

No. 1-11-0960

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).

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. 10 CR 18658
)	
NITA KING,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant was not subjected to improper double enhancement; we vacate defendant's convictions for two counts of unlawful use of a weapon by a felon and three counts of aggravated unlawful use of a weapon based on the one-act, one-crime doctrine and the court's merger of all counts; we affirm defendant's conviction of AUUW (Count 3); and we remand the cause for the trial court to impose mandatory assessments against defendant.
- ¶ 2 Following a bench trial, defendant Nita King was convicted of unlawful use of a weapon by a felon (UUWF) and aggravated unlawful use of a weapon (AUUW) and sentenced, as a Class X offender, to seven years' imprisonment. On appeal, defendant asserts that she was subjected to

improper double enhancement when the trial court allegedly utilized the same prior felony conviction to elevate the classification of the UUWF offense from a Class 3 to a Class 2 felony and then to serve as the basis for classifying her to a Class X offender. We order that the mittimus be corrected to reflect a single conviction under Count 3 for AUUW. In addition, the State correctly contends that this cause must be remanded to the circuit court with directions to impose mandatory costs, fines, and fees against defendant.

¶ 3 Defendant was arrested after police found her in possession of a loaded firearm near the intersection of Ferdinand Street and Laramie Avenue in Chicago on October 5, 2010. Defendant was then charged with and convicted of the following six counts:

Count 1: UUWF where she possessed a firearm and had previously been convicted of a 1998 Class 2 felony for delivery of controlled substance (98 CR 06193); the State expressly sought to sentence her as a Class 2 offender based on the same prior 1998 drug case (98 CR 06193);

Count 2: UUWF where she possessed firearm ammunition and had been convicted of the same 1998 drug offense (98 CR 06193); the State expressly sought to sentence her as a Class 2 offender based on the same prior 1998 drug case (98 CR 06193);

Count 3: AUUW where she carried a firearm while not on her own land or in a place of business and the firearm was uncased, loaded and immediately accessible at the time of the offense; the State expressly sought to sentence her as a Class 2 offender based on a 2008 conviction for possession of a controlled substance (08 CR 00709).

Count 4: AUUW charge that mirrored Count 3 except the aggravating factor was her failure to have been issued a currently valid Firearm Owner's Identification (FOID) Card.

Count 5: AUUW where she carried a firearm upon a public street within the City of Chicago and the firearm was uncased, loaded and immediately accessible at the time of the offense; the State expressly sought to sentence her as a Class 2 offender based on the same 2008 conviction for possession of a controlled substance (08 CR 00709).

Count 6: AUUW charge that mirrored Count 5 except the aggravating factor was her failure to have been issued a currently valid FOID card.

¶ 4 Before trial began, the public defender, the State, and the trial court all agreed that if defendant was convicted under Count 3 or 4, defendant would be subject to Class X sentencing based on her background. Following trial, the court found defendant guilty of all six counts and ruled that all the counts would merge because her convictions stemmed from a single act.

¶ 5 At the subsequent sentencing hearing, the State indicated that defendant was a Class X offender based on her 1998 Class 2 felony conviction for delivery of a controlled substance conviction, and her prior 1995 Class 1 felony case for manufacture/delivery conviction (95 CR 20492). The trial court raised concerns about double enhancement based on the 1998 conviction already being used to elevate the UUWF convictions to a Class 2 offense. The State, however, directed the trial court to Count 3, which indicated that the State would seek to enhance the AUUW conviction as a Class 2 offender based on her 2008 felony conviction, and did not seek enhancement based on defendant's 1998 conviction. The trial court then confirmed that defendant was Class X mandatory on Count 3, and heard arguments in aggravation and mitigation. Defendant was subsequently sentenced to seven years' imprisonment. Defendant

made an oral motion to reconsider sentence which the court denied. The mittimus lists all six convictions, each with a seven-year sentence. The trial court did not enter an order assessing any mandatory costs, fines, or fees, and found that defendant's credit for her time in custody "satisfied" them.

¶ 6 On appeal, defendant contends that she was subjected to an improper double enhancement where the same prior 1998 felony conviction (98 CR 06193) was used to elevate the classification of her UUWF offense from a Class 3 to a Class 2, and then was utilized to categorize her as a Class X offender subject to a Class X sentence. The linchpin of this appeal is whether, after merging all six counts upon conviction, the court imposed sentence on Count 1 for UUWF or Count 3 for AUUW. For the reasons that follow, we find that the court properly imposed sentence on Count 3 for AUUW.

¶ 7 The State initially observes that defendant has forfeited her claim because she never raised any such argument in the trial court and now does so on appeal for the first time. Defendant seeks review of the issue on the basis that the sentence imposed was void or, alternatively, under the plain error rule where the court's determination that she was eligible for an enhanced sentence affected her substantial rights. Defendant's position has no merit because the sentence imposed is not an error.

