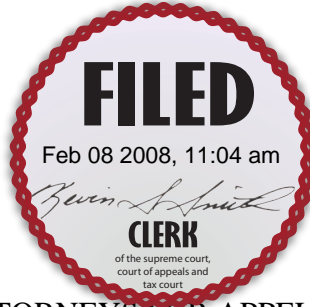


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

**MARCE GONZALEZ, JR.**  
Dyer, Indiana

**STEVE CARTER**  
Attorney General of Indiana

**J.T. WHITEHEAD**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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ROBERT G. MILLER,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 45A03-0705-CR-238

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Salvador Vasquez, Judge  
Cause No. 45G01-0503-FC-44

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**February 8, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Following a jury trial, Robert Miller was found guilty of Burglary<sup>1</sup> as a class C felony and Theft<sup>2</sup> as a class D felony and was also found to be a habitual offender. Miller raises the following restated issues:

1. Did Miller knowingly, voluntarily, and intelligently waive his right to a jury trial on the habitual offender charge?
2. Did the trial court properly enter a separate sentence for the habitual offender finding?

We affirm and remand.

Miller was arrested for burglarizing several storage units at A to Z Storage in Crown Point, Indiana, and for stealing various items of property from the units. The State charged Miller with burglary as a class C felony and theft as a class D felony. It also alleged that Miller was a habitual offender.

At Miller's jury trial, while the jury was deliberating, the following exchange occurred:

BY THE COURT: I don't know obviously what the jury is going to decide, but if they return with a verdict of guilty you do have a right to have a jury trial on the habitual offender count. That choice is yours, and yours alone. If you want to exercise that right, we'll prepare the instructions for that possibility. You do have the right, however, to waive the jury trial on that issue; and then we would discharge the jury after the deliberations, and then you can either have the bench trial where the parties would submit the evidence to me, or you can admit the habitual offender status. At this point I just need to know if you wanted to exercise your right to a jury trial on the habitual offender count.

BY THE DEFENDANT: What do you mean?

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<sup>1</sup> Ind. Code Ann. § 35-43-2-1 (West, PREMISE through 2007 1st Regular Sess.).

<sup>2</sup> I.C. § 35-43-4-2 (West, PREMISE through 2007 1st Regular Sess.).

BY THE COURT: Do you want to have the jury make the decision on the habitual if they return with a guilty verdict, or do you want to waive the jury on that issue? Do you want to have some time to talk to your attorney?

BY [DEFENSE COUNSEL]: We talked about this.

BY THE DEFENDANT: If I get found guilty, I would rather just go on with the habitual.

BY THE COURT: Do you want the jury to hear that?

BY THE DEFENDANT: No.

*Transcript* at 392-94. The jury ultimately found Miller guilty of class C felony burglary and class D felony theft. The trial court then held a hearing on the habitual offender charge. The jury was not present for this hearing. During the hearing, Miller admitted his habitual offender status.

After holding a sentencing hearing, the trial court entered a sentencing order that provided as follows:

The defendant is now ordered committed to the custody of the Department of Correction for classification and confinement in a medium security facility for a period of seven (7) years in Count I [burglary], three (3) years in Count II [theft], and ten (10) years on Habitual Offender Enhancement.

*Appendix to Belated Brief of Appellant* Vol. I at 127. This appeal ensued.

1.

Miller first argues that he did not knowingly, voluntarily, and intelligently waive his right to a jury trial on the habitual offender charge. Both the United States Constitution and the Indiana Constitution guarantee the right to trial by jury. *Jones v. State*, 810 N.E.2d 777 (Ind. Ct. App. 2004). That right applies to habitual offender

proceedings. *Dixie v. State*, 726 N.E.2d 257 (Ind. 2000). A defendant charged with a felony has an automatic right to a jury trial, and is presumed not to waive this right unless he or she affirmatively acts to do so. *Jones v. State*, 810 N.E.2d 777. “It is fundamental error to deny a defendant a jury trial unless there is evidence of a knowing, voluntary and intelligent waiver of the right.” *Id.* at 779. A defendant must express his or her personal desire to waive a jury trial and such a personal desire must be apparent from the court’s record, either in the form of a written waiver or a colloquy in open court. *Jones v. State*, 810 N.E.2d 777.

The record indicates that the trial court advised Miller of his right to a jury trial on the habitual offender charge. It also indicates that Miller spoke with his defense counsel about this matter. After being advised of his rights by the trial court, Miller stated that he did not want the jury present for the habitual offender hearing. Based on this evidence, we conclude that Miller knowingly, voluntarily, and intelligently waived his right to a jury trial on the habitual offender charge.

2.

Miller next contends that the trial court erred in imposing a separate sentence for the habitual offender determination. “A habitual offender finding does not constitute a separate crime nor does it result in a separate sentence. Rather it results in a sentence enhancement imposed upon the conviction of a subsequent felony.” *Barnett v. State*, 834 N.E.2d 169, 173 (Ind. Ct. App. 2005). “In the event of simultaneous multiple felony convictions and a finding of habitual offender status, trial courts must impose the resulting penalty enhancement upon only one of the convictions and must specify the

conviction to be so enhanced.” *Greer v. State*, 680 N.E.2d 526, 527 (Ind. 1997). Here, the trial court erred when it imposed a separate ten-year sentence upon the habitual offender finding. Having found an irregularity in the trial court’s sentencing decision, we exercise our option to remand to the trial court for a clarification or new sentencing determination consistent with this opinion. *Hope v. State*, 834 N.E.2d 713 (Ind. Ct. App. 2005).

Judgment affirmed and remanded.

ROBB, J., and MATHIAS, J., concur.