

NOTICE  
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2012 IL App (4th) 100652-U

Filed 2/24/12

NO. 4-10-0652

IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
JERMAINE WALKER,	)	No. 08CF1197
Defendant-Appellant.	)	
	)	Honorable
	)	Charles G. Reynard,
	)	Judge Presiding.

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JUSTICE McCULLOUGH delivered the judgment of the court.  
Justices Pope and Knecht concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant's two criminal-drug-conspiracy convictions were based upon the same, single act of conspiracy and one of those convictions and its accompanying sentence must be vacated. However, the trial court committed no error in sentencing defendant to 10 years in prison on the remaining conspiracy count as that 10-year sentence fell within the statutory sentencing range applicable to defendant.

¶ 2 Following a bench trial, the trial court found defendant, Jermaine Walker, guilty of two counts of criminal drug conspiracy (720 ILCS 570/405.1 (West 2006)) and sentenced him to two, concurrent 10-year prison terms. Defendant appeals, arguing (1) this court must vacate one of his two criminal-drug-conspiracy convictions because both were based upon the same act of conspiracy and (2) the lower court applied the incorrect classification to the charged offenses and, as a result, misapprehended the permissible sentencing range. We affirm in part, vacate in part, and remand with directions to the trial court to enter an amended sentencing judgment,

vacating defendant's criminal-drug-conspiracy conviction and sentence for count II.

¶ 3 On October 29, 2008, a grand jury indicted defendant with one count of criminal drug conspiracy (720 ILCS 570/405.1 (West 2006)), alleging he agreed with Pauline Blathers to commit the offense of unlawful delivery of a controlled substance (720 ILCS 570/401(d) (West 2006)) and that an act in furtherance of their agreement was committed on June 13, 2008, when Blathers delivered cocaine to a police officer. On February 11, 2009, the grand jury indicted defendant on a second criminal-drug-conspiracy count. Again, it alleged he agreed with Blathers to commit unlawful delivery of a controlled substance and an act in furtherance of that agreement was committed on May 23, 2008, when Blathers delivered cocaine to a confidential source.

¶ 4 On February 18, 2009, defendant's bench trial was conducted. The State presented evidence that Blathers allowed several individuals, including defendant, to sell drugs out of her home in exchange for receiving some of the drugs for herself. On May 23, and June 13, 2008, police conducted two controlled drug buys during which police officer Darren Wolters accompanied confidential police source David Hall to Blathers' home to purchase cocaine. The State presented further evidence that, on each alleged date, Blathers contacted defendant who, shortly thereafter, arrived at Blathers' home with cocaine that was then sold to Hall and Wolters. On June 4, 2009, the trial court found defendant guilty of both criminal-drug-conspiracy counts.

¶ 5 On September 23, 2009, the trial court conducted defendant's sentencing hearing. At that time, the party's agreed defendant was subject to an extended-term sentencing range of 3 to 14 years in prison. Following arguments, the court sentenced defendant to two, concurrent 10-year prison sentences. On October 21, 2009, defendant filed a motion to reconsider his sentence, arguing the court afforded too little weight to mitigating factors and too much weight to

aggravating factors. On July 29, 2010, the court denied defendant's motion.

¶ 6 This appeal followed.

¶ 7 On appeal, defendant first argues both of his criminal-drug-conspiracy convictions may not stand because each conviction was based upon the same, single act of conspiracy. He contends the State alleged and proved the existence of only one continuing agreement to sell drugs between himself and Blathers.

¶ 8 "Multiple convictions are improper if they are based on precisely the same physical act." *People v. Miller*, 238 Ill. 2d 161, 165, 938 N.E.2d 498, 501 (2010). Here, defendant was charged with, and convicted of, two counts of criminal drug conspiracy (720 ILCS 570/405.1 (West 2006)). A person commits that offense when, with the intent to commit a drug-related offense, he agrees with another person to commit the offense and one of the conspirators commits an act in furtherance of the agreement. 720 ILCS 570/405.1 (West 2006).

¶ 9 The scope of every conspiracy is defined by the agreement to commit an offense or offenses "and the mere fact that separate overt acts have been committed in furtherance of a single conspiracy does not create a new conspiracy." *People v. Burlison*, 50 Ill. App. 3d 629, 633, 365 N.E.2d 1162, 1166 (1977). "[A] person charged with multiple conspiracies cannot be convicted of more than a single conspiracy if he has with the necessary intent entered into a single agreement to commit a crime even if multiple overt acts are committed in furtherance of that agreement." *Burlison*, 50 Ill. App. 3d at 635, 365 N.E.2d at 1167. However, "a person charged with multiple conspiracies can be convicted of those multiple conspiracies if, with the necessary intent, he entered into multiple, although partially overlapping agreements to commit crimes so long as overt acts are committed in furtherance of those agreements." *Burlison*, 50 Ill.

