

2013 IL App (2d) 120950-U
No. 02-12-0950
Order filed August 19, 2013

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
SECOND DISTRICT

<i>In re</i> ALBERTO L., a Minor,)	Appeal from the Circuit Court
)	of De Kalb County.
)	
v.)	No. 10-JD-97
)	
)	Honorable
(The People of the State of Illinois, Plaintiff-)	William P. Brady,
Appellee, v. Alberto L., Defendant-Appellant).)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* A new sentencing hearing was required where the trial court erroneously concluded that aggravated battery was a forcible felony—absent the relevant statutory factors—that required a minimum sentence of five-years’ probation.

¶ 2 I. INTRODUCTION

¶ 3 Defendant, Alberto L., was charged in juvenile court with aggravated battery (720 ILCS 5/12-4(b)(3) (West 2010)). After a bench trial, defendant was found guilty of the charge. Defendant, a minor, was sentenced to a five-year term of probation, which was to terminate on defendant’s 21st birthday. He now appeals, arguing that the judge erred in finding that the offense was a forcible

felony (see 720 ILCS 5/2-8 (West 2010)) and, consequently, improperly sentenced him to what the judge believed was the minimum term of probation (see 705 ILCS 405/5-715 (West 2010)). We agree with defendant's position, and, for the following reasons, we vacate defendant's sentence and remand for further proceedings.

¶ 4

II. BACKGROUND

¶ 5 At trial on August 18, 2011, the victim, Valerie Bilek, testified that she was the assistant principal at DeKalb High School. On February 1, 2010, she responded to a report of a fight in the girls' bathroom. When she got to the scene, security had detained the two girls who had been fighting. Defendant then walked by, yelling at the girls. His language was profane, but Bilek could not hear all the words. She further testified that defendant seemed agitated. As defendant walked by, Bilek attempted to grab his shoulder, but he "darted around" her and continued down the hallway. She followed him, telling him to stop. He stopped at the end of the hall and turned around to face her. Defendant then pushed Bilek with both hands and made contact with her forearm and mid-section, causing a red mark on her arm. Defendant was then detained until a police officer assigned to the school arrived.

¶ 6 Defendant testified that his agitation the day of the battery stemmed from the fight between the two girls. One of the girls was his girlfriend, and before school defendant had told her not to fight the other girl that day. While defendant was in class, he was made aware that two girls were fighting, and he had a strong inclination that the fight involved his girlfriend and the other girl. His agitation, defendant testified, was further exacerbated by his bipolar condition.

¶ 7 Defendant submitted a motion for directed finding contending that he lacked actual knowledge that Bilek was an employee at the DeKalb High School at the time of the offense. The

trial court denied the motion, finding that the State had proven beyond a reasonable doubt that defendant made physical contact with Bilek causing bodily harm and that defendant knew she was a person of authority at the school. Defendant was subsequently found guilty of aggravated battery. He was sentenced to five-years' probation, which was set to expire on his 21st birthday.

¶ 8 Defendant filed a motion to reconsider his sentence, which was heard on July 24, 2012. At the motion hearing, the judge remarked that defendant's aggravated battery fell within the definition of "forcible felony" set forth in section 2-8 of the Criminal Code of 1961 (Code) (720 ILCS 5/2-8 (West 2010)). Accordingly, the trial court denied defendant's motion, and this appeal followed.

¶ 9 III. ANALYSIS

¶ 10 On appeal, defendant argues that he was erroneously sentenced to a term of five years' probation because the trial court incorrectly concluded that aggravated battery is a forcible felony. See 720 ILCS 5/2-8 (West 2010). Believing defendant had committed a forcible felony, the trial court, in turn, concluded that the minimum term of probation to which defendant could be sentenced was five years. See 705 ILCS 405/5-715 (2010) ("The juvenile court may terminate probation or conditional discharge and discharge the minor at any time if warranted * * *; provided, however, that the period of probation for a minor who is found to be guilty for an offense which is * * * a forcible felony shall be at least 5 years."). Defendant contends his sentence should be vacated and remanded for a new sentencing hearing. We agree.

