

No. 1-10-3083

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 03 CR 220254
)	
PAUL MCGEE,)	Honorable
)	Larry G. Axelrod,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE ROBERT E. GORDON delivered the judgment of the court.
Justices Garcia and Palmer concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant was convicted of a Class 2 felony but, as a result of his criminal history, was required to be sentenced as a Class X offender, the trial court properly sentenced the defendant to serve the mandatory supervised release term imposed upon Class X offenders.

¶ 2 After defendant Paul McGee was convicted by a jury of burglary, he was sentenced to 15 years in the Illinois Department of Corrections and 3 years of mandatory supervised release (MSR). McGee had been previously convicted of multiple felonies and the recidivism statute mandated that he be sentenced as a Class X offender. 730 ILCS 5/5-5-3(c)(8) (West 2002). On

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direct appeal, this court affirmed the conviction. *People v. McGee*, 373 Ill. App. 3d 824 (2007).

In this current postconviction petition, McGee challenges the validity of his sentence. The trial court dismissed the petition as frivolous and without merit. McGee now appeals, claiming that the trial court acted without statutory authority when it imposed a three-year MSR term, and the sentence is void. See *People v. Arna*, 168 Ill. 2d 107, 113 (1995). For the following reasons, we affirm.

¶ 3

BACKGROUND

¶ 4 After a jury trial, McGee was convicted of burglary, a Class 2 felony. McGee committed the offense on April 24, 2003. At the time of commission, the Unified Code of Corrections required that defendants convicted of a Class 1 or Class 2 felony, after having been previously convicted of two Class 2 or greater felonies,¹ be sentenced as Class X offenders. 730 ILCS 5/5-5-3(c)(8) (West 2002). McGee had previously been convicted of two prior felonies, and was therefore sentenced as a Class X offender. As a result, the trial court sentenced McGee to 15 years in the Illinois Department of Corrections (IDOC).

¶ 5 McGee was also sentenced to three years of mandatory supervised release, pursuant to the statute's requirement that offenders sentenced as Class X offenders receive a three-year MSR term. 730 ILCS 5/5-8-1(d)(1) (West 2002). McGee appealed his conviction, claiming that the trial court improperly denied his motion to quash arrest and suppress evidence, that the State

¹ If a defendant was convicted of a felony in another state or of a federal felony, the statute would apply if the offenses contained the same elements of an offense classified in Illinois as a Class 2 or greater Class felony. 730 ILCS 5/5-5-3(c)(8) (West 2002).

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failed to prove his guilt beyond a reasonable doubt, and that trial counsel was ineffective. This court affirmed on May 21, 2007. *People v. McGee*, 373 Ill. App. 3d 824 (2007). McGee did not raise any issues related to sentencing in that appeal.

¶ 6 McGee filed the current *pro se* postconviction petition on May 29, 2008, but did not raise the issue of an improper MSR term in his petition. The trial court appointed the State Appellate Defender's office to assist McGee, therefore taking the postconviction proceeding to its second stage. The State Appellate Defender's office filed a 651(c) certificate, stating that the attorney assigned to McGee's case had met with McGee, ascertained his issues, read the necessary portions of his record, and decided that no supplemental petition was necessary. See Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

¶ 7 The State filed a motion to dismiss the petition on August 27, 2010, and, after a hearing on the motion, the trial court granted the State's motion to dismiss on October 8, 2010. McGee then filed this timely appeal.

¶ 8 ANALYSIS

¶ 9 McGee has raised only one issue on appeal, asserting that his three-year MSR term is void and must be reduced to a two-year term. McGee argues that because he was convicted of burglary, a Class 2 felony, he should have received the corresponding two-year MSR period reserved for Class 1 and Class 2 felonies, and not the three-year MSR term reserved for Class X offenders. 730 ILCS 5/5-8-1(d)(1), (2) (West 2002). The State claims that McGee has forfeited the issue, and argues notwithstanding that the MSR term was proper. For the following reasons, we affirm the dismissal of the postconviction petition.

