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CONCLUSION

The district court erred in not permitting DHHS to recover the full amount of its counterclaim, to be satisfied from the funds withheld from the settlement proceeds pursuant to the stipulation of the parties. The judgment of the district court is reversed, and the cause is remanded with directions to enter judgment in accordance with this opinion. Because DHHS is entitled to the full amount of its counterclaim, Smalley's assignments of error on cross-appeal need not be addressed.

REVERSED AND REMANDED WITH DIRECTIONS.

GERRARD, J., not participating in the decision.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM D. KINSER, JR., APPELLANT.

811 N.W.2d 227

Filed March 23, 2012. No. S-11-558.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
2. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
3. **Sentences: Prior Convictions: Habitual Criminals: Proof.** In a habitual criminal proceeding, the State's evidence must establish with requisite trustworthiness, based upon a preponderance of the evidence, that (1) the defendant has been twice convicted of a crime, for which he or she was sentenced and committed to prison for not less than 1 year; (2) the trial court rendered a judgment of conviction for each crime; and (3) at the time of the prior conviction and sentencing, the defendant was represented by counsel or had knowingly and voluntarily waived representation for those proceedings.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed.

Brian J. Lockwood and Richard L. DeForge, Deputy Scotts Bluff County Public Defenders, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

NATURE OF CASE

A jury found William D. Kinser, Jr., guilty of felony flight to avoid arrest. After finding that Kinser had five previous felony convictions, the district court for Scotts Bluff County found Kinser to be a habitual criminal and sentenced him to a term of not less than 18 nor more than 30 years' imprisonment with the Nebraska Department of Correctional Services (DCS) for that crime. Kinser contends that the habitual criminal determination was erroneous because the flight to avoid arrest conviction was enhanced from a misdemeanor to a felony based upon Kinser's willful reckless operation of a motor vehicle and that any further enhancement under the habitual criminal statute would result in an improper double enhancement. Kinser also argues that the sentencing order must be reversed because the district court intended for him to be eligible for parole after 10 years, whereas, under the sentence imposed for his flight to avoid arrest conviction, he will not be eligible for parole for 14 years. We find no merit to either contention and therefore affirm.

BACKGROUND

On the evening of December 23, 2010, Deputy Lanny Hanks was observing traffic on Lake Minatare Road in Scotts Bluff County, Nebraska. He saw a vehicle exceeding the speed limit and undertook pursuit. Hanks initially activated only his patrol car's overhead lights, but when he realized the vehicle was not stopping, he activated his car's siren. After a chase of approximately 10 miles, Hanks was able to immobilize the vehicle. Kinser was identified as the operator of the vehicle.

The State charged Kinser with felony operation of a motor vehicle to avoid arrest; driving under revocation, first offense; and driving while under the influence of alcohol (DUI), second offense. The State alleged that Kinser's flight to avoid arrest involved willful reckless operation of a motor vehicle, which made the offense a Class IV felony under Neb. Rev. Stat.

§ 28-905(3)(a)(iii) (Reissue 2008). The State also alleged that Kinser was a habitual criminal under Neb. Rev. Stat. § 29-2221 (Reissue 2008). A jury trial was held on the flight to avoid arrest and driving under revocation charges. The jury found Kinser guilty of both offenses.

Prior to sentencing, the State notified Kinser and the court that it would present evidence that Kinser was a habitual criminal. At the hearing, the State introduced five prior convictions: (1) a 1983 conviction for burglary, (2) a 1993 conviction for failure to appear, (3) a 1993 conviction for theft, (4) a 1995 conviction for second degree assault, and (5) a 1995 conviction for assault on a police officer in the third degree. Certified records showed that Kinser received a sentence of at least 1 year's imprisonment for each of these convictions and that Kinser was represented by counsel at the time of each conviction and each sentencing.

The trial court considered and rejected Kinser's argument that a habitual criminal enhancement would result in an impermissible double enhancement. The court noted that the flight to avoid arrest conviction was a felony because of the additional element of willful reckless operation of a motor vehicle and that the increase from a misdemeanor to a felony was not based on prior convictions for the same offense. The court also noted that this was somewhat similar to being charged with a felony that had a misdemeanor lesser-included offense. The court stated, "You would have to commit the misdemeanor lesser included, then something in addition to that to get the felony status and those have been used in the past for purposes of [a habitual criminal] enhancement . . . ." The court found there were five valid and usable prior convictions and sentenced Kinser as a habitual criminal on the felony flight to avoid arrest conviction. During sentencing, the court stated:

> [Kinser] will . . . be sentenced to serve sentences in an institution under the jurisdiction of [DCS] as follows: On Count II [driving under revocation], which is the misdemeanor, six months, and there's a one year revocation of his license. On Count I [fleeing to avoid arrest], which is the felony, not less than 18 years and not more than 30 years. The minimum will include the mandatory

> minimum of 10 years with a two-year revocation of his license. Those sentences will be served concurrent. I give him credit for 190 days that he has served.

