

No. 1-12-0810

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 7473
	)	
DARIUS WILLIAMS,	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE FITZGERALD SMITH delivered the judgment of the court.  
Presiding Justice Howse and Justice Lavin concurred in the judgment.

**ORDER**

- ¶ 1 **Held:** Class X sentence imposed on possession of a controlled substance with intent to deliver was not void; \$35 serious traffic violations fine vacated; defendant entitled to a \$5 per-day pre-sentence custody credit of \$1,595; mittimus corrected; judgment affirmed in all other respects.
- ¶ 2 Following a bench trial, defendant Darius Williams was found guilty of possession of a controlled substance with intent to deliver and sentenced as a Class X offender to eight years' imprisonment. On appeal, he contends that his Class X sentence is void and that his case should be remanded for resentencing within the Class 1 felony range. He also contests the propriety of

certain pecuniary penalties entered against him, and requests pre-sentence custody credit and a corrected mittimus.

¶ 3 Defendant was convicted on evidence showing that midday on April 12, 2011, Chicago police officer Isaac Lee, Jr. and his partner, Officer Cortez, set up a surveillance in an unmarked car about 50 yards from the alley near 4237 South Michigan Avenue in Chicago, where drugs were reportedly being sold. There, they observed defendant, who fit the description they were given of the offender, enter the alley, walk to a post sticking out of the ground, reach into that post, and remove a Doritos bag. Defendant then removed an item from the bag, placed the bag back in the post, and walked out of the officers' view.

¶ 4 Defendant repeated this behavior twice; however, the third time he returned to the alley and removed the bag from the post, then walked up to an individual who had also entered the alley, engaged in a brief conversation with him, reached into the bag, and "conducted a hand-to-hand transaction." Defendant then placed the bag back in the post. Based on his experience, Officer Lee believed that defendant had conducted a narcotics transaction.

¶ 5 After defendant left the alley, Officer Lee retrieved the bag from the post and observed therein 40 small bags containing a white, powdery substance, which the officer believed to be heroin. When defendant returned to the alley a fourth time, Officer Lee took him into custody. The parties stipulated that the recovered suspect narcotics tested positive for heroin.

¶ 6 At the sentencing hearing, the State informed the court of defendant's criminal history which mandated Class X sentencing. That history included a conviction for possession of stolen motor vehicle (PSMV) and sentence of 24 months' probation on August 8, 2007, which defendant violated. On February 15, 2008, probation was revoked and defendant was sentenced to boot camp. On the same date, defendant was also convicted of felony possession of a firearm and sentenced to boot camp which was to be served concurrently with the sentence entered on the

prior PSMV offense. Based on these prior convictions, the trial court sentenced defendant as a Class X offender to eight years' imprisonment in this case.

¶ 7 On appeal, defendant first contends that this sentence is void. He maintains that the date of his conviction for the first prior offense of PSMV was February 15, 2008, the date final sentence was entered after his probation had been revoked. He thus argues that he was not subject to Class X sentencing because the date of conviction for both the PSMV and firearm offenses was February 15, 2008, and the firearm offense could not have been committed after his conviction of PSMV, as required under the statute. As a result, he requests this court to vacate his sentence and remand for resentencing within a Class 1 sentencing range.

¶ 8 Defendant acknowledges that he failed to raise this issue in the trial court, but maintains that a void sentence may be raised at any time. *People v. Thompson*, 209 Ill. 2d 19, 27 (2004). The State responds that defendant's claim is meritless as it runs afoul of clear legislative intent.

¶ 9 Under the time sequence set forth in the Class X sentencing statute, defendant may not be sentenced as a Class X offender unless the second felony was *committed after* conviction of the first. (Emphasis added.) 730 ILCS 5/5-4.5-95(b) (West 2010). Defendant, citing *People v. Holmes*, 405 Ill. App. 3d 179, 186 (2010), asserts that the date of conviction is the date of sentencing, and in his case, the operative date is the date he was resentenced after the revocation of his probation. As a result, he argues that he was not subject to mandatory Class X sentencing because his first conviction was not entered until after he committed the second offense.

¶ 10 In making this assertion, defendant relies on *People v. Lemons*, 191 Ill. 2d 155, 159 (2000), where the supreme court, citing *People v. Robinson*, 89 Ill. 2d 469, 477 (1982), held that for purposes of determining the 10-year period for the extended term sentencing, "the date of a [prior] conviction is the date of entry of the sentencing order." In *Lemons*, 191 Ill. 2d at 157, defendant had been convicted of aggravated battery and resisting a peace officer, and was

sentenced to an extended 10-year prison term on the basis of a 1984 burglary which defendant was originally convicted of on February 26, 1985, and sentenced to 18 months' probation. Defendant's probation was revoked three times, and the third time, October 31, 1996, he was sentenced to 54 months in prison. *Lemons*, 191 Ill. 2d at 157. Under these circumstances, the supreme court determined that the date of conviction was October 31, 1996, the date of the sentencing order entered upon the final revocation of probation. *Lemons*, 191 Ill. 2d at 160.

