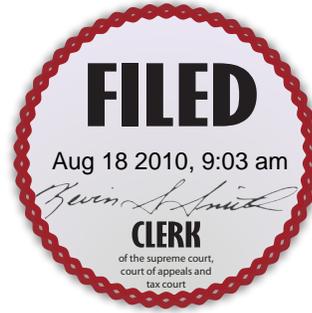


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DAVID D. HAUK,)

Appellant-Defendant,)

vs.)

No. 20A05-1003-CR-161

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Charles Carter Wicks, Judge
Cause No. 20D05-0805-FD-169

August 18, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

David Hauk appeals his aggregate sentence of ten years for operating a vehicle while intoxicated, a Class D felony,¹ and for being an habitual substance offender.² Finding no abuse of discretion by the trial court and his sentence appropriate, we affirm.

FACTS AND PROCEDURAL HISTORY

On April 7, 2008, Officer Chris Waddel observed Hauk driving erratically while operating a motor scooter. He pulled Hauk over, administered three sobriety tests, and placed him under arrest. Hauk resisted Officer Waddel's attempt to arrest him and had to be subdued by stun gun. He was charged as an habitual traffic offender, a Class D felony;³ operating a vehicle while intoxicated, a Class A misdemeanor;⁴ resisting law enforcement, a Class A misdemeanor;⁵ and operating a vehicle while intoxicated, a Class D felony. The State dropped the resisting law enforcement charge, merged the operating a vehicle while intoxicated charges, and changed the habitual traffic offender charge to an habitual substance offender charge.

A jury found Hauk to be an habitual substance offender and guilty of Class D felony operating a vehicle while intoxicated. He was sentenced to three years, with a seven-year enhancement for being an habitual substance offender, for a total sentence of ten years.

¹ Ind. Code § 9-30-5-3(a)(1).

² Ind. Code § 35-50-2-10.

³ Ind. Code § 9-30-10-16.

⁴ Ind. Code § 9-30-5-2(b).

⁵ Ind. Code § 35-44-3-3(a)(1).

DISCUSSION AND DECISION

1. Habitual Offender Enhancement

Hauk argues the trial court abused its discretion when enhancing his sentence for being an habitual substance offender.⁶ Ind. Code § 35-50-2-10(f) reads:

The court shall sentence a person found to be a habitual substance offender to an additional fixed term of at least three (3) years but not more than eight (8) years imprisonment, to be added to the term of imprisonment imposed under IC 35-50-2 or IC 35-50-3.

The length of such a sentence enhancement is left to the trial court's sound discretion.

Johnston v. State, 578 N.E.2d 656, 659 (Ind. 1991).⁷

Hauk's sentence enhancement was seven years, which is one year less than the statutory maximum. Hauk's criminal history includes nine prior operating while intoxicated offenses. Therefore we find no abuse of discretion in the trial court enhancing Hauk's sentence by seven years. *See, e.g., Lindsey v. State*, 877 N.E.2d 190, 197 (Ind. Ct. App. 2007) ("Given Lindsey's history of OWI offenses and that the current offense is his fifth such violation, a seven-year [habitual substance offender] enhancement is not out of proportion to the gravity of the offense committed."), *trans. denied*.

⁶ Hauk conceded he was twice convicted of operating a vehicle while intoxicated and is an habitual substance offender. He argues only that the length of the enhancement is an abuse of discretion.

⁷ *Johnston* involved a sentence enhancement under the general habitual offender statute, Ind. Code § 35-50-2-8. "Because the language of [the habitual substance offender] statute mirrors the language contained in Ind. Code § 35-50-2-8, the general habitual offender statute, decisions interpreting the habitual offender statute are applicable to issues raised under I.C. 35-50-2-10." *Roell v. State*, 655 N.E.2d 599, 601 (Ind. Ct. App. 1995), *trans. denied*.

2. Sentence for Operating a Vehicle while Intoxicated

In reviewing a sentence, we consider the nature of the offense and the character of the offender, pursuant to Indiana Appellate Rule 7(B). We give deference to the trial court, recognizing its special expertise in making sentencing decisions. *Barber v. State*, 863 N.E.2d 1199, 1208 (Ind. Ct. App. 2007), *trans. denied*. The defendant bears the burden of persuading us the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

Hauk argues the nature of his offense does not support a ten year prison term: “[O]n the spectrum of offenses that constitute operating while intoxicated, this current offense does not justify a ten (10) year executed prison term.” (Appellant’s Br. at 3.) But Hauk was not sentenced to ten years for only the offense of Class D felony operating a vehicle while intoxicated. He was sentenced to ten years for committing Class D felony operating a vehicle while intoxicated after having been convicted of nine prior substance offenses. *See Bauer v. State*, 875 N.E.2d 744, 747 (Ind. Ct. App. 2007) (“A habitual substance offender finding is not a separate crime but an enhancement of the sentence for the underlying crime to which it is attached.”), *trans. denied*.

Hauk indicates he was “not operating an automobile during this incident,” which shows he was “attempting to comport his behavior within the law.” (Appellant’s Br. at 2.) However, Hauk was riding a motor scooter, which is a motor vehicle for purposes of the operating while intoxicated statutes. *See State v. Loveless*, 705 N.E.2d 223, 226 (Ind. Ct. App. 1999) (holding scooter is a motor vehicle). Hauk offers no argument why his operation

of a motor scooter while intoxicated requires a shorter sentence than committing that offense in an automobile, or how operating a scooter while intoxicated reflects an attempt to “comport his behavior within the law.” (Appellant’s Br. at 2.) We reject both of his suggestions.

Hauk also argues his sentence is inappropriate based on his character. He indicates that, at the time of his arrest, he had “maintained fifteen years of employment, had been honorably discharged from the Indiana National Guard, and had the support of his family.” (*Id.* at 3.) He argues “the combination of these factors, and the fact that Hauk was gainfully employed at the time of his arrest demonstrate[s] that in spite of his admitted alcohol addiction, Hauk was a contributing member of society.” (*Id.*)

The trial court found as a mitigator, “1 satisfactory discharge from probation.” (Tr. at 165.) As aggravators, the court found “9 prior OWI offenses, 2 felonies, one unsatisfactory discharge from probation, 2 violations of probaiton [sic], [and] 11 other misdemeanor offenses.” (*Id.*) The trial court opined it had “a duty to the public to prevent you from operating vehicles while drunk on the roadways of Indiana.” (*Id.*) We do not find Hauk’s character, as reflected in his lengthy record of similar offenses and probation violations, renders his sentence inappropriate. *See, e.g., Lindsey*, 877 N.E.2d at 199 (“In light of [Lindsey’s] continued substance abuse and complete disregard of the laws of this state and the safety of others traveling on the roadways, we cannot say the [eight-year] sentence imposed is inappropriate in light of the character of this offender.”).

The trial court did not abuse its discretion when enhancing Hauk's sentence by seven years due to his status as an habitual substance offender, and Hauk's ten-year sentence is not inappropriate based on the nature of the offense or Hauk's character. Accordingly, we affirm.

Affirmed.

BAILEY, J., and BARNES, J., concur.