

No. 1-13-1039

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
FIRST JUDICIAL DISTRICT

| | | |
|--------------------------------------|---|---------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 04 CR 15330 |
| |) | |
| ROBERT JONES, |) | Honorable |
| |) | Carol A. Kipperman, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE NEVILLE delivered the judgment of the court.
Justices Pucinski and Mason concurred in the judgment.

O R D E R

¶ 1 *Held:* Court did not have statutory authority to impose extended-term sentence at resentencing based on convictions arising after defendant's conviction and initial sentencing, so that sentence must be modified to maximum unextended sentence.

¶ 2 Following a bench trial, Robert Jones, the defendant, was convicted of two counts of armed robbery and sentenced to concurrent prison terms of 45 years, including a 15-year firearm enhancement. On direct appeal, we affirmed his convictions but vacated his sentence and remanded for resentencing. *People v. Jones*, 2012 IL App (1st) 100527. On remand, the court

sentenced him to concurrent extended prison terms of 40 years. On appeal, defendant contends that the court had no statutory authority to impose an extended term based on convictions arising after his conviction and initial sentencing herein, so that his sentence is void. The State responds that the court is so authorized and the sentence is not erroneous. For the reasons stated below, we agree with the defendant and modify his sentences to concurrent prison terms of 30 years.

¶ 3 Defendant was charged with armed robbery of two customers at a nail salon in April 2004 and convicted in a 2009 trial on pre-trial and trial identifications by the victims. He was sentenced on February 24, 2010, to 45 years' imprisonment, or the maximum 30-year penalty for armed robbery plus a 15-year firearm enhancement. At the time of sentencing, the defendant had multiple prior felony convictions through 1999, none being a Class X felony, and pending cases of armed robbery (04CR15326), aggravated vehicular hijacking (04CR15327), and attempted murder, aggravated vehicular hijacking, armed robbery, and aggravated kidnapping (04CR15329).

¶ 4 On appeal, we held that the 15-year sentence enhancement for armed robbery with a firearm is unconstitutional on its face, and thus void, as it violates the proportionate penalties clause. *Jones*, ¶¶ 31-35, citing *People v. Clemons*, 2012 IL 107821. We therefore vacated defendant's sentence and remanded for resentencing while otherwise affirming the circuit court.

¶ 5 Upon remand, the trial court ordered a new presentencing investigation (PSI), which showed, in addition to the beforementioned prior convictions, an August 2011 guilty plea and sentence of 25 years' imprisonment for the Class X offenses of aggravated vehicular hijacking, armed robbery, and aggravated kidnapping in 04CR15329. No party objected to or corrected the PSI.

¶ 6 At resentencing on January 28, 2013, the State argued that the original 45-year sentence was appropriate and would be supported by aggravating factors: that defendant's conduct threatened serious harm, that he has a history of prior criminal activity, that his sentence would deter others, and that he committed this felony offense while on mandatory supervised release (MSR) for an earlier offense. Defendant argued that he should receive the same 25-year sentence he received in 04CR15329. The court found that it had the discretion to impose an extended-term sentence, expressly found that defendant was on MSR during the instant offense, noted that the court is not bound by its 25-year sentence in 04CR15329 to impose the same here, and sentenced defendant to concurrent prison terms of 40 years. This appeal timely followed.

¶ 7 On appeal, defendant contends that the court had no statutory authority to impose an extended term based on convictions arising after his conviction and initial sentencing, and, therefore, his sentence is void. The State responds that the court has the authority to impose such a sentence so that his sentence is not erroneous.

¶ 8 Armed robbery is a Class X felony punishable by 6 to 30 years' imprisonment or an extended term of up to 60 years. 720 ILCS 5/18-2(b); 730 ILCS 5/5-4.5-25(a) (West 2010). Section 5-5-3.2(b) of the Code of Corrections (Code) lists grounds for imposing an extended-term sentence, including:

"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, excluding time spent in custody, and such charges are

separately brought and tried and arise out of different series of acts." (Emphasis added.) 730 ILCS 5/5-5-3.2(b)(1) (West 2010).

