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No. 3--09--0656

Order filed June 2, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 10th Judicial Circuit,
)	Peoria County, Illinois,
Plaintiff-Appellee,)	
)	No. 08--CF--1330
v.)	
)	
DANARIOUS KELLY,)	Honorable
)	Michael E. Brandt,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Carter concurred in the judgment.
Justice Wright dissented.

ORDER

Held: Where juvenile defendant, who was sentenced to 21 years in prison for armed robbery with a firearm by accountability, provided the firearm and actively participated in the robbery, the trial court's inability to exercise discretion and consider factors in mitigation did not render mandatory 15-year sentencing enhancement unconstitutionally disproportionate as applied to defendant.

Defendant Danarious Kelly was convicted of armed robbery based on accountability and sentenced to a minimum term of 21 years under

the mandatory enhancement provision of the armed robbery statute (720 ILCS 5/18--2(a)(2), (b) (West 2008)). He appeals, claiming that the enhancement provision, which requires the imposition of an additional 15 years in prison without discretion or consideration of mitigation factors, violated the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, §11) as applied to him because of his young age. We find the statute constitutional as applied and affirm.

Defendant was charged by indictment with armed robbery by accountability. The indictment stated: "[The defendant], being a person over 15 but under 17 years of age, while armed with a dangerous weapon, a handgun[,] did take property being United States currency from the person or presence of Naresh Konduru [sic] by threatening imminent use of force in violation of 720 ILCS 5/18--2(a)(2)."

The parties entered a negotiated plea and agreed to a sentencing cap of eight years. At the plea hearing, the State indicated that the offense was a Class X felony. Defendant was admonished and informed that the charge carried with it a sentencing range of 6 to 30 years.

The factual basis provided that on October 21, 2008, Peoria police officers investigated a robbery at a local gas station. The clerk, Naresh Kondu, said that three males came into the store. Two of the men went to the merchandise area; the third pulled out

a handgun and demanded money from the cash register. Kondu opened the drawer and one of the other men took the cash out. The surveillance video of the incident confirmed Kondu's description of the incident. From the video, officers recognized one of the men involved as Shyheim Chapai and later identified defendant.

During defendant's interview, he told investigators that he accompanied Chapai and another boy named Christian that night. Chapai asked to borrow a gun from defendant, which defendant gave him. As they were walking around, Chapai said he was going to "stick the dude up." They went into the gas station, and Chapai pointed the gun at the clerk and demanded money. Following his interview, defendant helped the officers recover the gun from his house. Defense counsel agreed to the facts as presented, and the trial court accepted the plea.

At sentencing, defense counsel stated that he believed a mandatory enhanced sentence might apply to defendant's offense and, therefore, the plea agreement may be void. Counsel was given leave to research the issue. One week later, he moved for a declaratory ruling, asking the court to determine whether the mandatory gun enhancement of armed robbery applied to a defendant charged with the offense by accountability. At the hearing, the prosecutor argued that the law made the guilty plea agreement void and that defendant should be allowed to withdraw his plea. After considering both parties' positions, the trial court held that the

mandatory gun enhancements applied to defendant's conviction by accountability and vacated defendant's negotiated plea. Defense counsel objected, arguing, among other things, that the enhancing provision did not apply because defendant was a minor.

The case eventually proceeded to a stipulated bench trial. The evidence presented was similar to the facts established at the guilty plea hearing. The surveillance video showed two men in the merchandise area. Another man wearing a black hooded sweatshirt entered the gas station and demanded money from the register. He was holding what appeared to be a .38 caliber revolver. When the register opened, one of the other two men grabbed the cash. The third man watched the store entrance. During defendant's police interview, he admitted that Chapai asked him to get the money out of the register because Kondu was not moving fast enough. Defendant hit the register, and when Kondu opened it, defendant grabbed the money. Chapai and defendant then ran to defendant's apartment and split the cash between them. The gun recovered from defendant's bedroom was the firearm used in the robbery. Defendant did not present any witnesses. The trial court found him guilty.