¶ 11 At issue here is the definition of "forcible felony" contained in section 2-8 of the Code. The meaning of a statute presents a purely legal question and is reviewed *de novo*. *People v. Smith*, 259 Ill. App. 3d 492, 495 (1994). If a trial judge imposes a sentence that is not authorized by statute, that sentence is void because the judge acted without authority. *People v. Hillier*, 237 Ill. 2d 539, 544

(2010). Further, a void order can be attacked at any time. *People v. Davis*, 156 Ill. 2d 149, 155 (1993). When a reviewing court interprets a provision of the Code, it must ascertain and give effect to the intent of the legislature. *In re B.L.S.*, 202 Ill. 2d 510, 514 (2002). The language of the statute, given its plain and ordinary meaning, is the best indication of the legislature's intent. *Id.* Where a statute lists the things to which it refers, there is an inference that all omissions should be understood as intentional exclusions. *People v. O'Connell*, 227 Ill. 2d 31, 37 (2007).

¶ 12 A forcible felony, as set forth in section 2-8 of the Code, includes “aggravated battery resulting in great bodily harm or permanent disability or disfigurement and any other felony which involves the use or threat of physical force or violence against any individual.” (720 ILCS 5/2-8 (West 2010)). This court has held that this definition excludes aggravated batteries that do not result in great bodily harm or permanent disability or disfigurement. See *In re Angelique E.* 389 Ill. App. 3d 430, 433 (2009). The State does not dispute this holding or argue that the acts of defendant in this case resulted in great bodily harm or caused permanent disability or disfigurement.

¶ 13 However, the State argues that defendant has forfeited review of this issue because he failed to file a post-sentencing motion and, absent plain error, this constitutes a waiver of review. *People v. Reed*, 177 Ill. 2d 389, 392-395 (1997). Where the respondent also failed to raise plain error on appeal, he has forfeited the plain-error issue as well. *Hillier*, 237 Ill. 2d at 545-46. Further, under Supreme Court Rule 341(h)(7) (eff. February 6, 2013), points that are not argued in the opening brief are waived and shall not be raised in defendant's reply brief. 177 Ill. 2d R. 341(h)(7). In this case, defendant did not raise plain-error until he filed his reply brief. However, Rule 341(h)(7) notwithstanding, raising plain error for the first time in a reply brief is enough to allow us to conduct

plain-error review. *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010); *People v. Williams*, 193 Ill. 2d 306, 347-48 (2000).

¶ 14 The plain error rule applies to a sentencing issue when the error is so fundamental that the defendant may have been deprived of a fair sentencing hearing. In *People v. Hausman*, 287 Ill. App. 3d 1069, 1071-72 (1997), the reviewing court explained:

“A defendant is entitled to be sentenced by a trial judge who knows the minimum and maximum sentences for the offense. A misunderstanding as alleged here falls within the second prong of the plain error rule.”

Such is the case here. A fact finder’s misinterpretation of the proper sentencing range constitutes plain error. *Id.*

¶ 15 The State acknowledges that error occurred in this case. In light of our holding that forfeiture does not apply here, defendant’s cause must be remanded for resentencing. See *Angelique E.* 389 Ill. App. 3d at 433. A new sentencing hearing is mandated “when it appears that the mistaken belief of the judge *arguably* influenced the sentencing decision.” (Emphasis in the original.) *Hausman*, 287 Ill. App. 3d at 1072 (quoting *People v. Eddington*, 77 Ill. 2d 41, 48 (1979)). The record here clearly reflects that the trial court sentenced defendant to 60 months’ probation based on a mistaken belief that aggravated battery is a “forcible felony” as defined in section 2-8 of the Code (720 ILCS 5/2-8 (West 2010)). 705 ILCS 405/5-715 (West 2010). The trial court specifically remarked, “A forcible is required to be five years,” and, “this [aggravated battery] falls under the definition of forcible felony.” Because the mistaken belief of the trial court influenced the sentencing decision, a new sentencing hearing is required.

¶ 16

IV. CONCLUSION

¶ 17 For the aforementioned reasons, we vacate defendant's sentence and remand for further proceedings consistent with this order.

¶ 18 Sentence vacated; cause remanded.