¶ 11 The supreme court explained that to use the initial sentencing date when probation was originally entered against defendant instead of the final sentencing date on the revocation of the probation would defeat the policy considerations embodied in the extended-term sentencing statute, and lead to absurd results where a defendant violating his probation and postponing the revocation of probation, would escape a later sentence under the extended-term statute. *Lemons*, 191 Ill. 2d at 159-60. The court specifically noted the policy considerations set out in *Robinson* that the aim of recidivist statutes is to impose harsher sentences on offenders whose repeated convictions have shown their resistance to correction. *Lemons*, 191 Ill. 2d at 160. This same purpose is reflected in the Class X offender sentencing statute, *i.e.*, to punish recidivists more severely than first-time offenders. *People v. Davis*, 2012 IL App (5th) 100044, ¶30, citing *People v. Lee*, 397 Ill. App. 3d 1067, 1070 (2010).

¶ 12 These policy considerations and the reasoning in *Lemons* support the conclusion that the date of conviction for purposes of Class X offender sentencing is the date defendant was originally sentenced to probation for the 2007 PSMV offense. To conclude otherwise would lead to an absurd result where defendant removes himself from Class X sentencing because he violated the probation on the first felony, and that probationary term was revoked on a date later than the commission of a second felony. *Lemons*, 191 Ill. 2d at 160.

¶ 13 We further observe that the imposition of probation following conviction of a criminal offense is a final and appealable order, where defendant may raise any irregularity in the form of conviction originally imposed or as to the imposition of sentence. *People v. McCarty*, 101 Ill. App. 3d 355, 357 (1981), *aff'd in part, rev'd in part on other grounds*, 94 Ill. 2d 28 (1983); *People v. Lambert*, 23 Ill. App. 3d 615, 618 (1974). From this, we find further support for our conclusion that a conviction for Class X sentencing purposes is the date defendant was originally sentenced to probation, which is consistent with the goal of recidivist statutes to punish repeat offenders.

¶ 14 Defendant, nonetheless, maintains that the rule of lenity requires the Class X mandatory sentencing statute to be interpreted in his favor. Although an ambiguity in a criminal statute will ordinarily be resolved in defendant's favor, that rule of construction does not require a court to construe a statute so rigidly so as to defeat the intent of the legislature. *People v. Murphy*, 2013 IL App (2d) 120068, ¶5. Accordingly, we will not construe the statute to reach the absurd result indicated above which is clearly contrary to the intent of the legislature to punish repeat offenders. We, therefore, conclude that defendant's sentence was not void, and we honor his forfeiture of the issue. *People v. Hillier*, 237 Ill. 2d 539, 547 (2010)

¶ 15 Defendant next asserts, and the State agrees, that the trial court improperly assessed a \$35 fine against him as that fine only applies to serious traffic violations. 625 ILCS 5/16-104(d) (West 2010). Defendant was not convicted of such a crime, and pursuant to our authority under Rule 615(b)(2) (eff. Aug. 27, 1999), we vacate the \$35 fine, and direct that the trial court's order be modified to that effect.

¶ 16 Defendant also contends and the State concedes that he is entitled to a \$5 per-day pre-sentence custody credit against the \$2,000 controlled substance fine. 725 ILCS 5/110-14(a) (West 2010); 720 ILCS 570/401 (West 2010). Defendant was awarded 319 days of presentence

credit, which would afford him a \$1,595 credit. Accordingly, we correct his fine, fee and costs order to reflect this credit and the vacation of the \$35 fine, which amounts to \$915.

¶ 17 Finally, defendant contends and the State agrees that the mittimus should reflect a conviction for possession of a controlled substance with intent to deliver instead of manufacturing or delivery of a controlled substance. The indictment shows that defendant was charged, in relevant part, with "possession of a controlled substance with intent to deliver," under section 401(c)(1) of the Illinois Controlled Substances Act (Act) (720 ILCS 570/401(c)(1) (West 2010)). The title of section 401 of the Act is "Manufacture or delivery unauthorized by Act; penalties;" however, the actual offenses described in that section include not just manufacture or delivery but also possession with intent to deliver or manufacture. 720 ILCS 570/401(c)(1) (West 2010). Defendant is entitled to a mittimus reflecting the proper conviction (*People v. Peoples*, 155 Ill. 2d 422, 496 (1993)); and we, therefore, order the clerk of the circuit court to correct the mittimus to accurately reflect defendant's conviction of possession of a controlled substance with intent to deliver (*People v. McCray*, 273 Ill. App. 3d 396, 403 (1995)).

¶ 18 In light of the foregoing, we direct that the fines and fees order be modified to reflect a \$1595 credit against the controlled substances fine, vacate the \$35 fine, order the mittimus corrected as indicated, and affirm the judgment of the circuit court of Cook County in all other respects.

¶ 19 Affirmed as modified; mittimus corrected.