

No. 1-12-0312

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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. 09 CR 6824
)	
WILLIAM FLOWERS,)	Honorable
)	Kenneth J. Wadas,
Defendant-Appellant.)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where convictions for being an armed habitual criminal and unlawful use of a weapon by a felon for possessing a firearm violated the one-act, one-crime rule, conviction for unlawful use of a weapon by a felon for possessing a firearm vacated; remand for imposition of judgment and sentencing for unlawful use of a weapon by a felon for possessing firearm ammunition.
- ¶ 2 Following a bench trial, defendant William Flowers was found guilty of being an armed habitual criminal (Count 1), unlawful use of a weapon by a felon for possessing a firearm (Count 2), unlawful use of a weapon by a felon for possessing firearm ammunition (Count 3), and 12

counts of aggravated unlawful use of a weapon. At sentencing, the trial court sentenced defendant to eight years' imprisonment for being an armed habitual criminal (Count 1) and merged the remaining counts into a sentence of seven years' imprisonment for unlawful use of a weapon by a felon for possessing a firearm (Count 2), with the sentences to run concurrently.

¶ 3 On appeal, defendant correctly contends and the State concedes that the one-act, one-crime rule prohibits two convictions (Counts 1 and 2) based on his singular possession of a gun, and therefore, the conviction for Count 2 must be vacated. The parties also correctly agree that defendant's conviction based on possession of firearm ammunition (Count 3) can be reinstated and the cause should be remanded for imposition of a sentence on Count 3. The only remaining dispute on appeal is whether the cause should also be remanded for resentencing on Count 1, as argued by defendant. We vacate defendant's conviction for Count 2 and remand for the imposition of judgment and sentencing on Count 3.

¶ 4 At trial, the relevant evidence showed that on March 14, 2009 at approximately 6:16 pm, Officer Southard and Officer Lopez were on patrol in a marked squad car in the area of 1300 South Kostner in Chicago. Officer Southard saw a suspected hand-to-hand drug transaction between an individual and defendant, the driver of a Chevrolet Impala. When the Impala began to drive away, Officer Southard activated his squad car's lights and emergency siren to pull the Impala over. As Officer Southard approached, the Impala drove away and shortly afterwards crashed into a curb. Defendant then exited the Impala, tossed a handgun onto the sidewalk, and fled. Officer Lopez recovered the gun, which was a .380 Beretta with one live round in the chamber and six live rounds in the magazine. After a chase, Officer Southard caught up to defendant inside Franklin Park, at approximately 1431 South Tripp Avenue, and placed him in custody.

¶ 5 The parties stipulated to the chain of custody for the gun. The State also introduced two of defendant's prior convictions—a 2000 Class 2 narcotics conviction for delivery of a controlled substance and a 2007 second degree murder conviction.

¶ 6 The trial court found defendant guilty of all 15 counts. At sentencing, when defense counsel asked if Count 2, unlawful use of a weapon by a felon for possessing a firearm, would merge with Count 1, being an armed habitual criminal, the trial court responded, "I'm sentencing him separately on that, but I just want to make sure—I think all the other U UW counts would merge into this Count 2." The trial court noted that defendant's prior second degree murder conviction was a Class 1 felony, and the prior narcotics conviction was a Class 2 felony. The trial court initially stated that because defendant had two prior Class 2 or greater convictions, he must receive a Class X sentence for Count 2. The State pointed out that using the second degree murder conviction to enhance Count 2 to a Class X sentence and as an element for the armed habitual criminal count could result in a double enhancement. As a result, the trial court noted that defendant would be subject to a 3 to 7-year sentence for Count 2 and a 6 to 30-year sentence for Count 1.

¶ 7 After hearing the arguments in mitigation and defendant's statement, the trial court noted it initially felt that the appropriate sentence for the armed habitual criminal count was 10 years. It then stated:

"[H]owever, your right of allocation as well as your lawyer's comments in mitigation have basically talked me into lowering that figure on Count 1 to eight years in the Illinois Department of Corrections, and on Count 2 seven years IDOC, both of those counts to run concurrent to each other. Counts 3 to 15, they're all aggravated unlawful use of weapons counts, merge into Count 2."

Defendant was sentenced to eight years' imprisonment for being an armed habitual criminal and seven years' imprisonment for unlawful use of a weapon by a felon for possessing a firearm, with the sentences to run concurrently.

¶ 8 On appeal, defendant contends that his convictions for being an armed habitual criminal and unlawful use of a weapon by a felon for possessing a firearm violate the one-act, one-crime rule because they are both based on the singular act of his possessing one gun. The State concedes this point.

¶ 9 Defendant acknowledges that trial counsel did not raise the alleged violation of the one-act, one-crime rule during trial, but claims we should review for plain error. The plain error doctrine allows a reviewing court to address unpreserved error when (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Our supreme court has held that an alleged one-act, one-crime violation and the potential for a surplus conviction and sentence affects the integrity of the judicial process, thus satisfying the second prong of the plain error rule. *People v. Harvey*, 211 Ill. 2d 368, 389 (2004). Our review of defendant's argument is *de novo*. *People v. Artis*, 232 Ill. 2d 156, 161 (2009).

