

Anthony Taylor appeals the trial court's habitual offender finding and sentence. Taylor raises two issues, which we consolidate and restate as whether the trial court erred by ordering an enhanced sentence under the general habitual offender statute by proof of the same felony used to establish that he was a serious violent felon. We reverse and remand.

In August 2006, the State charged Taylor with several offenses, including unlawful possession of a firearm by a serious violent felon as a class B felony¹ and unlawful possession of body armor as a class D felony.² Specifically, the State alleged:

COUNT I

[Taylor], being a serious violent felon, that is: having been convicted of Rape, a class B felony . . . on March 13, 1991, did, on or about August 8, 2006, knowingly or intentionally possess a firearm, that is: a handgun[.]

* * * * *

COUNT II

[Taylor], on or about August 8, 2006, did knowingly or intentionally use body armor while committing a felony, that is: Unlawfully Possessing a Firearm as a Serious Violent Felon.

Appellant's Appendix at 23, 25. The State also alleged that Taylor was an habitual offender³ based upon the 1991 rape conviction and a 1989 conviction for carrying a handgun without a license as a class D felony. On April 12, 2007, the trial court found Taylor guilty of Count I and Count II and found him to be an habitual offender.

¹ Ind. Code § 35-47-4-5 (Supp. 2006).

² Ind. Code § 35-47-5-13 (2004).

On appeal, Taylor argues that the trial court erred by ordering an enhanced sentence under the general habitual offender statute by proof of the same felony used to establish that he was a serious violent felon. Taylor argues that the trial court could not use the rape conviction to establish his conviction for unlawful possession of a firearm by a serious violent felon and also use the rape conviction to establish his status as an habitual offender. The State concedes that Taylor is correct based upon Mills v. State, 868 N.E.2d 446, 451 (Ind. 2007), which was handed down on June 21, 2007, shortly after Taylor's conviction and sentencing.

In Mills, the defendant was charged with unlawful possession of a firearm by a serious violent felon, and the serious violent felony was a 1995 conviction for voluntary manslaughter. 868 N.E.2d at 447. The State also alleged that he was an habitual offender based in part upon the same 1995 voluntary manslaughter conviction. Id. The Indiana Supreme Court held that "a defendant 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 defendant was a 'serious violent felon.'" Id. at 451 (citing Conrad v. State, 747 N.E.2d 575, 594-595 (Ind. Ct. App. 2001), trans. denied). Consequently, the court held that:

Had this sentence been imposed following a trial, it would have been improper because, in accord with Conrad, a defendant 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 defendant was a "serious violent felon."

³ Ind. Code § 35-50-2-8 (Supp. 2005).

Id. at 452.

Based upon Mills, the State concedes that “this case must be remanded to the trial court for the vacation of the habitual offender enhancement.” Appellee’s Brief at 6. Consequently, we reverse and remand with instructions to vacate the habitual offender enhancement in compliance with Mills.

Reversed and remanded.

BARNES, J. and VAIDIK, J. concur