The presentencing investigation report indicated that defendant was 16 years old when he committed the offense. His criminal history indicated he had a previous conviction for possession of cannabis (a Class 4 felony) and a few curfew violations. He attended high school and had a job during the

summer. He lived with his mother and his sisters and had a good relationship with his family.

Defense counsel recommended imposition of a minimum sentence of six years, while recognizing the 15-year enhancement provision would also apply based on the court's earlier ruling. The State noted several mitigating factors, including defendant's young age, and suggested the minimum sentence of 21 years. The trial court then sentenced defendant to a "minimum term" of 21 years, with day-for-day credit to apply.

Defendant moved to reconsider, arguing that the application of the firearm enhancement to defendant's sentence was unconstitutional because it violated the proportionate penalties clause. The trial court denied defendant's motion.

ANALYSIS

I

Defendant argues that his 21-year sentence should be vacated and his guilty plea agreement should be reinstated. He claims that the 15-year sentencing enhancement for use of a firearm is unconstitutional as applied to him, based on his status as a juvenile offender, citing *Graham v. Florida*, __ U.S. __, 130 S. Ct. 2011 (2010) and *People v. Miller*, 202 Ill. 2d 328 (2002). Specifically, defendant claims that the enhancing provision is unconstitutional because it mandated his disproportionate sentencing by denying the trial court the ability to consider

mitigating factors and impose punishment below the enhancement devised for adults.

A statute is presumed constitutional and a party challenging the statute bears the burden of demonstrating its invalidity. *People v. Huddleston*, 212 Ill. 2d 107 (2004). We review questions regarding the constitutionality of a statute *de novo*. *People v. Cornelius*, 213 Ill. 2d 178 (2004).

Section 18--2 of the armed robbery statute provides:

"(a) A person commits armed robbery when he or she violates Section 18--1; and

(2) he or she carries on or about his or her person or is otherwise armed with a firearm.

(b) Sentence.

Armed robbery in violation of subsection (a)(1) is a Class X felony. A violation of subsection (a)(2) is a Class X felony for which 15 years shall be added to the term of imprisonment imposed by the court." 720 ILCS 5/18--2(a)(2), (b) (West 2005).

The legislature has the discretion to prescribe penalties for described offenses. *People v. Sharpe*, 216 Ill. 2d 481 (2005). That discretion necessarily includes the authority to enact mandatory sentences, even if the mandatory sentence restricts the

judiciary's discretion in imposing sentences. *People v. Davis*, 177 Ill. 2d 495 (1997).

However, that power is not without constitutional restrictions. The proportionate penalties clause of the Illinois Constitution provides that all criminal penalties shall be determined "both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, §11. A sentence may be found unconstitutional if the punishment is cruel, degrading, or "so wholly disproportioned to the offense as to shock the moral sense of the community." See *Miller*, 202 Ill. 2d at 339, quoting *Trop v. Dulles*, 356 U.S. 86 (1958). In determining whether a punishment violates these concepts, we review the gravity of the offense and the mandated severity of the sentence in light of the evolving community standards of decency. *Miller*, 202 Ill. 2d at 340.

Evaluating the evolving standards of decency in the realm of juvenile offenses is particularly complex. In *Graham*, the Supreme Court of the United States considered the disproportionate punishment of juveniles under the eighth amendment of the federal constitution and concluded that there is a difference between juvenile and adult offenders. *Graham*, 130 S. Ct. 2011. In that case, a 16-year-old defendant was convicted of armed burglary and another offense and sentenced to probation. He subsequently

violated probation and was sentenced to life in prison without the possibility of release. He challenged his sentence under the eighth amendment as cruel and unusual punishment. In reviewing the sentence, the Supreme Court noted that juveniles have lessened culpability and are therefore "less deserving of the most severe punishment." *Graham*, 130 S. Ct. at 2026. "It would be misguided to equate the failings of a minor with those of an adult, for greater possibility exists that a minor's character deficiencies will be reformed." *Graham*, 130 S. Ct. at 2026-27. The Court also considered factors such as retribution, deterrence, incapacitation and rehabilitation and determined that those factors supported the need to evaluate juveniles differently than adults. It then reached the following conclusion:

"[P]enological theory is not adequate to justify life without parole for juvenile nonhomicide offenders. This determination; the limited culpability of juvenile nonhomicide offenders; and the severity of life without parole sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual. This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile

nonhomicide offenders who are not sufficiently culpable to merit that punishment. Because '[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood,' those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime." *Graham*, 130 S. Ct. at 2030, quoting *Roper v. Simmons*, 543 U.S 551, 574 (2005).

The Illinois Supreme Court also considered the issue of appropriate punishment for juvenile offenders tried as adults. In *Miller*, a juvenile defendant was tried as an adult and convicted of two counts of murder based on accountability. *Miller*, 202 Ill. 2d 328. The trial court sentenced the defendant to 50 years in prison after finding that the mandatory natural life statute (730 ILCS 5/5--8--1(a)(1)(c)(ii) (West 2002)) was unconstitutional as applied to the defendant. On appeal, our supreme court agreed that the statute violated the proportionate penalties clause of the Illinois Constitution. The court found that the penalty mandated by the multiple murder sentencing statute, as applied to the juvenile defendant, was particularly harsh and unconstitutionally disproportionate:

"We agree with defendant that a mandatory sentence of natural life in prison with no possibility of parole grossly distorts the factual realities of the case and

does not accurately represent defendant's personal culpability such that it shocks the moral sense of the community. This moral sense is particularly true, as in the case before us, where a 15-year-old with one minute to contemplate his decision to participate in the incident and stood as a lookout during the shooting, but never handled a gun, is subject to life imprisonment with no possibility of parole--the same sentence applicable to the actual shooter." *Miller*, 202 Ill. 2d at 341.

Defendant argues that the rules set forth in *Graham* and *Miller* require a finding that his sentence is unconstitutional as applied. We disagree. The rules articulated in those cases are narrow and fact specific and do not apply to defendant for three reasons.

First, the decisions in both *Graham* and *Miller* were motivated by the juvenile's sentence to life in prison without release for acts committed by the minor in their immaturity, without significant forethought about their culpability in the crimes. In such instances, both courts found a life sentence "particularly harsh." Here, the mandatory sentence imposed was not life without the possibility of parole; defendant was sentenced to 21 years in prison with day-for-day credit.

Second, the evidence in this case shows that defendant provided the handgun used to commit the offense, that he forced open the cash register, and that he removed all the cash from the

drawer. Defendant and Chapai then ran from the scene and retreated to defendant's apartment where he and his partner split the money. This level of participation is not the passive accountability shown in *Miller*. In that case, the defendant was not involved in planning the crime and had no knowledge of what was about to happen. He only had a minute to react when the shooting started. Therefore, we reject defendant's argument that the *Miller* rationale should apply.

Third, the holdings in *Graham* and *Miller* do not prevent the legislature of a state from imposing severe sanctions on a juvenile *nonhomicide* offender to express its condemnation of the crime and to protect the community. See *Graham*, 130 S. Ct. at 2026; *Miller*, 202 Ill. 2d at 341. The legislature has set the sanction to be imposed by considering the needs of society and the need to deter others. The minimum sentence for armed robbery is 6 years, plus 15 years if the robbery is committed with a firearm. The enhancement provision for use of a firearm has been challenged based on the proportionate penalties clause and that challenge has failed. See *Sharpe*, 216 Ill. 2d at 524. The legislature made a determination that armed robberies committed with a firearm constitute serious felonies, and the rehabilitative potential of the offender was considered in adding the enhancement provision (See *Sharpe*, 216 Ill. 2d at 524). We find the challenged penalty is within the legislature's discretion.