App. 3d at 635, 365 N.E.2d at 1167.

¶ 10 "Where coconspirators agree to work in furtherance of a common goal or purpose, there is but one conspiracy." *People v. Edwards*, 337 Ill. App. 3d 912, 924, 788 N.E.2d 35, 45 (2002). "Although the parties to the agreement may change over time and there may be many transactions, this does not establish that there were separate conspiracies." *Edwards*, 337 Ill. App. 3d at 924, 788 N.E.2d at 45. "Only where the conspirators have different interests and distinct goals will the court find the existence of multiple conspiracies." *Edwards*, 337 Ill. App. 3d at 924, 788 N.E.2d at 46.

¶ 11 In this case, although defendant faced multiple conspiracy counts, the State's evidence established the existence of only a single, ongoing agreement between defendant and Blathers. At defendant's February 2009 bench trial, Blathers testified that, the previous summer, she allowed several people to sell drugs out of her home and identified defendant as one of those individuals. Her testimony established the procedure she and defendant followed to carry out their agreement. Blathers testified she did not keep drugs at her home and, when someone came to her house to buy drugs, she would have to make a telephone call. On the occasions she called defendant, he came to her house with the drugs and they exchanged the drugs for money.

¶ 12 Although Blathers appeared to have separate agreements with several different individuals, no evidence was presented showing the existence of multiple agreements between herself and defendant. The evidence showed only two separate transactions that occurred pursuant to a single overriding agreement between Blathers and defendant. As stated, multiple transactions does not necessarily establish multiple conspiracies. Here, the nature of Blathers' and defendant's agreement required that Blathers contact defendant when an individual came to

her house to purchase drugs. Defendant would then bring drugs to Blathers' home and exchange the drugs for money. Contrary to the State's argument, no evidence was presented showing any agreement between defendant and Blathers that ended following a particular drug transaction or that a "fresh agreement" was created during subsequent transactions. Instead, the evidence showed their agreement to sell drugs was larger than each individual transaction.

¶ 13 The evidence also established that defendant and Blathers had a common interest, *i.e.*, distributing drugs out of Blathers' home. Blathers testified she received drugs in exchange for allowing drug transactions to take place in her home. She agreed that "the more deals that were done at [her] house, the more [she] had to smoke." While defendant and Blathers likely received distinct benefits from their agreement, those benefits could only be obtained by either party through the shared interest of selling drugs.

¶ 14 In this instance, the State's evidence was insufficient to show multiple conspiracies. As a result, only one conviction for criminal drug conspiracy may stand. We vacate defendant's conviction and sentence for criminal drug conspiracy based upon count II.

¶ 15 On appeal, defendant next argues the trial court applied the incorrect classification to the charged offenses and, as a result, misapprehended the permissible sentencing range. He contends the court mis-classified criminal drug conspiracy as a Class 2 offense and, finding he had a prior conviction for a Class 2 offense within the previous 10 years, determined he was eligible for an extended-term Class 2 sentence. However, defendant maintains that criminal drug conspiracy is only a Class 4 offense and, as a result, he was only eligible for a Class 4 extended-term sentence. Defendant requests this court vacate his sentence and remand for a new sentencing hearing.

¶ 16 Section 405.1 of the Illinois Controlled Substances Act (Act) (720 ILCS 570/405.1 (West 2006)) sets forth the offense of criminal drug conspiracy. That section does not expressly state a classification for the offense but does provide that "[a] person convicted of criminal drug conspiracy may be fined or imprisoned or both, but any term of imprisonment imposed shall be not less than the minimum nor more than the maximum provided for the offense which is the object of the conspiracy." 720 ILCS 570/405.1(c) (West 2006). In this instance, the offense serving as the object of both criminal-drug-conspiracy counts against defendant was unlawful delivery of less than a gram of a substance containing cocaine, a Class 2 felony. 720 ILCS 570/401(d) (West 2006). The sentencing range for a Class 2 felony is three to seven years in prison. 730 ILCS 5/5-8-1(a)(5) (West 2006) (recodified at 730 ILCS 5/5-4.5-35(a) (West 2010)).

¶ 17 Here, defendant acknowledges that, due to his criminal history, he was subject to an extended-term sentence. See 730 ILCS 5/5-5-3.2(b)(1) (West 2006) (providing that an extended-term sentence may be imposed 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"). His criminal record shows a prior Class 2 felony conviction within the previous 10 years. The extended-term sentencing range for a Class 2 felony is 7 to 14 years' imprisonment. 730 ILCS 5/5-8-2(a)(4) (West 2006) (recodified at 730 ILCS 5/5-4.5-35(a) (West 2010)). At sentencing, the parties agreed defendant was subject to sentencing for a Class 2 felony and, in particular, defense counsel asserted the applicable sentencing range was 3 to 14 years in prison. As stated, the trial court sentenced defendant to 10 years in prison.