Kinser filed a timely notice of appeal.

ASSIGNMENTS OF ERROR

Kinser assigns the district court erred in sentencing him as a habitual criminal and in imposing an erroneous sentence for his flight to avoid arrest conviction.

STANDARD OF REVIEW

[1,2] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.[1] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.[2]

ANALYSIS

Kinser Was Properly Sentenced as Habitual Criminal

[3] Subject to exceptions not applicable to this case, the habitual criminal statute in part provides:

> Whoever has been twice convicted of a crime, sentenced, and committed to prison, in this or any other state or by the United States or once in this state and once at least in any other state or by the United States, for terms of not less than one year each shall, upon conviction of a felony committed in this state, be deemed to be a habitual criminal and shall be punished by imprisonment . . . for a mandatory minimum term of ten years and a maximum term of not more than sixty years . . . .[3]

In a habitual criminal proceeding, the State's evidence must establish with requisite trustworthiness, based upon a preponderance of the evidence, that (1) the defendant has been twice

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[1] *State v. Jimenez, ante* p. 95, 808 N.W.2d 352 (2012).

[2] *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011).

[3] § 29-2221(1).

convicted of a crime, for which he or she was sentenced and committed to prison for not less than 1 year; (2) the trial court rendered a judgment of conviction for each crime; and (3) at the time of the prior conviction and sentencing, the defendant was represented by counsel or had knowingly and voluntarily waived representation for those proceedings.[4] The district court concluded that there were five valid and usable convictions for purposes of the habitual criminal enhancement. Kinser does not challenge this conclusion, which is fully supported by the record. Instead, Kinser argues that using his felony flight to avoid arrest conviction to trigger a habitual criminal enhancement would result in an improper double enhancement.

Felony flight to avoid arrest is criminalized under § 28-905, which in relevant part provides:

> (1) Any person who operates any motor vehicle to flee in such vehicle in an effort to avoid arrest or citation commits the offense of operation of a motor vehicle to avoid arrest.
>
> (2)(a) Except as otherwise provided in subsection (3) of this section, any person who violates subsection (1) of this section shall be guilty of a Class I misdemeanor.
>
> . . . .
>
> (3)(a) Any person who violates subsection (1) of this section shall be guilty of a Class IV felony if, in addition to the violation of subsection (1) of this section, one or more of the following also applies:
>
> (i) The person committing the offense has previously been convicted under this section;
>
> (ii) The flight to avoid arrest results directly and proximately in the death of or injury to any person if such death or injury is caused directly and proximately by the vehicle being driven by the person fleeing to avoid arrest; or
>
> (iii) The flight to avoid arrest includes the willful reckless operation of the motor vehicle.

Kinser was convicted of a Class IV felony under § 28-905(3)(a)(iii), based on his willful reckless operation of

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[4] *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

the vehicle during the flight to avoid arrest. Kinser argues he was improperly sentenced as a habitual criminal because the "enhancement" from a misdemeanor to a felony under § 28-905(3)(a)(iii) plus the habitual criminal enhancement results in an impermissible double enhancement under this court's holding in *State v. Chapman*.[5] Evaluating this argument requires a discussion of *Chapman* and its progeny.

The defendant in *Chapman* was convicted of third-offense DUI. He was sentenced as a habitual criminal under § 29-2221 then in effect based upon his prior felony convictions for malicious destruction of property and third-offense DUI. This court concluded the district court erred in sentencing him as a habitual criminal. We reasoned that his prior conviction for third-offense DUI was not a prior felony for purposes of a habitual criminal enhancement because the offense became a felony solely due to his prior DUI convictions. The statute prohibiting third-offense DUI in relevant part provided, "[I]f such conviction is for a third offense, or subsequent offense thereafter, such person shall be imprisoned . . . for not less than one year nor more than three years . . . ."[6] After noting a reluctance "to apply an expansive reading to the Habitual Criminal Act," this court held in *Chapman* that "offenses which are felonies because the defendant has been previously convicted of the same crime do not constitute 'felonies' within the meaning of prior felonies that enhance penalties under the habitual criminal statute."[7] We noted the language of the statute evidenced a legislative intent that "convictions for third offense and all subsequent offenses . . . should be treated similarly"[8] and that the "weight of authority [was] against double penalty enhancement through application of both a specific subsequent offense statute and a habitual criminal statute."[9]

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[5] *State v. Chapman*, 205 Neb. 368, 287 N.W.2d 697 (1980).

