

No. 1-11-1801

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 3151
)	
DARIUS WARE,)	Honorable
)	Michael Brown,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Quinn and Simon concurred in the judgment.

ORDER

- ¶ 1 *Held:* When a defendant's prior conviction was used as both an element of the offense and as one of the convictions rendering him eligible for Class X sentencing, defendant was subject to an improper double enhancement.
- ¶ 2 After a bench trial, defendant Darius Ware was convicted of the failure to report a change in address in violation of the registration provisions of the Sex Offender Registration Act (Act) (730 ILCS 150/3, 6 (2010)). He was sentenced, because of his background, to a Class X sentence of seven years in prison. On appeal, defendant first contends that he was subject to an improper double enhancement when his prior conviction for aggravated criminal sexual assault

was both an element of the instant offense and one of the convictions which rendered him eligible for a Class X sentence. In the alternative, defendant contends that the trial court improperly imposed the three-year term of Mandatory Supervised Release (MSR) that accompanies a Class X felony when he is only subject to a two-year term of MSR based upon his conviction for a Class 2 felony. He further contests the imposition of certain fees. We vacate defendant's sentence and remand for resentencing.

¶ 3 The evidence at defendant's bench trial established, in part through defendant's testimony, that defendant was subject to the registration provisions of the Act due to a conviction for aggravated criminal sexual assault in case No. 91 CR 24168. Although defendant registered in August 2008, he did not register in 2009 because the address at which he wanted to register did not match the address on his state-issued photo identification. Defendant explained that he was homeless and moved from shelter to shelter. However, the shelter at which he resided between August 2009 and January 2010 did not issue residency letters, and consequently, he was not able to register at that address. Certified copies of defendant's prior convictions for aggravated criminal sexual assault and for the failure to report a change of address in violation of the Act were introduced without objection.

¶ 4 In finding defendant guilty, the court characterized him as an intelligent man who, despite knowing that he was required to register and having done so during prior reporting periods, did not register between August 2009 and January 2010.

¶ 5 At sentencing, the State argued that defendant should be sentenced to a substantial prison term. The defense responded that defendant was not subject to Class X sentencing because defendant's prior conviction for aggravated criminal sexual assault could not be used both as an element of the charging offense and as one of the two felony convictions rendering him Class X eligible. The trial court rejected this argument and sentenced defendant, based upon his background, to a Class X sentence of seven years in prison.

¶ 6 On appeal, defendant contends that his sentence in the instant case was subject to an improper double enhancement when his prior conviction for aggravated criminal sexual assault was used as both an element of the offense of which he was found guilty and as one of the convictions used to find him eligible for a Class X sentence.

¶ 7 A double enhancement occurs when either 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 the same factor is used twice to elevate the severity of the offense itself. *People v. Guevara*, 216 Ill. 2d 533, 545 (2005). A double enhancement is not necessarily improper, as it may reflect legislative intent. *People v. Thomas*, 171 Ill. 2d 207, 224 (1996). This court has previously determined that "nothing" in the statutory language of section 5-5-3(c)(8) of the Unified Code of Corrections (see 730 ILCS 5/5-5-3(c)(8) (West 2004)) "expressly" indicated that the legislature intended such a double enhancement to be permissible in Class X sentencing. *People v. Owens*, 377 Ill. App. 3d 302, 304-05 (2007); see also *People v. Chaney*, 379 Ill. App. 3d 524, 532 (2008).

¶ 8 In the case at bar, the parties disagree as to which kind of double enhancement defendant was subject to. Defendant argues that his case falls under the first kind, in that his prior conviction for aggravated criminal sexual assault was relied upon both as an element of the charged crime and as a basis for finding him eligible for a Class X sentence. Although the State concedes that "defendant's conviction for aggravated criminal sexual assault was undoubtedly an element of the crime of failure to register as a sex offender" and that defendant's prior felony convictions "for aggravated criminal sexual assault and possession of a controlled substance with intent to deliver triggered" defendant's eligibility for Class X sentencing, the State contends that defendant was not subject to a double enhancement because the same factor was not used twice to elevate the severity of the offense itself. In other words, the State appears to concede that defendant was subject to the first kind of double enhancement, but contends that no error ultimately occurred because defendant was not subject to the second kind. We disagree.