¶ 18            However, on appeal, defendant argues that, because the classification for criminal drug conspiracy is not expressly stated in the defining statute, the Unified Code of Corrections (Code) requires the offense to be classified as a Class 4 felony. The Code provides that offense classifications are "are specified in the law defining the felony" but "[a]ny unclassified offense that is declared by law to be a felony or that provides a sentence to a term of imprisonment for one year or more is a Class 4 felony." 730 ILCS 5/5-5-2(a) (West 2006) (repealed by Pub. Act 95-1052, § 95 (eff. July 1, 2009)) (now 730 ILCS 5/5-4.5-85(a) (West 2010)). The sentencing range for a Class 4 felony is one to three years. 730 ILCS 5/5-8-1(a)(7) (West 2006) (recodified at 730 ILCS 5/5-4.5-45(a) (West 2010)). The extended-term sentencing range for a Class 4 felony is three to six years in prison. 730 ILCS 5/5-8-2(a)(6) (West 2006) (recodified at 730 ILCS 5/5-4.5-45(a) (West 2010)).

¶ 19            Defendant argues he was subject to only a Class 4 extended-term sentence of three to six years in prison. He notes that range is less than three-to-seven-year range for the underlying, Class 2 offense. Thus, defendant maintains the maximum sentence he could have lawfully received was 7 years and, as a result, the court's 10-year sentence was outside of the permissible statutory limit. We disagree.

¶ 20            Issues that involve statutory construction are subject to a *de novo* standard of review. *People v. Young*, 2011 IL 111866, ¶ 10. "When construing a statute, this court's primary objective is to ascertain and give effect to the legislature's intent, keeping in mind that the best and most reliable indicator of that intent is the statutory language itself, given its plain and ordinary meaning." *Young*, 2011 IL 111866, ¶ 11.

¶ 21            The plain and ordinary meaning of section 405.1 of the Act is that a defendant

sentenced to a term of imprisonment for criminal drug conspiracy must receive a sentence within the same sentencing range as the offense that is the object of the conspiracy. As discussed, the underlying offense in this case was a Class 2 felony. Thus, the trial court was required to treat defendant as a Class 2 offender and sentence him within the range applicable to Class 2 felonies. Where a defendant has a prior conviction for a Class 2 offense within the previous 10 years, he is subject to an extended-term, Class 2 sentence of 3 to 14 years. Here, given defendant's prior conviction for a Class 2 offense, the applicable Class 2 sentencing range was 3 to 14 years in prison. Defendant's 10-year sentence was well within the permissible range.

¶ 22 In *People v. Gonzales*, 314 Ill. App. 3d 993, 997, 734 N.E.2d 77, 81 (2000), the defendant was convicted of criminal drug conspiracy based upon an underlying Class X felony. The Second District found it clear "the legislature intended that [the] defendant receive a Class X sentence and carry the label of a Class X offender." *Gonzales*, 314 Ill. App. 3d at 997, 734 N.E.2d at 81. Further, it held that, "despite the legislature's failure to classify the offense, criminal drug conspiracy is not a Class 4 felony under" the unclassified felony provision of the Code. *Gonzales*, 314 Ill. App. 3d at 997, 734 N.E.2d at 81. Ultimately, the court determined that "for the purposes of determining a defendant's eligibility for a home detention credit under \*\*\* the Code," it would treat defendant's criminal-drug-conspiracy conviction as a Class X felony. *Gonzales*, 314 Ill. App. 3d at 998, 734 N.E.2d at 81. It also distinguished case law cited by the defendant involving offenses which the legislature had given an express classification, noting the legislature "chose to leave criminal drug conspiracy unclassified." *Gonzales*, 314 Ill. App. 3d at 998, 734 N.E.2d at 82.

¶ 23 Defendant argues *Gonzales* is factually distinguishable and its analysis is flawed.

Although *Gonzales* is not directly on point with the issue presented here, we find it persuasive. Additionally, to support his position of a flawed analysis, defendant primarily relies upon *People v. Pullen*, 192 Ill. 2d 36, 733 N.E.2d 1235 (2000), arguing it was applicable supreme court precedent that the *Gonzales* court failed to consider. However, in that case, the supreme court specifically distinguished cases dealing with unclassified felonies, finding they had no application and noting the case before it dealt with an explicitly classified Class 2 felony. *Pullen*, 192 Ill. 2d at 46, 733 N.E.2d at 1240. *Pullen* does not control the issue presented here and the remaining cases cited by defendant are also factually distinguishable.

¶ 24 Here, the Act required defendant to be sentenced as a Class 2 offender. That is precisely how the trial court sentenced him and it committed no error.

¶ 25 For the reasons stated, we affirm in part and vacate in part the trial court's judgment and remand to the trial court for an amended sentencing judgment, vacating defendant's conviction and sentence on count II for criminal drug conspiracy.

¶ 26 Affirmed in part and vacated in part; cause remanded with directions.