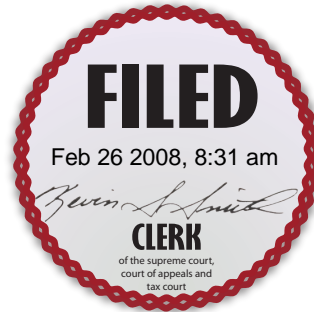


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

TIMOTHY L. POTTER,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 92A03-0710-CR-463

APPEAL FROM THE WHITLEY CIRCUIT COURT
The Honorable James R. Heuer, Judge
Cause No. 92C01-0611-FC-169

February 26, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Following a jury trial, Appellant-Defendant Timothy Potter was convicted of Failure to Support a Dependent Child as a Class D felony¹ and determined to be a Habitual Offender.² The trial court sentenced Potter to an aggregate sentence of seven and one-half years, to be served in the Department of Correction. Upon appeal, Potter claims the trial court erred in denying his motion to dismiss. We affirm.

FACTS AND PROCEDURAL HISTORY

Potter is the father of M.M., who was born in 1991. Potter concedes that during the period of time from November 8, 2001, to November 8, 2006, he was obligated to pay support for M.M. and failed to do so.

In September of 2003, the State charged Potter with non-support of a dependent child as a Class D felony³ based upon his alleged failure to pay child support from August 1998 to August 2003. On July 10, 2006, the State filed an information alleging Potter to be a habitual offender. On November 3, 2006, the Whitley County Prosecutor notified Potter that this habitual offender information was defective.⁴ The prosecutor also notified Potter that his support arrearage had since grown to \$19,000. Based upon the defective habitual offender information and the outdated non-support charge, the prosecutor

¹ Ind. Code § 35-46-1-5(a) (2006).

² Ind. Code § 35-50-2-8 (2006).

³ The September 2003 charging information does not appear in the appendix. The State does not dispute Potter's facts with respect to this charging information.

⁴ According to the prosecutor, Potter was not sentenced on the second listed felony until well after August 1998, the initial date specified in the September 2003 charging information.

indicated his intention to dismiss both the original non-support and habitual offender informations and to refile a new information alleging nonsupport as a Class C felony,⁵ as well as a revised habitual offender information.⁶ On November 8, 2006, the day before trial on the September 2003 charges, the State notified the court of its intent to dismiss the existing charges and to refile a Class C felony nonsupport charge with a habitual offender enhancement. Potter objected and filed a motion to dismiss, which the trial court denied. That same day, the State refiled charges against Potter for failure to support a dependent child as a Class C felony and for being a habitual offender. On May 7, 2007, Potter filed a motion to reconsider. On July 24, 2007, the trial court ordered that the State proceed to trial on a Class D, rather than a Class C, felony charge and the habitual offender enhancement.

Following a July 31, 2007 jury trial, in which Potter was found guilty of nonsupport of a dependent and was determined to be a habitual offender, the trial court entered judgment of conviction against him. On August 27, 2007, the trial court sentenced Potter to seven and one-half years in the Department of Correction.

DISCUSSION AND DECISION

Potter claims on appeal that the trial court erred in denying his motion to dismiss the refiled charges. Potter argues that the dismissal and refiling of the instant charges prejudiced his substantial rights.

⁵ Indiana Code section 35-46-1-5 provides that nonsupport of a dependent child is a Class C felony if the total amount of unpaid support is at least \$15,000.

⁶ The range of dates in the November 8, 2006 information alleged nonsupport from November 8, 2001 to November 8, 2006.

In appealing from the denial of his motion to dismiss, Potter is appealing from a negative judgment. *Mendoza v. State*, 869 N.E.2d 546, 551 (Ind. Ct. App. 2007), *trans. denied*. Where a defendant appeals from a negative judgment, we will reverse the trial court's ruling only if the evidence is without conflict and leads inescapably to the conclusion that the defendant was entitled to dismissal. *Id.*

Under Indiana Code section 35-34-1-13 (2006), the prosecutor may move for the dismissal of the information at any time prior to sentencing. So long as the motion states a reason for the dismissal, the trial court must grant the motion. *Davenport v. State*, 689 N.E.2d 1226, 1229 (Ind. 1997). Once an information has been dismissed by the State under section 35-34-1-13, the State may refile an information against the defendant, subject to certain restrictions. *Id.* Indiana courts have long held that the State may refile for the same offense so long as jeopardy has not already attached. *Id.* Indiana courts have also long held that the State's power to dismiss and refile may not be used to evade the defendant's speedy trial rights. *Id.* The State may not use its authority to dismiss and refile charges if doing so will prejudice a defendant's substantial rights. *Id.*

The State does not necessarily prejudice a defendant's substantial rights if it dismisses the charge because it is not ready to prosecute and then refiles the information for the same offense. *Id.* Similarly, the State does not necessarily prejudice a defendant's substantial rights when, on a refiled information, it amends the original information but charges the same offense. *Id.* The State is entitled to amend charges, even as to theory and identity, if it can be done without prejudicing the substantial rights of the accused. *Hollowell v. State*, 773 N.E.2d 326, 330 (Ind. Ct. App. 2002). The

defendant's substantial rights are not prejudiced in these situations primarily because the defendant can receive a fair trial on the same facts and employ the same defense in the second trial as in the first. *Davenport*, 689 N.E.2d at 1229. Public policy favors the prosecution of persons accused of criminal offenses when a fair trial is available. *Id.* at 1230.

Here, Potter suggests that his substantial rights were prejudiced because, in denying his motion to dismiss, the trial court allowed the State to continue his trial, to add allegations of additional conduct to the charging information, and to subject him to possible increased punishment. We decline to find substantial prejudice on these grounds. As stated above, the State does not necessarily prejudice a defendant's substantial rights either by dismissing and refileing when it is ready to prosecute the case, or by dismissing and refileing in order to change the dates on which it alleges a particular crime occurred. *Id.* at 1229 (citing *Willoughby v. State*, 660 N.E.2d 570, 577-78 (Ind. 1996) (finding defendant's substantial rights were not prejudiced when State dismissed and subsequently refiled charge alleging expanded dates of crime)). Potter alleges no facts suggesting that the State's dismissing and refileing the charges somehow changed the facts against him at trial or the defense he employed. Indeed, it appears that the State's case against Potter was simply that, with the exception of June 2002 until April 2003, he had continually failed to pay support, and Potter's defense to this nonpayment was that he was incarcerated until May 2002 and had had recurring health problems from April 2003 to November 8, 2006. Additionally, Potter had ample time to prepare for the new charges, which were not tried until July 31, 2007, more than eight months after they were filed.

With respect to Potter's claim of prejudice on the basis that he was subjected to possible increased punishment, we need look no further than the trial court's order requiring the State to proceed at trial only upon a Class D felony charge, thereby placing Potter at no greater risk of punishment than he faced under the original charging information. More to the point, even if the State's motive were to enhance his penalty to reflect additional facts not available at the time of the initial charging information, Potter has made no showing that this somehow affected his trial or his defense and thus his substantial rights. *See Jones v. State*, 701 N.E.2d 863, 870-71 (Ind. Ct. App. 1998) (determining there was no prejudice to defendant's substantial rights where, based upon evidence acquired several weeks before trial, prosecutor dismissed two counts of neglect and refiled one count of neglect and one count of murder).

Having found no prejudice to Potter's substantial rights, we affirm the trial court's denial of his motion to dismiss.

The judgment of the trial court is affirmed.

BAKER, C.J., and DARDEN, J., concur.