

No. 1-09-1521

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e) (1).

SECOND DIVISION  
January 18, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 02 CR 26283
	)	
BENJAMIN THOMAS,	)	The Honorable
	)	John J. Fleming,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE KARNEZIS delivered the judgment of the court.

Presiding Justice Cunningham and Justice Connors concurred in the judgment.

**O R D E R**

*HELD:* Where the presentence investigation report shows that defendant has been previously convicted of at least two Class 2 felonies, the trial court was authorized to sentence him as a Class X offender. Defendant's conviction and six-year Class X sentence were affirmed.

After a bench trial, defendant Benjamin Thomas was found guilty of delivery of a controlled substance and sentenced as a Class X offender to six years in prison. On appeal, defendant contends that the court erred in sentencing him because his criminal history did not qualify him as a Class X offender.

Defendant was convicted of delivery of a controlled substance, a Class 2 felony. The presentence investigation report (PSI) does not list the specific class of any of defendant's prior convictions. The attachments to the PSI, however, reveal that defendant was convicted of possession of a stolen motor vehicle in 1994, a Class 2 felony. 625 ILCS 5/4-103(a)(1), (b) (West 1992). He violated his probation, which was revoked in 1995. Also in 1995, defendant was convicted of two separate instances of manufacturing and delivery of a controlled substance, also a Class 2 felony, 720 ILCS 570/401(d) (West 1994), one committed in 1994 (No. 94 CR 2849401), and the other committed in 1995 (No. 95 CR 0436201).

At the sentencing hearing, the trial court had the following exchange with the parties:

"THE COURT: All right. '92 he has a P.S.M.V., right. All right, so '92 he has a Class 2. '95 there is two so does he have another Class 2?

STATE: Yes, Judge, it looks like in my perusal...

THE COURT: Is it 'X' by background?

STATE: Yes, we've got the P.S.M.V. that was, yeah, January the 19th of '94 he was sentenced to that one, that is a Class 2. And then in '95 violating that probation he picked up another Class 2. So this would be his, this would be at least his third one. So he is actually mandatory Class X, 6 to 30.

THE COURT: All right, counsel, anything you have to say on that?

DEFENSE COUNSEL: Judge, I would see no reason to give him any more than the minimum 6 which obviously would be enhanced by the prior."

Defendant did not object and the trial court proceeded to sentence him as a Class X offender to the minimum six-year prison term.

On appeal, defendant asserts that the court erred in sentencing him as a Class X offender. Specifically, defendant argues that the PSI only shows one prior Class 2 felony conviction for possession of a stolen motor vehicle, and that the court mistakenly based his Class X sentence on the single Class 2

felony conviction and his violation of probation from that conviction. The State contends that defendant has forfeited this issue.

It is well settled that a contemporaneous objection and a written postsentencing motion are both required to preserve a sentencing error for review. *People v. Hillier*, 237 Ill. 2d 539, 544. Defendant does not dispute that he failed to object at the sentencing hearing or file a postsentencing motion addressing his sentence, but rather argues that his sentence was unauthorized by statute and, as such, is void and may be challenged at any time. *People v. Thompson*, 209 Ill. 2d 19, 23-25 (2004). In the alternative, he argues that his sentence may be reviewed under the second prong of the plain error rule. *People v. Bannister*, 232 Ill. 2d 52, 65 (2008). Therefore, our first question is whether the imposed sentence was unauthorized by statute.

A defendant who is convicted of a Class 2 felony may be sentenced as a Class X offender if he has been previously convicted of two Class 1 or Class 2 felonies "arising out of a different series of acts." *People v. Lee*, 397 Ill. App. 3d 1067, 1068 (2010); 730 ILCS 5/5-5-3(c)(8) (West 2002).

Here, the record shows that defendant was eligible to be sentenced as a Class X offender. As the State points out, defendant was previously convicted of three Class 2 felonies: possession of a stolen motor vehicle, and two separate instances

of manufacturing and delivery of a controlled substance.

Therefore, defendant was eligible to be sentenced as a Class X offender. In making his argument, defendant does not address the State's reliance on the PSI attachments, and instead focuses on the PSI itself and the exchange between the court and the State. But because defendant's Class X eligibility is supported by the PSI attachments, at best his argument is that the court made a mistake in relying on the incomplete PSI. This alleged mistake could have been addressed by the court had defendant objected. Instead, he acquiesced in his Class X offender status and requested the minimum sentence. Under these circumstances, we must honor the forfeiture.

Defendant also argues that his sentence may be reviewed under the second prong of the plain error doctrine. To overcome forfeiture, defendant must show that there was plain error. *Hillier*, 237 Ill. 2d at 545. Defendant bears the burden of persuasion, and if he fails to meet the burden, forfeiture will be honored. *Hillier*, 237 Ill. 2d at 545. To succeed on the second prong of the plain error doctrine, the defendant must first show that a clear and obvious error occurred and then that the error was so serious, it affected the fairness of the sentencing hearing and challenged the integrity of the judicial process. *People v. Walker*, 232 Ill. 2d 113, 124 (2009); *People v. Hagler*, 402 Ill. App. 3d 149, 152 (2010). Here, even assuming

that the court did base its sentence on the PSI and defendant's violation of probation, defendant is unable to show that the error affected the fairness of his sentencing hearing.

Defendant's criminal history qualified him for a Class X sentence, and the court sentenced him the minimum he could have received as a Class X offender. 730 ILCS 5/5-8-1(a)(3) (West 2002). Therefore, defendant cannot succeed under the plain error rule, and has forfeited this issue.

Affirmed.