¶ 8 Double enhancement occurs when a single factor that constitutes an element of an offense is utilized as an aggravating factor to impose a harsher penalty than would otherwise be imposed. *People v. Guevara*, 216 Ill. 2d 533, 545 (2005). Using a prior conviction both to elevate the classification of an offense and to enhance the punishment for that offense constitutes double enhancement. *People v. Hobbs*, 86 Ill. 2d 242, 245-46 (1981). Generally, double enhancement is impermissible unless the intent of the legislature to enhance the penalty for a crime is clear. *People v. Sharpe*, 216 Ill. 2d 481, 530 (2005).

¶ 9 Here, defendant maintains that the trial court improperly used her prior 1998 felony conviction to elevate the classification of her UUWF charge and as a requisite prior conviction to classify her as a Class X offender subject to a Class X sentence. As charged, defendant is correct that the State used her 1998 conviction in Counts 1 and 2 alleging UUWF to establish the necessary element that she was a felon for the purpose of the UUWF charge (720 ILCS 5/24-1.1(a) (West 2010)) and also to elevate her UUWF charge from a Class 3 to a Class 2 felony for the purpose of sentencing her for UUWF as a Class 2 felony (720 ILCS 5/24-1.1(e) (West 2010)). There is no dispute that these UUWF charges are proper.

¶ 10 There is also no dispute that, in contrast to the UUWF offenses, Counts 3 through 6 alleging AUUW did not include defendant's 1998 Class 2 felony conviction because a prior felony is not an element of the offense of AUUW. See 720 ILCS 5/24-1.6(a) (West 2010). For the purpose of classifying the AUUW offenses, the State used a different prior felony conviction (a 2008 case for possession of a controlled substance in 08 CR 00709) to elevate her AUUW charge from a Class 4 felony to a Class 2 felony for purposes of sentencing. See 720 ILCS 5.24-1.6(d) (West 2010). There is no dispute that these AUUW charges are proper.

¶ 11 At the sentencing hearing, the court found that defendant was "Class X mandatory" based on her prior 1998 Class 2 felony conviction and her 1995 Class 1 felony case (95 CR 20492). If the court imposed sentence on the UUWF conviction, then double enhancement is triggered because the 1998 felony conviction would have been used to both elevate her UUWF offense from a Class 3 to a Class 2 felony and establish her status as a Class X offender subject to a Class X sentence. If the court imposed sentence on the AUUW offense, then no double enhancement occurred because her 1998 felony conviction was only used once, *i.e.*, as one prior felony to establish her status as a Class X offender.

¶ 12 Thus, the dispute between the parties involves whether the trial court merged all six counts into Count 3 (AUUW) or Count 1 (UUWF) of the information. In finding defendant guilty of all six counts, the trial court merged all of them together, but failed to specify which particular count the charges merged into, or whether it was one of the two UUWF counts or the four AUUW counts. Defendant maintains that the trial court merged all of the counts into Count 1 (UUWF) and the State claims all of the counts merged into Count 3 (AUUW). We agree with the State.

¶ 13 Before the trial started, the record shows that the State, public defender, and the trial court all agreed that if defendant was found guilty of AUUW based on Count 3 or 4, she would be subject to Class X sentencing. The parties made it clear that defendant's 1998 conviction was not being used as the predicate offense for the AUUW counts to avoid double enhancement. At sentencing, defendant's status as a Class X offender was again discussed. The State informed the court that defendant was subject to mandatory Class X sentencing based on her prior felony convictions in 1998 and 1995. The trial court questioned the State to make certain that defendant was not subject to double enhancement based on the fact that the 1998 case was already being used to elevate the class of the offense for the UUWF convictions. In response, the State directed the court to Count 3, which charged defendant with AUUW and indicated that it sought to sentence her as a Class 2 offender based on her 2008 felony conviction, and did not seek enhancement based on the 1998 case. The trial court then agreed that defendant was Class X mandatory on Count 3. Therefore, when taken in its entirety, the record shows that all the counts merged into Count 3, and defendant was properly sentenced as a Class X offender and not subject to an improper double enhancement.

