

February 2009, defendant pleaded guilty to both counts, and the trial court later sentenced him to probation for 30 months.

In May 2009, the State filed a petition to revoke probation, alleging that defendant violated a condition of his probation by ingesting cannabis. At a June 2009 hearing, defendant admitted that he had violated the terms of his probation as alleged. Following an August 2009 hearing, the court resentenced defendant to a seven-year, extended-term prison sentence on each count, to be served concurrently.

Defendant appeals, arguing that the trial court's imposition of a seven-year, extended-term prison sentence for escape violated the double-enhancement rule because his prior felony conviction was both (1) an element of the offense charged and (2) an aggravating factor the court relied upon to impose the extended-term. Because we agree, we affirm defendant's conviction and sentence as modified and remand for issuance of an amended sentencing judgment.

I. BACKGROUND

In October 2008, the State filed a two-count information against defendant. Count I of the State's information alleged the following:

"[T]hat [defendant,] on or about May 9, 2008,
*** committed the offense of *Escape* in that
*** defendant, after having been convicted of

Aggravated Battery, a felony, *** and released from the department of corrections and placed on a[n] electronic home monitoring detention program, knowingly violated a condition of that program by leaving his home other than authorized.

Class 3 Felony

Extend[ed] Term Eligible due to [a] prior Class 3 or greater [felony conviction]"

(Emphasis in original.)

Count II alleged that defendant knowingly caused over \$500 damage to his electronic home monitoring device. In addition, the State's information noted that defendant was eligible for an extended-term sentence because he had been convicted of a "Class 3 or greater" felony.

In February 2009, defendant pleaded guilty to the aforementioned counts, and the trial court later sentenced him to probation for 30 months. In May 2009, the State filed a petition to revoke defendant's probation, alleging that defendant violated a condition of his probation by ingesting cannabis. At a June 2009 hearing, defendant admitted that he had violated the terms of his probation as alleged. Following an August 2009 hearing, the court resentenced defendant to a seven-year, extended-term prison sentence on each count, to be served concurrently.

This appeal followed.

II. DEFENDANT'S DOUBLE-ENHANCEMENT CLAIM

Defendant argues that the trial court's imposition of a seven-year, extended-term prison sentence for escape violated the double-enhancement rule because his prior felony conviction was both (1) an element of the offense charged and (2) an aggravating factor the court relied upon to impose the extended term. We agree.

A. Double Enhancement Defined and the Standard of Review

"A double enhancement occurs when either (1) a single factor is used both as an element of an offense and as a basis for imposing a harsher sentence than might otherwise have been imposed, or (2) the same factor is used twice to elevate the severity of the offense itself." (Internal quotation marks omitted.) *People v. Siguenza-Brito*, 235 Ill. 2d 213, 232, 920 N.E.2d 233, 245 (2009) (quoting *People v. Guevara*, 216 Ill. 2d 533, 545, 837 N.E.2d 901, 908 (2005)). The general rule against double enhancement is merely a rule of construction established by the supreme court, "which arises from the presumption that the legislature considered the factors inherent in the offense in setting the initial penalty for that offense." *People v. Sharpe*, 216 Ill. 2d 481, 530, 839 N.E.2d 492, 522 (2005). The double-enhancement rule is designed to prevent subjecting a defendant to a harsher sentence than might otherwise have been imposed.

People v. Phelps, 211 Ill. 2d 1, 12, 809 N.E.2d 1214, 1221 (2004).

Because this issue involves application of a statute to undisputed facts, which raises a question of law, our review is *de novo*. *People v. Richards*, 394 Ill. App. 3d 706, 709, 916 N.E.2d 66, 69 (2009).

B. The Offense of Escape

Section 5-8A-4.1 of the Unified Code, which pertains to the offense of escape (failure to comply with a condition of the electronic home monitoring detention program) provides the following:

"(a) A person charged with or convicted of a felony *** conditionally released *** through an electronic home monitoring detention program, who knowingly violates a condition of the *** program is guilty of a Class 3 felony.

(b) A person charged with or convicted of a misdemeanor *** conditionally released *** through an electronic home monitoring detention program, who knowingly violates a condition of the *** program is guilty of a Class B misdemeanor.

(c) A person who violates this Section

while armed with a dangerous weapon is guilty of a Class 1 felony." 730 ILCS 5/5-8A-4.1 (West 2008).

C. Extended-Term Sentencing

Section 5-5-3.2(b)(1) of the Unified Code, which pertains to factors in aggravation, provides as follows:

"(b) The following factors, related to all felonies, may be considered by the court as reasons to impose an extended term sentence under Section 5-8-2 upon any offender:

(1) When a defendant is convicted of any felony, after having been previously convicted in Illinois or any other jurisdiction of the same or similar class felony or greater class felony, when such conviction has occurred within 10 years after the previous conviction, excluding time spent in custody, and such charges are separately brought and tried and arise out of different series of acts[.]"

730 ILCS 5/5-5-3.2(b)(1) (West 2008).

D. The Trial Court's Imposition of an Extended-Term Sentence

As previously noted, one of the elements of escape under section 5-8A-4.1(a) of the Unified Code requires that the defendant be "charged with or convicted of a felony." In this regard, the State's charging document specifically identified defendant's 2007 conviction for aggravated battery--defendant's sole felony conviction at that time--to satisfy this element. Thus, by accepting defendant's guilty plea to the escape charge, the trial court could not also consider his 2007 felony conviction as an aggravating factor to impose a harsher penalty in the form of an extended-term for that conviction. See *People v. Rankin*, 297 Ill. App. 3d 818, 822, 697 N.E.2d 1246, 1249 (1998) (where this court held that the trial court erred by relying on one previous felony conviction to both convict the defendant and impose an extended-term sentence).

When a trial court imposes a sentence in excess of that permitted by statute, the excess portion is void. *People v. Harvey*, 196 Ill. 2d 444, 448, 753 N.E.2d 293, 295 (2001). The sentencing range for escape under section 5-8A-4.1(a) of the Unified Code--a Class 3 felony--is not less than two years and not more than five years in prison. See 730 ILCS 5/5-8-1(a)(6) (West 2008). Thus, based on our holding, two years of defendant's seven-year sentence for escape is void. Accordingly, pursuant to our authority under Supreme Court Rule 615(b)(4)

(eff. Jan. 1, 1967), we remand with directions that the trial court amend its sentencing order to show a five-year sentence for defendant's escape conviction.

In so doing, we note that defendant does not challenge his seven-year, extended-term prison sentence for criminal damage to government-supported property under the double-enhancement rule. See *Siguenza-Brito*, 235 Ill. 2d at 233, 920 N.E.2d at 245 (the use of a single factor to enhance two separate and distinct offenses does not implicate the double-enhancement rule). Thus, given that the court ordered the sentences it imposed to be served concurrently, the reduction of defendant's sentence for escape from seven to five years will have no effect on the duration of defendant's current imprisonment.

III. CONCLUSION

For the reasons stated, we (1) affirm defendant's conviction and sentence and (2) remand for issuance of an amended sentencing judgment consistent with this order. As part of our judgment, we award the State its \$50 statutory assessment as costs of this appeal.

Affirmed as modified and remanded with directions.