

2012 IL App (2d) 110815-U
No. 2-11-0815
Order filed September 27, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of Stephenson County.
Plaintiff-Appellee,)	
v.)	No. 04-CF-290
EDMOND W. ELLIS,)	Honorable
Defendant-Appellant.)	James M. Hauser, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in imposing an enhanced sentence for attempted murder when the enhancing factor was not charged in the information and submitted to the jury; we vacated both the base sentence and the enhancement, as the court did not indicate whether it would have imposed the same base sentence even without the enhancement, and we remanded for resentencing.

¶ 2 At issue in this appeal is whether defendant, Edmond W. Ellis, was subject to an enhanced sentence on his attempted first-degree murder conviction (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2004)) when the fact warranting an enhanced sentence, *i.e.*, that defendant personally discharged a firearm that proximately caused great bodily harm to the victim, was neither charged in the information nor

submitted to the jury as an aggravating factor. We determine that he was not. Thus, we vacate the sentence imposed on defendant's attempted murder conviction and remand this cause for resentencing on that conviction only.

¶ 3 The facts relevant to resolving this appeal are as follows.¹ Following a 2004 robbery of a convenience store where the cashier was shot in the chest, defendant was charged with both armed robbery (720 ILCS 5/18-2(a)(4) (West 2004)) and attempted first-degree murder. Concerning the armed-robbery charge, the information provided:

“[O]n or about the 17th day of SEPTEMBER, 2004 at and within Stephenson County, Illinois [defendant] did commit the offense of **ARMED ROBBERY in violation of 720 ILCS 5/18-2(a)(4)** in that said defendant while armed with a dangerous weapon, a firearm, knowingly took property, that being an undisclosed amount of United States Currency, from the presence of [the cashier] by the use of force, the defendant having personally discharged a firearm that caused great bodily harm to [the cashier].”

With regard to the attempted murder charge, the information stated:

“[O]n or about the 17th day of SEPTEMBER, 2004 at and within Stephenson County, Illinois [defendant] did commit the offense of **ATTEMPT (FIRST DEGREE MURDER) in violation of 720 ILCS 5/8-4(a)** in that said defendant with the intent to commit the offense

¹Because we have already detailed the evidence presented at defendant's jury trial in a previous appeal and the facts established at defendant's trial do not affect our decision in this case, we incorporate by reference our decision in defendant's previous appeal (see *People v. Ellis*, Nos. 2-05-0452 & 2-05-0453 (2007) (unpublished order under Supreme Court Rule 23)) and recite now only those facts necessary to resolve the issue raised.

of first degree murder in violation of Section 9-1(a)(1) of Act 5 of Chapter 720 of the Illinois Compiled Statutes, performed a substantial step toward the commission of that offense in that he, without authority, knowingly took a firearm and with the intent to kill [the cashier] shot [the cashier] with the firearm.”²

¶ 4 Defendant elected to proceed with a jury trial, and, at the close of his case, the jury was given several instructions. These instructions included issues instructions for armed robbery and attempted first-degree murder. The jury instruction laying out the elements of armed robbery provided:

“To sustain the charge of armed robbery, the State must prove the following propositions:

First Proposition: That the defendant knowingly took property from the person or presence of [the cashier]; and

Second Proposition: That the defendant did so by the use of force or by threatening the imminent use of force; and

Third Proposition: That the defendant during the offense personally discharged a firearm that proximately caused great bodily harm to another person.

²The State charged defendant with attempted first-degree murder pursuant to a version of the attempt statute that did not contain the sentencing enhancement, because, under our supreme court’s decision in *People v. Morgan*, 203 Ill. 2d 470, 491 (2003), the attempt statute with the enhancement was declared unconstitutional in that it permitted a defendant convicted of attempted first-degree murder to be subject to penalties that were not set according to the seriousness of the offense. As a result, defendant had to be charged based on the version of the statute in effect before the enhancement was enacted.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.”