[6] Neb. Rev. Stat. § 39-669.07(3) (Reissue 1974). See *State v. Chapman, supra* note 5.

[7] *State v. Chapman, supra* note 5, 205 Neb. at 370, 287 N.W.2d at 698.

[8] *Id.* at 371, 287 N.W.2d at 699.

[9] *Id.* at 370, 287 N.W.2d at 699.

This court later extended the *Chapman* holding in *State v. Hittle*.[10] The defendant in that case was convicted of felony flight to avoid arrest and felony driving under a 15-year license suspension. Based on a prior conviction for operating a motor vehicle with a suspended or revoked license and convictions from a single proceeding for possessing a stolen firearm and a controlled substance, he was sentenced as a habitual criminal. The statute criminalizing driving under a revoked license at the time of his offenses, Neb. Rev. Stat. § 60-6,196(6) (Reissue 1993), provided, "Any person operating a motor vehicle on the highways or streets of this state while his or her operator's license has been revoked pursuant to subdivision (2)(c) of this section [after two previous DUI convictions] shall be guilty of a Class IV felony." On appeal, this court acknowledged that *Chapman* was distinguishable because a conviction under § 60-6,196(6) was a felony whether or not the defendant was previously convicted of the same offense. But we stated that *Chapman* rested upon two general principles:

> (1) A defendant should not be subjected to double penalty enhancement through application of both a specific subsequent offense statute and a habitual criminal statute and (2) the specific enhancement mechanism contained in Nebraska's DUI statutes precludes application of the general enhancement provisions set forth in the habitual criminal statute.[11]

We reasoned that driving under a revoked license was criminalized under the same statutory scheme as DUI and that a person could become a felon for driving under a suspended license only by first committing multiple DUI offenses. Thus, we observed that the penalty for driving under a revoked license was "enhanced by virtue of the defendant's prior violations of other provisions within the same statute."[12] Based on this reasoning, we held that a conviction under § 60-6,196(6) could not be used as either the offense triggering a habitual

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[10] *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999).

[11] *Id.* at 355, 598 N.W.2d at 29.

[12] *Id.* at 356, 598 N.W.2d at 29.

criminal enhancement or a prior felony for purposes of the enhancement.

This court next considered the holdings of *Chapman* and *Hittle* in *State v. Taylor*.[13] The defendant in that case was convicted of third degree assault on an officer under Neb. Rev. Stat. § 28-931 (Reissue 1995), which at the time of the offense, provided:

> (1) A person commits the offense of assault on an officer in the third degree if he or she intentionally, knowingly, or recklessly causes bodily injury to a peace officer or employee of [DCS] while such officer or employee is engaged in the performance of his or her official duties.
>
> (2) Assault on an officer in the third degree shall be a Class IV felony.

That felony conviction served as the trigger for a habitual criminal enhancement. On appeal, the defendant argued he should not have been convicted under § 28-931 and sentenced as a habitual criminal under § 29-2221 because that resulted in an improper double enhancement. He contended that third degree assault under Neb. Rev. Stat. § 28-310 (Reissue 2008) was a misdemeanor and that his conviction was enhanced to a felony based on the status of his victim, a DCS employee.

After noting that the defendant's argument presented "a question of statutory interpretation as to whether the Legislature enacted § 28-931 as a 'specific subsequent offense statute' for general third degree assault, or as a separate crime,"[14] this court rejected the defendant's argument "because § 28-931 [was] not a specific subsequent offense statute."[15] We explained:

> Nothing contained in the plain language of § 28-931 enhances the penalties for third degree assault upon a DCS employee based on subsequent offenses. A comparison of the plain language of §§ 28-310 and 28-931 indicates that the Legislature enacted these statutes to

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[13] *State v. Taylor*, 262 Neb. 639, 634 N.W.2d 744 (2001).

[14] *Id.* at 647, 634 N.W.2d at 750.

[15] *Id.* at 647, 634 N.W.2d at 751.

> punish two separate and distinct crimes with separate and distinct elements. Under § 28-931, the status of the victim is an element of the crime and is not a subsequent offense penalty enhancement.[16]

The same reasoning applies to this case, despite the fact that misdemeanor and felony flight to avoid arrest are defined in the same statute. Section 28-905(3)(a)(iii) is not a specific subsequent offense statute. Reading § 28-905 as a whole, the offense of flight to avoid arrest is a misdemeanor if it involves fleeing in a motor vehicle in an effort to avoid arrest, whereas the offense becomes a felony under § 28-905(3)(a)(iii) if the State alleges and proves the additional element of willful reckless operation of a motor vehicle. This additional fact pertains to the manner in which the offense was committed, and not to prior criminal conduct. Thus, Kinser was not subjected to an impermissible double enhancement and the district court did not err in sentencing him as a habitual criminal. We express no opinion as to whether the result would be the same if Kinser had been convicted of felony flight to avoid arrest under § 28-905(3)(a)(i), as that issue is not presented in this case.