¶ 9 A double enhancement takes place when either 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 the same factor is used twice to elevate the severity of the offense itself. *Guevara*, 216 Ill. 2d at 545. In other words, a defendant may be subject to an improper double enhancement in two different ways. Here, defendant contends, and we agree, that he was subject to the first kind, that is, a single factor was used both as an element of the offense and as a basis for the imposition of a Class X sentence, a sentence harsher than he may otherwise have received. See *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 9 (a single factor cannot be used both as an element of an offense and as a basis for imposing a harsher sentence than might otherwise have been imposed).

¶ 10 Here, the record reveals that defendant was charged with a violation of the Act (see 730 ILCS 150/1 *et seq.* (West 2010)), in that having previously been convicted of aggravated criminal sexual assault in case No. 91 CR 24168, he changed his residence and failed to report that change of address. See 730 ILCS 150/6 (2010). At sentencing, defendant was deemed eligible for a class X sentence based upon two prior Class 2 or higher felony convictions, one for possession with intent to deliver and one for aggravated criminal sexual assault. 730 ILCS 5/5-5-3(c)(8) (West 2008); now 730 ILCS 5/5-4.5-95(b) (West 2010).

¶ 11 However, because the record reveals that defendant only had two prior Class 2 or higher felony convictions—one for possession with intent to deliver and one for aggravated criminal sexual assault—the use of the same conviction as an element of the offense and as a basis for imposing a Class X sentence amounted to an impermissible double enhancement (*Guevara*, 216 Ill. 2d at 545). Therefore, the trial court erred when it determined that defendant was eligible for a Class X sentence (*Owens*, 377 Ill. App. 3d at 304-05), and this cause must be remanded for resentencing.

¶ 12 Here, defendant was convicted of the failure to register a change of address in violation of section 6 of the Act (730 ILCS 150/6 (West 2010)), a Class 2 felony (see 730 ILCS 150/10(a) (West 2010)). The sentencing range for a Class 2 felony is between three and seven years in prison. See 730 ILCS 5/5-4.5-35(a) (West 2010). Although defendant's seven-year sentence fell within the permissible sentencing range for a Class 2 felony the cause must still be remanded for resentencing as the trial court relied upon the wrong sentencing range in imposing sentence. See *Owens*, 377 Ill. App. 3d at 305-06 (even when a sentence imposed under an incorrect sentencing range fits within the correct range, the original sentence must be vacated because the trial court relied on the wrong sentencing range when imposing sentence).

¶ 13 Because we remand for resentencing, we need not address defendant's contention that his term of MSR should be reduced. Ordinarily, the fact that we have found that defendant is entitled to a new sentencing hearing would alleviate our need to address any remaining issues raised by defendant. However, as the fines and fees issue raised in defendant's appeal may reoccur at resentencing, we will briefly address this issue. Defendant contends, and the State concedes, that the trial court improperly imposed the \$200 DNA analysis fee and the \$5 Court System Fee (55 ILCS 5/5-1101(a) (West 2010)). We agree that under *People v. Marshall*, 242 Ill. 2d 285, 302-03 (2011), the imposition of the DNA indexing fee in this case was improper because defendant provided a DNA sample in a previous case, and that the court system fee for vehicle offenses should be vacated as defendant was not convicted of a vehicle offense (see 55 ILCS 5/5-1101(a) (West 2010)).

¶ 14 Accordingly, we vacate defendant's Class X sentence of seven years in prison and remand to the trial court for resentencing.

¶ 15 Vacated and remanded.