¶ 10 Turning to the substance of defendant's argument, the one-act, one-crime doctrine prohibits multiple convictions when they are carved from the same physical act or where one of the offenses is a lesser included offense of the other. *People v. Quinones*, 362 Ill. App. 3d 385, 397 (2005). An "act" is any overt or outward manifestation that will support a different offense. *People v. King*, 66 Ill. 2d 551, 566 (1977).

¶ 11 Here, defendant was convicted of being an armed habitual criminal and unlawful use of a weapon by a felon. A person commits the offense of being an armed habitual criminal if he possesses any firearm after being convicted two or more times of enumerated offenses, including a forcible felony or a violation of the Illinois Controlled Substances Act. 720 ILCS 5/24-1.7 (West 2008). A person is guilty of unlawful use of a weapon by a felon if he possesses any firearm or firearm ammunition and he has previously been convicted of a felony. The possession of each firearm or firearm ammunition is a single and separate violation. 720 ILCS 5/24-1.1(a), (e) (West 2008).

¶ 12 We agree with the parties that defendant's convictions violated the one-act, one-crime rule. Defendant's convictions for being an armed habitual criminal and unlawful use of a weapon by a felon for possessing a firearm were based on the same physical act—possessing the .380 Berretta. Accordingly, we vacate defendant's conviction for unlawful use of a weapon by a felon for possessing a firearm (Count 2). This result is consistent with *People v. Bailey*, 396 Ill. App. 3d 459, 465 (2009) (affirming the defendant's conviction for being an armed habitual criminal and reversing one of his convictions for unlawful use of a weapon by a felon because both were based on the defendant's possession of the same firearm) and *Quinones*, 362 Ill. App. 3d at 397 (vacating one of the defendant's two convictions for aggravated unlawful use of a weapon where both convictions were based on defendant's possession of the same firearm).

¶ 13 The State argues, and defendant concedes, that separate judgment should have been entered on Count 3, unlawful use of a weapon by a felon for possessing firearm ammunition. In *People v. Anthony*, 2011 IL App (1st) 091528-B, this court held that the unlawful use of a weapon by a felon statute (720 ILCS 5/24-1.1(a), (e) (West 2008)) allows for multiple convictions based on simultaneous possession of a firearm and firearm ammunition—such as in the case of a loaded gun. *Anthony*, 2011 IL App (1st) 091528-B at ¶ 3, 9. As in *Anthony*, here it

is undisputed that defendant possessed a firearm and firearm ammunition. We agree with the parties that defendant can be convicted for being an armed habitual criminal for possessing the gun and for unlawful use of a weapon by a felon for possessing the ammunition inside the gun, and that the trial court should have entered judgment separately on Count 3. Accordingly, we remand to the trial court to enter judgment and impose a sentence on Count 3. See, e.g., *People v. Scott*, 69 Ill. 2d 85, 88 (1977).

¶ 14 We disagree with defendant's contention that the cause should be remanded for resentencing on both Count 1 (armed habitual criminal) and Count 3 (unlawful possession of a weapon by a felon for possessing firearm ammunition), rather than only to enter judgment and impose a sentence on Count 3, as the State suggests. Here, it is not necessary to remand for resentencing on Count 1. Remand for resentencing is not required where the record indicates that the sentencing judge did not substantially consider the vacated convictions in sentencing defendant on the other convictions. *People v. Banks*, 260 Ill. App. 3d 464, 475 (1994). In this case, at multiple points, the trial court was careful to separate the sentence for the armed habitual criminal conviction from the sentence for the now-vacated unlawful use of a weapon by a felon conviction. When discussing whether Counts 1 and 2 would merge, the trial court explicitly said, "I'm sentencing him separately on that," referring to Count 1, the armed habitual criminal count. After discussing the potential for double enhancement, the trial court again indicated the two counts had separate sentencing ranges. When the trial court lowered defendant's sentence based on defendant's comments and his counsel's arguments, it explicitly imposed separate sentences for Count 1 and Count 2. Based on the record, it is clear that defendant was sentenced separately for each count and that the vacated conviction did not affect his sentence for being an armed habitual criminal. As such, we will not remand for resentencing on Count 1. See *People v. Ramirez*, 2012 IL App (1st) 093504, ¶ 49 (where trial court's statements made clear that the

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defendant was sentenced separately on each count and improper conviction did not affect the duration or severity of his sentence, remand for resentencing was unnecessary). Accordingly, we remand to enter judgment and impose a sentence only on Count 3, unlawful use of a weapon by a felon for possessing firearm ammunition.

¶ 15 For the foregoing reasons, we vacate defendant's conviction for Count 2, unlawful use of a weapon by a felon based on his possession of the firearm, and remand to enter judgment and impose a sentence only on Count 3, unlawful use of a weapon by a felon for possessing firearm ammunition. We affirm the judgment of the trial court in all other respects.

¶ 16 Affirmed in part, vacated in part, and remanded in part.