District Court Did Not Impose Erroneous Sentence

Kinser argues that the sentencing order must be reversed as erroneous because of a discrepancy between the sentence imposed for his flight to avoid arrest conviction and the court's statements at the sentencing hearing regarding his eligibility for parole. Relying upon the following statement, Kinser asserts the trial court intended for him to be parole eligible after 10 years:

> So the defendant will be sentenced to serve an indeterminate or terms — let me rephrase that because we have a mandatory minimum. He'll be sentenced to serve sentences in an institution under the jurisdiction of [DCS] as follows: On Count II [driving under revocation], which is the misdemeanor, six months, and there's a one year revocation of his license. On Count I [fleeing to avoid arrest],

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[16] *Id.*

> which is the felony, not less than 18 years and not more than 30 years. The minimum will include the mandatory minimum of 10 years with a two-year revocation of his license. Those sentences will be served concurrent. I give him credit for 190 days that he has served. Costs will be taxed to the defendant. He will not be parole eligible until he has served the mandatory minimum of 10 and [DCS] can indicate the time period but he will be eligible for parole. I'll revoke his bond and remand him then back to custody.

The State argues this language fails to show "an intention that Kinser be parole eligible in 10 years."[17] It contends that the district court expressly left the issue of parole eligibility to DCS, but informed Kinser that he would serve the mandatory minimum of 10 years.

Subject to an exception not applicable here, in imposing an indeterminate sentence upon an offender, a court is required by Neb. Rev. Stat. § 29-2204 (Reissue 2008) to "[f]ix the minimum and maximum limits of the sentence,"[18] to "[a]dvise the offender on the record the time the offender will serve on his or her minimum term before attaining parole eligibility assuming that no good time for which the offender will be eligible is lost,"[19] and to "[a]dvise the offender on the record the time the offender will serve on his or her maximum term before attaining mandatory release assuming that no good time for which the offender will be eligible is lost."[20] We agree with the State that the sentencing court did not clearly state that Kinser would be eligible for parole after serving 10 years. But even if it had, the question would be resolved by § 29-2204(1), which provides, "If any discrepancy exists between the statement of the minimum limit of the sentence and the statement of parole eligibility . . . the statement[] of the minimum limit . . . shall control the calculation of the offender's term."

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[17] Brief for appellee at 13.

[18] § 29-2204(1)(a)(ii)(A).

[19] § 29-2204(1)(b).

[20] § 29-2204(1)(c).

Although this court has not had occasion to apply this provision, the opinion of the Nebraska Court of Appeals in *State v. Glover*[21] is instructive. The defendant in that case argued for a reduction in her sentence or, alternatively, for a resentencing, based on an incorrect statement made by the district court at sentencing. The trial judge sentenced her to a term of 21 to 30 months' imprisonment, but stated that on the low end, she would serve about 9 months. The Court of Appeals acknowledged the trial court's misstatement, explaining that assuming no loss of good time, the defendant would serve 10½ months before becoming eligible for parole. However, the court rejected her argument, reasoning that under the plain language of § 29-2204(1), the minimum sentence of 21 months controlled the calculation of her term, which determined her parole eligibility.

We agree with the Court of Appeals' interpretation and application of § 29-2204(1) in *Glover*. In this case, any discrepancy between the minimum sentence of 18 years for Kinser's flight to avoid arrest conviction and the statements of the sentencing court regarding parole eligibility would be controlled by the former. Under our holding in *Johnson v. Kenney*,[22] good time credit would not reduce the 10-year mandatory minimum portion of Kinser's sentence for that crime. Thus, assuming no loss of good time credit, Kinser would serve the 10-year mandatory minimum plus 4 of the remaining 8 years of the minimum sentence, less credit for time served, before becoming eligible for parole.[23]

CONCLUSION

For the reasons discussed, Kinser was properly sentenced as a habitual criminal and the sentence imposed for his flight to avoid arrest conviction was not erroneous. The judgment is affirmed.

AFFIRMED.

WRIGHT, J., not participating in the decision.

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[21] *State v. Glover*, 3 Neb. App. 932, 535 N.W.2d 724 (1995).

[22] *Johnson v. Kenney*, 265 Neb. 47, 654 N.W.2d 191 (2002).

[23] See Neb. Rev. Stat. §§ 83-1,107 (Supp. 2011) and 83-1,110 (Reissue 2008).