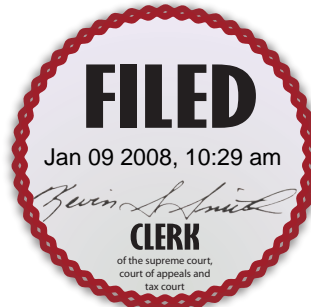


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

ADAM C. SQUILLER
Taylor and Squiller, P.C.
Auburn, Indiana

STEVE CARTER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

WILLIAM MISHLER,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 17A04-0708-CR-453

APPEAL FROM THE DEKALB CIRCUIT COURT
The Honorable Kirk D. Carpenter, Judge
Cause No. 17C01-0404-FD-39

January 9, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

William Mishler appeals his two-year sentence for class D felony operating a motor vehicle while being a habitual traffic violator (“HTV”). We affirm.

Issue

Did the trial court abuse its discretion in sentencing Mishler?

Facts and Procedural History¹

On April 26, 2004, the State charged Mishler with Count I, class A misdemeanor operating a vehicle while intoxicated (“OWI”), Count II, class A misdemeanor operating a vehicle with an unlawful alcohol concentration in blood or breath, Count III, class D felony operating a motor vehicle while being an HTV, Count IV, a failure to yield infraction, and Count V, an open container infraction. Mishler filed a motion to sever counts. The trial court granted Mishler’s motion and ordered a bifurcated trial. On May 29, 2007, Count III was tried to the jury, which found Mishler guilty as charged.

On June 19, 2007, the trial court sentenced Mishler as follows:

The Court has read the Pre-Sentence Investigation Report and the Supplement thereto and considers what’s in those reports in making [its] decision concerning sentencing today. The Court finds that there are enhancement factors, and those are his past criminal history and his continuance in that behavior and if I, my memory serves me correct, he has three (3) prior O.W.I.s and a prior H.T.V. before this one. Also, I believe that the Defendant’s past shows that there’s a substantial, I don’t know if likelihood is the right word but a definite possibility that the Defendant will continue to drive because he’s done so even though he’s been an Habitual Traffic Offender and so found on two (2) different occasions. Uh, however there is a reduction factor and that is

¹ We note that Mishler’s counsel included Mishler’s pre-sentence report in the appellant’s appendix. Indiana Administrative Rule 9(G)(1) states that the information therein “is excluded from public access and is confidential.” Indiana Trial Rule 5(G)(1) requires that such documents be separately identified and “tendered on light green paper or have a light green coversheet attached to the document, marked ‘Not for Public Access’ or ‘Confidential.’”

the fact that incarceration will cause a hardship upon his dependent children for which he's required to pay child support. The Court finds that the enhancement factors, however, outweigh reduction factors.

Tr. at 126-27 (nonessential words omitted). The court sentenced Mishler to two years executed and dismissed the remaining charges pursuant to the State's request. Mishler now appeals his sentence.

Discussion and Decision

“In general, sentencing decisions rest within the sound discretion of the trial court and on appeal the court's decision will be reversed only upon a showing of a manifest abuse of that discretion.” *Ingle v. State*, 766 N.E.2d 392, 395 (Ind. Ct. App. 2002), *trans. denied*. “It is within the trial court's discretion whether a presumptive sentence will be increased or decreased because of aggravating or mitigating circumstances.” *Id.* “When a trial court finds aggravating circumstances to enhance the presumptive sentence, it must set forth all significant factors, state the specific reasons why the circumstance is considered aggravating or mitigating, and articulate the court's evaluation and balancing of the circumstances.” *Id.* Only one aggravator is necessary to support an enhanced sentence. *Id.* at 396. Here, the trial court imposed an enhanced sentence on Mishler's class D felony HTV conviction based on its finding that the aggravating circumstances outweighed the mitigating circumstances. *See* Ind. Code § 35-50-2-7 (2004) (“A person who commits a Class D felony shall be imprisoned for a fixed term of one and one-half (1 ½) years, with not more than one and one-half (1 ½) years added for aggravating circumstances or not more than one (1) year subtracted for mitigating circumstances.”).

Mishler notes that “an element of a crime may not be used as an aggravating factor to enhance a sentence.” Appellant’s Br. at 11 (citing, *inter alia*, *Smith v. State*, 675 N.E.2d 693, 698 (Ind. 1996)). He also notes that the elements of operating a motor vehicle while being an HTV are that the defendant operated a motor vehicle while his driving privileges were suspended for being an HTV. *Id.* (citing, *inter alia*, Ind. Code § 9-30-10-16). Indiana Code Section 9-30-10-4(b) provides in pertinent part that a person who has accumulated at least three OWI-related convictions within a ten-year period, not arising out of the same incident, is an HTV. At trial, the State established that Mishler is an HTV by presenting evidence that he accumulated three OWI-related convictions, not arising out of the same incident, within ten years. State’s Exh. 1. Mishler contends that the trial court abused its discretion in finding these underlying convictions to be an aggravating factor supporting an enhanced sentence, as they are an element of the instant crime.

It is true that the OWI convictions supporting the HTV finding could not, standing alone, be relied upon as the aggravating factor of a prior criminal record to enhance Mishler’s sentence. *See Waldon v. State*, 829 N.E.2d 168, 181 (Ind. Ct. App. 2005) (citing *McVey v. State*, 531 N.E.2d 458, 461 (Ind. 1988), and *Darnell v. State*, 435 N.E.2d 250, 256 (Ind.

1982)), *trans. denied*.² Here, however, the trial court relied on Mishler's entire criminal history, which, as the court specifically noted, also includes a prior HTV conviction. As such, the trial court did not abuse its discretion in this regard. Given that Mishler's remaining argument is based on the premise that the trial court did abuse its discretion, we need not address it. Therefore, we affirm Mishler's sentence.

Affirmed.

DARDEN, J., and MAY, J., concur.

² *But see Jones v. State*, 600 N.E.2d 544, 548 (Ind. 1992) (holding that it is permissible for trial court to consider same prior offenses both for enhancement of instant offense and to establish habitual offender status). As we noted in *Waldon*, however,

The facts in *Jones* do not reveal if Jones had convictions other than those used to establish his habitual offender status. In stating that the trial court could rely upon the same felonies for habitual offender status and to enhance the offense, the Court cited to *Criss v. State*, 512 N.E.2d 858 (1987). In *Criss*, the Court stated, "It is not error for a court to use the same prior offenses for both enhancement of the instant offense and to establish a status as an habitual offender." *Id.* at 860. However, in *Criss*, the Court noted that the defendant had prior convictions of rape, armed robbery, burglary, robbery, confinement and two counts of second degree burglary. *Id.* The *Criss* Court, in turn, cited to *Darnell, supra*. As noted above, the holding in *Darnell* was based upon the fact that the trial court, in enhancing the sentence, relied upon the fact of more convictions than just the prior felonies used in the habitual offender count. 435 N.E.2d at 256. Whether *Criss* and *Jones* have altered the law so that a trial court may rely solely upon the felonies which support a habitual offender enhancement to also enhance a sentence because of criminal history is unclear. Nonetheless, we need not resolve that issue because of the availability of misdemeanor convictions in the case before us.

829 N.E.2d at 182 n.13. Likewise here, Mishler's criminal history includes a prior HTV conviction in addition to the underlying OWI convictions.