¶ 14 We further note that defendant's assumption that all the counts merged into Count 1 would be legally improper. Count 1 charged defendant with UUWF for possession of a firearm,

while Count 2 charged defendant with UUWF for possession of firearm ammunition. The UUWF statute provides that, "possession of each firearm or firearm ammunition in violation of this section constitutes a single and separate violation." 720 ILCS 5/24-1.1(e) (West 2010); *People v. Anthony*, 2011 IL App (1st) 091528-B, ¶ 9; see also *People v. McSwain*, 2012 IL App (4th) 100619, ¶ 63; *People v. Lee*, 379 Ill. App. 3d 533, 539 n2 (2008) (suggesting that the amendment of the UUWF statute to include single and separate language authorized convictions for both firearm and firearm ammunition). Therefore, the trial court's indications that all counts merged into one count cannot be construed as meaning Count 1. This is particularly true where the trial court is presumed to know the law, and nothing contained in the record affirmatively rebuts that assumption. *People v. Howery*, 178 Ill. 2d 1, 32 (1997).

¶ 15 Accordingly, the mittimus must be corrected to reflect a single conviction for AUUW under Count 3 under the one-act, one-crime rule.

¶ 16 The one-act, one-crime doctrine prohibits multiple convictions when the convictions are carved from precisely the same physical act. *People v. Miller*, 238 Ill. 2d 161, 165 (2010); *People v. King*, 66 Ill. 2d 551, 566 (1977). If the same physical act forms the basis for two separate offenses charged, a defendant could be prosecuted for each offense, but only one conviction and sentence may be imposed. *People v. Segara*, 126 Ill. 2d 70, 77 (1988). Where guilty verdicts are obtained for multiple counts arising from the same act, a sentence should be imposed on the most serious offense. *People v. Garcia*, 179 Ill. 2d 55, 71 (1997). Here, defendant's convictions were based on a single offense, and, as we found above, the court merged all of the counts into Count 3. Therefore, the six convictions cannot stand under the one-act, one-crime doctrine. We thus vacate defendant's convictions for UUWF under counts 1 and 2, and her convictions under counts 4 through 6 for AUUW.

¶ 17 In so finding, we reject defendant's argument that the one-act, one-crime rule compels the merger of her multiple convictions under count 1 for UUWF. In making her argument, defendant maintains that her more serious offense was UUWF rather than AUUW because she faced a greater possible maximum sentence for that offense. Defendant is correct that although both offenses were charged as Class 2 offenses in this case, the charge of UUWF carried with it a harsher sentencing range than AUUW. See 720 ILCS 5/24-1.1(e) (West 2010) (Class 2 felony of UUWF carries a sentencing range of 3 to 14 years); see also 720 ILCS 5/24-1.6(d) (West 2010) (Class 2 felony of AUUW carries a sentencing range of three to seven years). However, the Count 3 charge of AUUW here carried with it the harsher sentencing range because a conviction under Count 3 elevated her to a Class X offender (730 ILCS 5/5-4.5-95(b) (West 2010)), whereas a conviction under Count 1 could not do so without subjecting her to improper double enhancement. Therefore, we find that defendant was in fact sentenced under the offense that carried with it the greatest possible term of imprisonment.

¶ 18 Finally, the State raises for the first time on appeal that this cause must be remanded to the circuit court with directions to enter judgment for costs, fines, and fees against defendant. Defendant replies that the State forfeited this argument by failing to object during sentencing.

¶ 19 We find *People v. Keagbine*, 77 Ill. App. 3d 1039 (1979), instructive. In *Keagbine*, the trial court neglected to impose costs following the defendant's conviction and sentence. For the first time on appeal, the State requested that the cause be remanded to the trial court so that costs could be entered. The court in *Keagbine* reasoned that because such costs are imposed by the clerk of the court as part of his ministerial duties and are nondiscretionary, the failure of the trial court to assess those costs would not preclude a subsequent correction of the error. *Keagbine*, 77 Ill. App. 3d at 1047. The court thus remanded the cause to the trial court for the assessment of

costs. *Keagbine*, 77 Ill. App. 3d at 1047. See also *People v. Hodges*, 120 Ill. App. 3d 14, 17 (1983) (remanding the cause to the trial court to properly assess costs against the defendant).

¶ 20 Here, the record shows that the trial court believed that defendant's credit for her time in custody "satisfied" her costs, fines, and fees. However, only "fines" can be offset by pre-sentence confinement under section 110-14 of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14 (West 2010)). See *People v. Tolliver*, 363 Ill. App. 3d 94, 96 (2006) ("[t]he plain language of the statute indicates that credit applies only to 'fines' that are imposed pursuant to a conviction, not to any other court costs or fees"). Therefore, similarly to *Keagbine*, we must also remand this cause to the trial court for the assessment of costs as mandated by statute.

¶ 21 For the foregoing reasons, we remand this cause to the trial court for the assessment of costs; vacate the judgments entered on defendant's convictions of UUWF (Counts 1 and 2) and AUUW (Counts 4 through 6); order the clerk of the court to correct the mittimus to reflect a single conviction for AUUW (Count 3); and affirm the judgment of the circuit court in all other respects.

¶ 22 Affirmed in part; vacated in part; and remanded in part.