigating circumstances. D argues TR 60 & State ex rel AAFCO H. & A.C. Co., 328 N.E.2d 733, holding that judge cannot set aside judgment unless pursuant to motion filed by either party. Ind. S. Ct. holds that since lesser sentence was based on mistake of fact, Tr. Ct. had duty to correct it. Affirmed. DeBruler, joined by Dickson, DISSENTS, arguing that original order was valid, no reason need be given for not imposing enhanced sentence, & judge's act in restoring longer sentence was invalid.

TITLE: Vance v. State

INDEX NO.: E.13.b.

CITE: (06-01-11), 949 N.E.2d 1269 (Ind. Ct. App. 2011)

SUBJECT: Recommitment to DOC affirmed

HOLDING: Tr. Ct. had personal jurisdiction when it entered an order recommitting D to the DOC. A D can waive personal jurisdiction by failing to make a timely objection. Traux v. State, 856 N.E.2d 116 (Ind. Ct. App. 2006). If there is no objection, Tr. Ct. maintains personal jurisdiction. An argument for lack of personal jurisdiction fails if, when a D is released prior to the running of his sentence, he does not affirmatively “surrender,” or contact the Tr. Ct. Kindred v. State, 362 N.E.2d 168 (Ind. Ct. App. 1977). Further, when there is an undue delay in readmitting a D back into the DOC, Tr. Ct. loses jurisdiction if it does not act within a reasonable time. Woods v. State, 583 N.E.2d 1211 (Ind. 1992).

Here, D was released prematurely on parole from the DOC in 2007. D told prison officials his sentence was not yet satisfied, but they told him they had nothing on file. When D was arrested again, the probation officer conducting a pre-sentencing investigation discovered that he had not served the sentence for one of his offenses. D was then ordered to carry out the sentence. Court found that Tr. Ct. did have personal jurisdiction because D’s case was distinguishable from Kindred and Woods. Unlike in Kindred, D did not take an affirmative step toward contacting the Tr. Ct. Further, D’s case differs from Woods in that D committed other crimes after he was mistakenly released from the DOC, while the D in Woods stayed out of trouble and took care of his family for over five years. Held, judgment affirmed.

TITLE: Williams v. State

INDEX NO.: E.13.b.

CITE: (7/3/86), Ind. App., 494 N.E.2d 1001

SUBJECT: Correction of erroneous sentence; power of Ct.

HOLDING: When sentence imposed by Tr. Ct. is found to be improper, it is general if not unanimous rule that Tr. Ct. has power to vacate illegal sentence & impose proper one which results in increased sentence. Niece, 456 N.E.2d 1081. Here, D was convicted of robbery & found to be habitual offender. Ct. found that sentence of ten years plus thirty-year enhancement was invalid because habitual offender finding was erroneous. It therefore vacated sentence & sentence enhancement & resentenced D to ten years plus two-year enhancement. D claimed that only sentence enhancement should have been vacated & that ten-year sentence should not have been enhanced by two years. Ct. held that when sentence imposed by Tr. Ct. is found to be improper, Tr. Ct. has power to vacate illegal sentence & impose proper one which results in increased sentence; imposition of corrected sentence does not run afoul of prohibition against double jeopardy. Held, vacation of sentence & resentencing affirmed.

RELATED CASES: Fields, App., 825 N.E.2d 841 (notwithstanding plea agreement, Tr. Ct. did not err at sentencing when it merged attempted robbery & conspiracy to commit robbery to comply with Ind. Code 35-41-5-3); Ennis, App., 806 N.E.2d 804 (Tr. Ct. properly corrected D's judgment of conviction by modifying judgment from a Class D felony failure to pay child support to a Class C felony after it had accepted plea agreement; Tr. Ct. failed to provide its reasons for lowering conviction from Class C to D felony in accordance with Ind. Code 35-50-2-6(b)).

TITLE: White v. State

INDEX NO.: E.13.b.

CITE: (1st Dist, 8-20-03), Ind. App., 793 N.E.2d 1127

SUBJECT: D's motion to correct erroneous sentence was not petition for post-conviction relief

HOLDING: Although a petition for post-conviction relief is preferred procedure for presenting a sentencing error, a motion to correct erroneous sentence pursuant to Ind. Code 35-38-1-15 is appropriate where sentence is erroneous on its face & that facial error occurs when sentence violates express statutory authority. Mitchell v. State, 726 N.E.2d 1228 (Ind. 2000). Here, D filed his motion to correct erroneous sentence alleging only that he was sentenced under wrong version of sentencing statute for murder. D's motion was appropriate in that his sentence was erroneous on its face. It should not be construed as petition for post-conviction relief because it was not verified (as required by P.C.R. 1(2)), & did not contain statement that every ground for relief known to petitioner was included in petition (as required by P.C.R. 1(1)). Thus, D was not required to seek leave from Ct. App. prior to filing his petition for post-conviction relief. Held, judgment reversed & remanded.

RELATED CASES: Robinson, 805 N.E.2d 783 (White *overruled* to extent it held MCEs based on clear facial error are in nature of PCR petition).

TITLE: Woodcox v. State
INDEX NO.: E.13.b.
CITE: (4/14/2015), 30 N.E.3d 748 (Ind. Ct. App. 2015)
SUBJECT: Motion to correct erroneous sentence - clerical error in judgment of conviction
HOLDING: Tr. Ct. did not abuse its discretion in denying D's motion to correct erroneous sentence.

D received a 50-year sentence for a 1989 Class A felony rape conviction. But the abstract of judgment and sentencing order stated he was found guilty of, and judgment of conviction was entered for, class B felony rape (among other offenses). Approximately 25 years after the original sentencing, D sought to have his sentence corrected pursuant to Ind. Code § 35-38-1-15, claiming it is erroneous on its face because 50 years exceeds the statutory maximum for a Class B felony (which is 20 years).

Although it first appears the sentencing judgment is facially defective, this error is not the type contemplated by the correction of erroneous sentence statute and it would be contrary to the interests of justice to change the sentence to 20 years. Case cannot be resolved by considering only the sentencing judgment and relevant statutes. "D's claim...is nothing more than a manipulative attempt to excise thirty years from his sentence." Although he "carefully omitted from the appellate record any documents which might indicate that he was convicted of a Class A felony rather than a Class B felony rape, he cited to the unchallenged supreme court opinion that affirmed his rape conviction as a Class A felony." See Woodcox v. State, 591 N.E.2d 1019, 1021 (Ind. 1992). Thus, despite the notation in the judgment of conviction, D was actually convicted of Class A felony rape. It is an error of form rather than substance. Correction of sentence would give him a windfall based on a clerical error. Held, summary denial of Motion to Correct Erroneous Sentence affirmed, but remanded with instructions for nunc pro tunc correction of clerical error, to reflect conviction of Class A felony rape.