In this case, the sentence is not disproportionate to the crime. Defendant supplied the handgun to the codefendant; he was informed of the plan well in advance of the crime and did not leave; he actively participated in the robbery by taking the money from the cash register; and he shared in the proceeds of the crime by splitting the money with Chapai. In light of defendant's actions, the 21-year sentence imposed by the trial court is not cruel or degrading or shocking to the moral sense of the community. Thus, the 15-year enhancement provision as applied to defendant does not violate the proportionate penalties clause.

II

Defendant argues that by agreeing to the negotiated cap of eight years, the prosecutor constructively narrowed the indictment to a lesser included offense of armed robbery with a dangerous weapon (720 ILCS 5/18--2(a)(1) (West 2008)), a charge possessing no statutory sentencing enhancement to the standard Class X felony. Defendant claims that the prosecutor had the power to do so under separation of powers principles and that the court unconstitutionally interfered with that discretion in voiding the plea.

Defendant admits that he did not object at trial or in a posttrial motion on this basis, but asks us to excuse his procedural default and address the merits of the issue. See *People v. Enoch*, 122 Ill. 2d 176 (1988) (objections at trial and in

posttrial motion are needed to properly preserve issue for appeal). The plain error doctrine allows review of a forfeited error that affects a substantial right where (1) the evidence in a case is so closely balanced that the error may have affected the outcome, or (2) the error is so serious that the defendant was denied a substantial right, and thus a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005); Ill. S. Ct. R. 615(a). Under both prongs, the defendant bears the burden of persuasion. *Herron*, 215 Ill. 2d at 187. Under the second prong, prejudice is presumed, but "the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Herron*, 215 Ill. 2d at 187.

In this case, plain error review is not warranted. The original plea agreement was based on mutual mistake that resulted in a void sentence. Generally, plea agreements are governed by the basic principles of contract law, with some due process exceptions. *People v. Evans*, 174 Ill. 2d 320 (1996). Parties cannot bind a court to impose a sentence that is legally unauthorized. *People v. Hare*, 315 Ill. App. 3d 606 (2000). A plea agreement that is unauthorized is void and cannot be enforced against either party. *Hare*, 315 Ill. App. 3d at 611. Moreover, a court can only reform a plea if there is a mutual mistake and "the parties' written agreement does not accurately express their actual understanding."

Id.

In *Hare*, the defendant plead guilty to residential burglary and agreed to a sentence of four years. *Hare*, 315 Ill. App. 3d 606. In presenting the factual basis, the State noted that the defendant had four prior convictions of residential burglary. The trial court accepted the plea but later vacated the judgment, finding that the plea was void because the prior convictions required the defendant to be sentenced as a Class X offender with a minimum six-year term. See 730 ILCS 5/5--5--3(c)(8) (West 1996). Thus, the defendant's four-year sentence was illegal.

On appeal, the court rejected the defendant's argument that the invalid plea agreement should survive. The reviewing court held:

"Because adhering to the parties' contract would have violated the sentencing statute, the trial court could not hold defendant to his negotiated plea. However, it is equally true that the court could not require the State to perform according to an agreement that was void or according to one it did not make." *Hare*, 315 Ill. App. 3d at 610.

Here, both parties misconstrued the statute. At the time the State and defendant entered the plea agreement, the parties believed that defendant would plead guilty to armed robbery with a firearm under section 18--2(a)(2) and be sentenced as a Class X

offender with a range of 6 to 15 years. They further believed that an eight-year cap was within that sentencing range. However, the agreed upon sentence was not available under the statute because section 5/18--2(a)(2) requires the application of the 15-year sentence enhancement for use of a firearm. See 720 ILCS 5/18--2(a)(2) (West 2008). Thus, the agreement was void and could not be enforced against either party. See *People v. Wilson*, 181 Ill. 2d 409 (1998); *People v. Williams*, 179 Ill. 2d 331 (1997). Moreover, the record reflects that the parties' written agreement accurately expressed their understanding that an eight-year cap was within that statutory sentencing range. Therefore, the trial court was not authorized, under principles of mutual mistake, to bind the State by reforming the plea to a lesser included offense. See *Hare*, 315 Ill. App. 3d at 610 (plea can only be reformed if written agreement does not accurately reflect parties mutual understanding). Accordingly, we find no error in the trial court's refusal to reinstate the guilty plea agreement.