¶ 10

I. Standard of Review

¶ 11 At issue in this case is: (1) whether McGee forfeited his claim that he received an improper MSR term; and (2) whether the sentence is void because McGee should have received the MSR term imposed on Class 2 offenders, since the underlying felony on which he was convicted is classified as a Class 2 felony. The State contends that McGee forfeited the issue because he raises it for the first time on appeal, and that, even if the issue has not been forfeited, the MSR term imposed is proper for Class X offenders, when his criminal history requires that he be sentenced as a Class X offender.

¶ 12 McGee has asserted that his sentence was imposed in violation of statutory authority, and is therefore void. *Arna*, 168 Ill. 2d at 113. When an order is void, a reviewing court may consider the order at any time, even when the defendant fails to object or raise the issue in a posttrial motion. *People v. Harvey*, 196 Ill. 2d 444, 448 (2001).

¶ 13 To determine whether or not the sentence was void, we must examine the relevant statutes as they existed when McGee committed the underlying offense, which requires a *de novo* review. *People v. Delvillar*, 235 Ill. 2d 507, 517 (2009). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 14 The purpose of statutory construction is to "ascertain and give effect to the legislature's intent." *Michigan Avenue National Bank v. County of Cook*, 191 Ill. 2d 493, 503-04 (2000); *People v. McKinney*, 399 Ill. App. 3d 77, 80 (2010). The best indication of legislative intent is the plain and ordinary meaning of the statutory language. *Delvillar*, 235 Ill. 2d at 517; *Paris v.*

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Feder, 179 Ill. 2d 173, 177 (1997); *McKinney*, 399 Ill. App. 3d at 80. When the statutory language is clear and unambiguous, the court "must apply the statute without resorting to any aids of construction." *McKinney*, 399 Ill. App. 3d at 80.

¶ 15 II. Forfeiture and the Proper MSR Term

¶ 16 The State asks that we dismiss the appeal without reaching the merits because McGee forfeited the issue. McGee argues that the issue has not been forfeited because the trial court did not have authority under the sentencing statute to sentence him to an MSR term of three years, and the sentence is therefore void. See *Arna*, 168 Ill. 2d at 113. When an order is void, a reviewing court can make that determination at any time, even when the defendant fails to object at trial or when a defendant fails to place the issue in a posttrial motion. *People v. Harvey*, 196 Ill. 2d 444, 448 (2001).

¶ 17 We must therefore interpret the relevant statute that was written at the time of McGee's underlying offense, to determine whether the trial court had the authority to impose the MSR term that applies to Class X offenders.

¶ 18 When McGee committed the underlying offense, burglary was classified as a Class 2 felony. 720 ILCS 5/19-1 (West 2002). He had also been convicted of two prior Class 1 or Class 2 felonies. At the time McGee committed the offense, the Unified Code of Corrections required that someone of McGee's age and criminal history be "sentenced as a Class X offender." 730 ILCS 5/5-5-3(c)(8) (West 2002). The Illinois Appellate Court has, on multiple occasions, interpreted this subsection to require that defendants sentenced as Class X offenders must receive the entire sentence that an offender convicted of a Class X offense would receive. *McKinney*,

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399 Ill. App. 3d at 80-81; *People v. Lee*, 397 Ill. App. 3d 1067, 1073 (2010); *People v. Watkins*, 387 Ill. App. 3d 764, 766-77 (2009); *People v. Smart*, 311 Ill. App. 3d 415, 417-18 (2000); *People v. Anderson*, 272 Ill. App. 3d 537, 541 (1995). The MSR term is treated as part of an offender's sentence. *McKinney*, 399 Ill. App. 3d at 81; *Lee*, 397 Ill. App. 3d at 1073. Therefore, when an offender is convicted of a Class 1 or Class 2 felony, if the offender is to be sentenced as a Class X offender pursuant to section 5-5-3, the offender receives the Class X MSR term. *McKinney*, 399 Ill. App. 3d at 81.