The jury instruction for attempted first-degree murder stated:

“To sustain the charge of Attempt First Degree Murder, the State must prove the following propositions:

First Proposition: That the defendant performed an act which constituted a substantial step toward the killing of an individual; and

Second Proposition: That the defendant did so with the intent to kill an individual.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.”

¶ 5 The jury found defendant guilty of both offenses. Following a sentencing hearing, the court sentenced defendant to 20 years’ imprisonment on the attempted first-degree murder conviction, and, with regard to the armed-robbery conviction, defendant was sentenced to 20 years plus an additional 25 years for a total of 45 years’ imprisonment. See 720 ILCS 5/18-2(a)(4), (b) (West 2004) (“A

violation of subsection (a)(4)[, which provides that the defendant, in committing the robbery, personally discharged a firearm that proximately caused great bodily harm,] is a Class X felony for which 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court.”).

¶ 6 Thereafter, defendant appealed his convictions and sentences. This court affirmed. *People v. Ellis*, Nos. 2-05-0452 & 2-05-0453 (2007) (unpublished order under Supreme Court Rule 23).

¶ 7 In 2008, defendant filed a petition for relief from judgment (see 735 ILCS 5/2-1401(f) (West 2008)), claiming that the 25-year add-on for his armed-robbery sentence was void and had to be vacated.³ The trial court found that the sentences imposed on both convictions were void, and, accordingly, the trial court vacated the sentences and conducted a new sentencing hearing.⁴

³Defendant’s argument was based on our supreme court’s decision in *People v. Hauschild*, 226 Ill. 2d 63, 86-87 (2007), wherein the court determined that the 15-year enhancement for armed robbery violated the proportionate-penalties clause of the Illinois Constitution (Ill. Const. 1970, art. 1, § 11) by making the penalty for armed robbery more severe than the penalty for armed violence predicated on robbery. Because *Hauschild* made the armed-robbery statute void *ab initio*, sentences imposed on offenses committed between the time that the enhancement was enacted (January 1, 2000) and the time that our legislature amended the armed-violence statute (October 23, 2007) were void. *People v. Brown*, 2012 IL App (5th) 100452, ¶¶ 9-15. Thus, because defendant here committed his offense in 2004, which was between these dates, his enhanced sentence for armed robbery was void and had to be vacated.

⁴Defendant’s nonenhanced sentence for attempted first-degree murder was deemed void because, in *People v. Sharpe*, 216 Ill. 2d 481, 524 (2005), our supreme court overruled *Morgan*.

¶8 Following a new sentencing hearing, the trial court imposed a 20-year sentence on the armed-robbery conviction. With regard to the attempted first-degree murder conviction, the trial court imposed a 45-year sentence, consisting of a 20-year sentence plus an additional 25-year sentence imposed pursuant to section 8-4(c)(1)(D) of the Criminal Code of 1961 (720 ILCS 5/8-4(c)(1)(D) (West 2004)), which provides, in relevant part, that “an attempt to commit first degree murder during which the person personally discharged a firearm that proximately caused great bodily harm *** is a Class X felony for which 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court.” In imposing this additional 25-year sentence, the court found that defendant “discharged a firearm that proximately caused great bodily harm to another” and that defendant “had notice and [was] well aware that [his] discharging a firearm causing great bodily harm was at issue.”

¶9 The issue raised in this appeal is whether imposition of an enhanced sentence on defendant’s attempted-murder conviction was improper when the factor necessary to impose an enhanced sentence was neither charged in the information nor submitted to the jury. Because this issue concerns a pure question of law, our review is *de novo*. See *Jane Doe-3 v. McLean County Unit School No. 5 Board of Directors*, 2012 IL 112479, ¶ 20.