III

Defendant argues that the State failed to prove, beyond a reasonable doubt, that defendant carried a firearm during the robbery because there was no evidence to show a "handgun" was a firearm. Thus, he claims that his conviction should be reduced to the lesser included offense of armed robbery with a dangerous weapon (720 ILCS 5/18--2(a)(1) (West 2008)).

The Criminal Code states that a "firearm" has the meaning ascribed to it in Section 1.1 of the Firearm Owners Identification Card Act. 720 ILCS 5/2--7.1 (West 2008). The Firearm Owners Identification Card Act (430 ILCS 65/1.1 (West 2008)) defines "[f]irearm" as "any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas."

In this case, a stipulated bench trial was held and the State sought to prove defendant guilty by accountability of committing an armed robbery while carrying or otherwise being armed with a firearm under section 18--2(a)(2) of the armed robbery statute. 720 ILCS 5/5--2, 18--2(a)(2) (West 2008). Armed robbery in violation of section (a)(2) is a Class X felony for which a mandatory enhanced sentence of 15 years applies. 720 ILCS 5/18--2(b) (West 2008). Therefore, as an element of the offense, the State was required to prove beyond a reasonable doubt that the device used was a "firearm" because that fact exposed defendant to a penalty beyond the standard statutory maximum. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Here, the stipulation of facts presented to the trial court included defendant's and Kondu's statements to police, both of which made reference to a "handgun", a "revolver" and a "gun." In particular, the stipulated video recording showed Chapai holding a revolver which appeared to be a .38 caliber. A handgun, a .38

caliber revolver, and a gun are firearms and fall within the statutory definition. See Webster's Third New International Dictionary 1027 (1976) (defining "handgun" as "a firearm held and fired with one hand"); see also Black's Law Dictionary 570 (5th ed. 1979) (describing a "firearm" as "a weapon which acts by force of gunpowder. This word comprises all sorts of guns, fowling-pieces, blunderbusses, pistols, etc."); cf. *U.S. v. Brown*, 117 F.3d 353 (7th Cir. 1997) (gun carried by defendant was "firearm" within meaning of federal sentencing guidelines even though gun was inoperable.) Thus, based on the stipulated evidence, a reasonable trier of fact could conclude beyond a reasonable doubt that Chapai was armed with a firearm during the robbery. See *People v. Coleman*, 345 Ill. App. 3d 1029 (2004). We therefore affirm defendant's conviction and 21-year sentence.

CONCLUSION

The judgment of the circuit court of Peoria County is affirmed.

Affirmed.

JUSTICE WRIGHT, dissenting:

The confusion at the heart of this appeal stems from the fact that the prosecution elected to describe the object, a handgun, allegedly used during the underlying robbery as a "dangerous weapon" while omitting any allegation that *this* particular handgun

would qualify as a "firearm" for purposes of the current version of the armed robbery statute. I am not convinced that every "handgun" automatically qualifies as a "firearm." However, a determination of this point is not necessary to the outcome of this appeal.

I find it very significant that the State did not allege the handgun *in this case* to be a "firearm " even though the prosecution had recovered the handgun itself before the indictment was prepared. Here, the grand jury's indictment elected to describe the handgun as a "dangerous weapon," thereby putting the defense on notice that the prosecution intended to prove this particular handgun was a "dangerous weapon" alone. On this basis, the defense elected to engage in negotiations with the State resulting in a plea agreement that contemplated defendant would stand convicted of a simple Class X felony carrying a minimum 6 year sentence.

Based on this record, I contend there was not a mutual mistake underlying the binding, negotiated agreement. Perhaps the State's witnesses did not testify before the Grand Jury that the object was in fact a fully operational firearm. Regardless of the underlying reason, not disclosed by this record, it is undisputed that the indictment did not allege the State intended to prove this specific handgun would fit the definition of a firearm as required by statute.