¶ 19 At the time that McGee committed the underlying felony, the Uniform Code of Corrections imposed an MSR term of three years on offenders sentenced as Class X offenders. 730 ILCS 5/5-8-1(d)(1) (West 2002). However, McGee argues that he should receive the two-year MSR term because the sentencing statute imposed a two-year MSR term to offenders sentenced as Class 1 or Class 2 offenders. 730 ILCS 5/5-8-1(d)(2) (West 2002). Although McGee acknowledges that his argument has been rejected many times by the Illinois Appellate Court, he argues that these cases were wrongly decided. McGee points to the Illinois Supreme Court's decision in *People v. Pullen*, 192 Ill. 2d 36 (2000), to support his argument. Many of the decisions adverse to McGee's position have been decided since *Pullen* was decided in 2000. For example, *McKinney* and *Lee* were each decided 10 years after *Pullen*. *McKinney*, 399 Ill. App. 3d 77; *Lee*, 397 Ill. App. 3d 1067.

¶ 20 In *Pullen*, our supreme court was asked to analyze a sentencing statute which applied to offenders serving consecutive sentences. *Pullen*, 192 Ill. 2d at 40. The defendant in *Pullen* entered a negotiated guilty plea to five counts of burglary. *Pullen*, 192 Ill. 2d at 38. The

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defendant had an extensive criminal record, and was sentenced as a Class X offender, even though burglary is a Class 2 felony. *Pullen*, 192 Ill. 2d at 38-39. The defendant was sentenced to 15 years on each count of burglary; the sentences for counts I and II ran concurrently with each other, the sentences for counts III, IV, and V ran concurrently with each other, and those two terms were to be served consecutively, resulting in a total of 30 years' incarceration. *Pullen*, 192 Ill. 2d at 39.

¶ 21 On a motion to withdraw his guilty plea, the defendant argued that the 30-year sentence was void because it violated a statute limiting the aggregate length of consecutive prison terms to the sum of the maximum extended terms for the two most serious felonies. *Pullen*, 192 Ill. 2d at 39. During the relevant time period, the statutory limit for extended sentences for Class 2 felonies, such as burglary, was 14 years. *Pullen*, 192 Ill. 2d at 40-41 (citing 730 ILCS 5/5-8-2 (West 1994)). The defendant in *Pullen* argued that, because his sentence was comprised of two separate terms to be served consecutively, his total sentence could not exceed 28 years, or 14 years for each consecutive term. *Pullen*, 192 Ill. 2d at 40.

¶ 22 The Illinois Supreme Court held that the defendant was required to be sentenced as a Class X offender because of his prior criminal history. *Pullen*, 192 Ill. 2d at 41. However, the court concluded that, under the terms of section 5-8-4(c)(2) of the Unified Code of Corrections (730 ILCS 5/5-8-4(c)(2) (West 1994)), the defendant's aggregate sentence could not exceed 28 years' imprisonment. *Pullen*, 192 Ill. 2d at 43-44. The court found that the terms of the statute explicitly stated that the maximum sentence for consecutive terms could not exceed the sum of the maximum terms authorized for the two most serious felonies. *Pullen*, 192 Ill. 2d at 42. The

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two most serious felonies involved were burglaries, a Class 2 offense, and therefore, the maximum terms for Class 2 offenses applied. *Pullen*, 192 Ill. 2d at 42-43.

¶ 23 McGee argues that the reasoning in *Pullen* should apply here, but his arguments are not persuasive. As the Second District held in *McKinney*, the sentencing statute at issue here differs from the statute at issue in *Pullen* because the sentencing statute at issue "specific[ed] part of the sentence for a defendant's offense," whereas the statute at issue in *Pullen* "delineat[ed] how separate sentences for separate crimes are served." *McKinney*, 399 Ill. App. 3d at 83.