By contrast, section 5-5-3.2(a) of the Code enumerates aggravating factors that "shall be accorded weight in favor of imposing a term of imprisonment or may be considered by the court as reasons to impose a more severe sentence" within the statutorily-applicable range. 730 ILCS 5/5-5-3.2(a) (West 2010).

¶ 9 Here, the factors argued by the State, and those found by the court, at resentencing are section 5-5-3.2(a) aggravating factors rather than section 5-5-3.2(b) extended-term grounds. The only possible statutory basis for defendant's extended term is section 5-5-3.2(b)(1), and notably the State posits no other. However, that provision provides in clear language that the qualifying conviction must precede the instant conviction. Defendant's only Class X felony conviction, other than the 2010 conviction in this case, was a guilty plea and convictions of the Class X offenses in August 2011. Thus, without a previous felony conviction, there was no statutory authority for an extended term here, so the court at resentencing could not impose more than 30 years' imprisonment for each of defendant's armed robbery convictions. A sentence in excess of the applicable statutory maximum is void to the extent it exceeds that maximum. *People v. Moran*, 2012 IL App (1st) 111165, ¶ 31, citing *People v. Brown*, 225 Ill. 2d 188, 205 (2007).

¶ 10 The cases cited by the State for the proposition that the court could impose an extended term here are inapplicable. In *People v. Vaughn*, 301 Ill. App. 3d 242 (1998), a defendant who pled guilty to multiple offenses was sentenced for the qualifying offense

and then later in the same hearing given an extended term under section 5-5-3.2(b)(1) on another offense. The *Vaughn* court found the extended-term sentence proper because the trial court consciously sentenced him on the qualifying offense previously to the extended-term offense so that it could impose the extended term. Thus, it was *dicta* when the *Vaughn* court also found that the timing provision in the habitual criminal sentencing law (730 ILCS 5/5-4.5-95(a) (West 2010), formerly 720 ILCS 5/33B-1) means that "we decline to add timing restrictions to section 5-5-3.2(b)(1) by judicial fiat." *Vaughn*, 301 Ill. App. 3d at 247. We do not consider this persuasive *dicta* but find that the legislature itself "add[ed] timing restrictions to section 5-5-3.2(b)(1)" by including the unambiguous word "previously" so that it would be "judicial fiat" for us to ignore it.

¶ 11 In *People v. Rivera*, 346 Ill. App. 3d 398 (2002), a defendant was convicted of murder and, on a finding that his crime was exceptionally brutal and heinous, sentenced to 60 years' imprisonment. That conviction was vacated and a new trial held. Upon the resulting conviction, he was sentenced to an extended term of 80 years' imprisonment on a repeat brutal-and-heinous finding and the new grounds that he had been convicted of two weapons-in-prison offenses between his first and second murder trials. After disposing of his *Apprendi* challenge to the brutal-and-heinous finding, this court found that, "[t]hrough the events in prison took place after the murder for which he was on trial, the law operates so as to make the unlawful-use-of-a-weapon-by-a-felon-while-incarcerated conviction considered as a prior event" so that "Rivera's unlawful-use-of-a-weapon-by-a-felon-while-incarcerated charges *** effectively predate his murder conviction." *Rivera*, 346 Ill. App. 3d at 407. However, unlike the vacated murder

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conviction in *Rivera*, our defendant's convictions for armed robbery in February 2010 were not vacated but affirmed on direct appeal, with a remand only for resentencing, so that his 2011 convictions are not previous to the 2010 convictions as section 5-5-3.2(b)(1) requires. The principle recited by *Rivera* that it is generally not *unconstitutional* to consider subsequent offenses at resentencing does not override a *statutory* provision that applies here to the contrary.

¶ 12 Accordingly, we modify defendant's sentence to concurrent prison terms of 30 years and otherwise affirm the judgment of the circuit court.

¶ 13 Affirmed as modified.