Nonetheless, knowing the strengths and weaknesses of their respective cases, the record reveals the prosecutor and defense

counsel reached a mutual *understanding* that recognized this indictment was predicated on the presence of a "dangerous weapon" rather than "a firearm." Consequently, both attorneys negotiated a capped sentence for the offense of armed robbery with the minimum sentence of 6 years in mind. Simply stated, the parties' negotiated agreement presumed the "handgun" was indeed a "dangerous weapon [other than a firearm]" which satisfied the elements of a violation of section 18-2(a)(1) of the Criminal Code of 1961 (720 ILCS 5/18-2(a)(1) (West 2008)) (section 18-2(a)(1)), presumably without recognizing the indictment based on the language set out in 18-2(a)(1) mistakenly referred to section 18-2(a)(2) of the Criminal Code of 1961 (720 ILCS 5/18-2(a)(2) (West 2008)). I submit the court should have simply pointed out the non-substantive or scrivener's error in the statutory sub-section set out in the indictment which could have been corrected without invalidating the binding plea agreement.

The court's confusion is understandable because the language of the indictment alleges a hybrid category of armed robbery which does not exist under the current statute. For example, section 18-2(a)(2) requires the State to both plead and prove the use of a "firearm" without reference to whether the particular firearm used during the robbery was a dangerous weapon. (720 ILCS 5/18-2(a)(2) (West 2008)). In contrast, section 18-2(a)(1), a simple Class X offense, requires the State to plead and prove the object was a

dangerous weapon other than a firearm. (720 ILCS 5/18-2(a)(1) (West 2008)).

Each numerical subsection of section 18-2(a)(1) and (a)(2) defines separate but not necessarily included offenses. Each statutory offense involves mutually exclusive but separate *elements* dependent upon whether the object is alleged to be a "firearm" or whether the object may be some other "dangerous weapon other than a firearm" that falls short of qualifying as a firearm based on the available evidence. In either case, whether the object is or is not a firearm constitutes an element of each separate offense and should not be viewed as an enhancing factor to be applied during sentencing.

I agree with the majority's recitation of the case law regarding plain error. However, I would find the second prong of plain error is involved in this appeal because the error in this case denied defendant a substantial right to defend against the specific facts alleged in the original indictment. Here, defendant was put on notice by this indictment that the State alleged and intended to prove a "dangerous weapon" was used during the commission of this robbery as an element of that offense. However, after the negotiated agreement was finalized on this basis, the court set aside the agreement of the parties allowing the State to claim the indictment was predicated on the use of a "firearm" as an element of the offense, rather than the use of a "dangerous weapon"

(other than a firearm).

Thus, I suggest prejudice should be presumed under the second prong because the hybrid language set out in the indictment precipitated the judge's confusion, but did not invalidate the meeting of the minds between the parties, firmly predicated on the use of a dangerous weapon. Since neither party disputed reaching a negotiated agreement, I submit the judge's well intentioned intervention challenged the integrity of this proceeding. See *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

In order to avoid the confusion at the heart of this appeal, the State, when charging a violation of section 18-2(a)(1), should simply allege the "dangerous weapon" is an object "other than a firearm." Similarly, when alleging a violation of section 18-2(a)(2), the State should only describe the object as a "firearm." In future cases, the State could eliminate much confusion for the court and counsel by simply replicating the precise language of the statute and charge offenders with the use of a "firearm," rather than alleging the use of a "dangerous weapon [other than a firearm], a handgun."

Based on this view, I would not reach the other issues skillfully addressed by the majority. Instead, based on plain error, I would vacate the sentence and remand the matter to the trial court with directions to amend the scrivener's error in the indictment to allege a violation of section 18-2(a)(1). See *People*

v Kimbrough, 163 Ill. 2d 231 (1994). After the amendment following remand, the court should impose a sentence consistent with the original negotiated agreement.

For these reasons, I respectfully dissent.