¶10 In resolving the issue raised, we begin by examining section 111-3(c-5) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/111-3(c-5) (West 2004)), which provides:

“Notwithstanding any other provision of law, in all cases in which the imposition of the death penalty is not a possibility, if an alleged fact (other than the fact of a prior

Moreover, pursuant to *Hauschild, Sharpe* could be applied retroactively to vacate nonenhanced sentences imposed pursuant to *Morgan*. *Hauschild*, 226 Ill. 2d at 77.

conviction) is not an element of an offense but is sought to be used to increase the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for the offense, the alleged fact must be included in the charging instrument or otherwise provided to the defendant through a written notification before trial, submitted to a trier of fact as an aggravating factor, and proved beyond a reasonable doubt. Failure to prove the fact beyond a reasonable doubt is not a bar to a conviction for commission of the offense, but is a bar to increasing, based on that fact, the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for that offense. Nothing in this subsection (c-5) requires the imposition of a sentence that increases the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for the offense if the imposition of that sentence is not required by law.”

¶ 11 The plain language of section 111-3(c-5) of the Code, to which we must defer (see *People v. Pohl*, 2012 IL App (2nd) 100629, ¶ 9), provides, as relevant here, that if the State seeks to use a fact other than a prior conviction to increase the sentencing range applicable to a defendant, that fact must be charged in the charging instrument and proved to the trier of fact beyond a reasonable doubt. The fact at issue here, *i.e.*, that defendant “personally discharged a firearm that proximately caused great bodily harm,” was neither charged in the information nor submitted to the jury as a fact that could increase the sentencing range defendant faced if he was convicted of attempted first-degree murder. Although that fact was charged in the information charging defendant with armed robbery, this was insufficient to enhance the sentencing range for attempted murder. Section 111-3(c-5) of the Code makes clear that, if the State wants “to increase the range of penalties *for the offense*,” then the fact must be “submitted to the trier of fact *as an aggravating factor*.” (Emphases added.) 725

ILCS 5/111-3(c-5) (West 2004). Thus, to enhance the sentence for attempted murder, the State needed to include the fact at issue in the information and jury instruction for that offense. See *People v. Edgcombe*, 2011 IL App (1st) 092690, ¶ 27 (even though fact that the defendant personally discharged a firearm was presented to the jury when the jury was asked to consider whether the defendant committed aggravated battery with a firearm, that same fact could not be used to increase the defendant's sentence for attempted first-degree murder, because, in line with section 111-3(c-5) of the Code, that fact was not presented to the jury with regard to the attempted-murder charge).

¶ 12 Having concluded that the court could not sentence defendant to an enhanced sentence for attempted first-degree murder, because the fact necessary to impose an enhanced sentence was neither charged in the information nor submitted to the jury, we next must decide whether we may simply vacate the 25-year add-on or whether we must vacate the entire sentence for attempted first-degree murder and remand this cause for a new sentencing hearing. Because resolution of this issue does not require us to defer to the trial court's reasoning, our review is *de novo*. *People v. McCreary*, 393 Ill. App. 3d 402, 406 (2009).

¶ 13 In cases where the trial court improperly imposes an enhanced sentence, the reviewing court must vacate that sentence and remand the cause for resentencing. See *Hauschild*, 226 Ill. 2d at 88-89. Although courts have simply excised the add-on in some circumstances without remanding the cause for resentencing (see *People v. Baker*, 341 Ill. App. 3d 1083, 1090 (2003)), we do not believe that this is the proper course of action in this case, given that the court imposed the sentence without commenting on whether it would have imposed a 25-year sentence without the enhancement (see *People v. Gibson*, 403 Ill. App. 3d 942, 955 (2010)). Accordingly, in line with *People v. Herron*,

2012 IL App (1st) 090663, ¶ 29, we vacate defendant's sentence for attempted first-degree murder and remand this cause so that the court can impose a nonenhanced sentence for that offense.

¶ 14 For these reasons, the judgment of the circuit court of Stephenson County is vacated in part, and this cause is remanded for resentencing on the attempted first-degree murder conviction.

¶ 15 Affirmed in part and vacated in part; cause remanded.