¶ 24 The Illinois Supreme Court noted in *Pullen* that, had the defendant been sentenced to a single term, he would have been eligible for a longer sentence because he was sentenced as a Class X offender and would not have been subject to the maximum consecutive sentences statute. *Pullen*, 192 Ill. 2d at 45.

¶ 25 *Pullen* is distinguishable from McGee's voidness argument. The Illinois Supreme Court indicated that, had the defendant not been sentenced to consecutive sentences, he would have received the sentence mandated by statute to Class X offenders. *Pullen*, 192 Ill. 2d at 45.

McGee is not subject to consecutive sentences, and the sentencing statutes indicate that offenders with criminal histories similar to McGee's must be sentenced as Class X offenders, regardless of the classification of the underlying offense. 730 ILCS 5/5-5-3(c)(8) (West 2002). Illinois courts have consistently held that MSR terms are inseparable parts of sentences. *McKinney*, 399 Ill. App. 3d at 81; *Lee*, 397 Ill. App. 3d at 1073. The statute in the case at bar does not delineate between the prison sentence and the MSR term; rather, it states that convicted defendants "shall be sentenced as Class X offenders." 730 ILCS 5/5-5-3(c)(8) (West 2002). As a result, offenders

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who commit Class 1 or Class 2 offenses but are to be sentenced as Class X offenders are to be subject to Class X sentencing guidelines for every part of the sentence, including the MSR term.

¶ 26 McGee also cites the Second District's *People v. Hoekstra*, 371 Ill. App. 3d 720 (2007), to support his argument. In *Hoekstra*, the defendant pled guilty to burglary, and was sentenced as a Class X offender. *Hoekstra*, 371 Ill. App. 3d at 721, 728. The defendant argued that he needed to serve only a two-year MSR term and asked that the mittimus be amended to state that he was convicted of a Class 2 felony and need to only serve a two-year MSR term. *Hoekstra*, 371 Ill. App. 3d at 728. The State agreed that the defendant's MSR term should have been for two years instead of three, but argued that the court did not need to amend the mittimus because it stated that the defendant had been convicted of a Class 2 felony and that the "error" in sentencing was the fault of the Department of Corrections, not the court system. *Hoekstra*, 371 Ill. App. 3d at 728. The appellate court agreed with the State that the mittimus was correct and that defendant should therefore raise the sentencing issue with the IDOC, not the court. *Hoekstra*, 371 Ill. App. 3d at 728.

¶ 27 McGee's contention that *Hoekstra* supports his position is not persuasive. The appellate court did not find that the defendant had been improperly sentenced to a three-year MSR term; rather, it directed him to "raise the error" with the IDOC. *Hoekstra*, 371 Ill. App. 3d at 728. The appellate court did not order the mittimus changed. *Hoekstra*, 371 Ill. App. 3d at 728.

¶ 28 McGee's argument is also unpersuasive because of the sheer weight of authority that holds otherwise. Numerous appellate court cases, including *McKinney*, a Second District case decided after *Hoekstra*, have held that the MSR term is part of a sentence, and when recidivist

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offenders are *sentenced* as Class X offenders, they receive the *entire* Class X sentence, including the MSR term. See *Anderson*, 272 Ill. App. 3d at 541 (First District); *McKinney*, 399 Ill. App. 3d at 80-81 (Second District); *Watkins*, 387 Ill. App. 3d at 766-77 (Third District); *Lee*, 397 Ill. App. 3d at 1073 (Fourth District); *Smart*, 311 Ill. App. 3d at 417-18 (Fourth District).

¶ 29 Therefore, we find that the trial court had the statutory authority to impose the three-year MSR term, and thus the sentence is not void.

¶ 30 CONCLUSION

¶ 31 The trial court had the authority to sentence McGee as a Class X offender as a result of his criminal history. We affirm the judgment of the trial court.

¶ 32 Affirmed.