

2014 IL App (2d) 121078-U
No. 2-12-1078
Order filed March 31, 2014

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

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Carroll County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10-CF-59
)	
RANDOLPH J. PLOTE,)	Honorable
)	Val Gunnarsson,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's extended-term sentence for aggravated driving while his license was revoked was void, as the offense was less serious than, and was part of the same course of conduct as, his offense of aggravated driving under the influence of alcohol; thus, we reduced the sentence to the maximum nonextended term.

¶ 2 Defendant, Randolph J. Plote, appeals the trial court's order dismissing his postconviction petition. He contends that his six-year, extended-term sentence for aggravated driving while his license was revoked (DWLR) (625 ILCS 5/6-303(d) (West 2010)) is void because DWLR was not the most serious offense of which he was convicted. We agree and vacate the void portion of the sentence.

¶ 3 Following his arrest in November 2010, defendant pleaded guilty to aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(d)(1)(A) (West 2010)), a Class 1 felony (625 ILCS 5/11-501(d)(2)(D) (West 2010)), and aggravated DWLR, a Class 4 felony (625 ILCS 5/6-303(d) (West 2010)). By agreement, he was sentenced to four years' imprisonment for DUI and to an extended term of six years for DWLR.

¶ 4 After his direct appeal was dismissed for lack of jurisdiction (*People v. Plote*, 2012 IL App (2d) 110853-U), he filed a postconviction petition raising various allegations of ineffective assistance of counsel. The trial court dismissed the petition, and defendant timely appeals.

¶ 5 On appeal, defendant does not argue the merits of any issue raised in the petition. Instead, he argues for the first time that the extended-term sentence for DWLR is void. Initially, we note that defendant can raise this issue, even though he does so for the first time on appeal from the dismissal of a postconviction petition. See *People v. Caballero*, 228 Ill. 2d 79, 88 (2008).

¶ 6 The portion of a negotiated sentence that exceeds the statutory maximum is void. *People v. Hudson*, 2012 IL App (2d) 100484, ¶ 20. However, such a sentence does not necessarily void the entire plea agreement. *Id.* Rather, the reviewing court may simply vacate the unauthorized portion of the sentence. *Id.* Whether a sentence conforms to statutory requirements is an issue of law that we review *de novo*. *People v. Thompson*, 209 Ill. 2d 19, 22 (2004).

¶ 7 Defendant contends that the extended-term sentence for DWLR is void because DWLR was not the most serious offense of which he was convicted. A trial court may sentence an offender to an extended term for an offense “within the class of the most serious offense of which the offender was convicted.” 730 ILCS 5/5-8-2(a) (West 2010). However, a court may

impose an extended-term sentence for a less serious crime if the offenses were not part of the same course of conduct. *People v. Coleman*, 166 Ill. 2d 247, 255-56 (1995).

¶ 8 The State acknowledges that aggravated DWLR, a Class 4 felony, is less serious than aggravated DUI, which, as charged here, is a Class 1 felony. However, citing *People v. DiPace*, 354 Ill. App. 3d 104 (2004), the State contends that the two offenses were not part of the same course of conduct. *DiPace* does not control here. In *DiPace*, we held that the defendant could be convicted of and sentenced for both DUI and DWLR. We held that driving under the influence of alcohol and driving with a revoked license were completely separate acts, albeit committed simultaneously. *Id.* at 116. *Coleman*, however, held that, to impose an extended-term sentence on a less serious offense, the two offenses must be part of different courses of conduct. *Coleman*, 166 Ill. 2d at 255-56. A course of conduct, by definition, consists of more than one act. Thus, although *DiPace* held that DUI and DWLR involved two separate acts, it did not hold that they were not part of the same course of conduct.

¶ 9 More nearly on point is *People v. Bell*, 196 Ill. 2d 343 (2001), where our supreme court held that separate but closely related acts were part of the same course of conduct. Noting that the appellate court had developed two different tests for applying section 5-8-2(a), the “independent motivation” test and the “multiple acts” test (*id.* at 348), the court chose the former. *Id.* at 351. The court observed that, under the “multiple acts” test, virtually all offenses would be unrelated because different offenses generally require proof of different physical acts. *Id.* at 353. Applying the “independent motivation” test to the facts before it, the court held that the defendant’s offenses of armed robbery and aggravated battery were part of a single course of conduct and thus it vacated his extended-term sentence for the less severe aggravated battery conviction. *Id.* at 355.

¶ 10 *People v. Foster*, 316 Ill. App. 3d 855, 858 (2000), although purportedly applying the “multiple acts” test that *Bell* later rejected, nevertheless reached a similar conclusion. The reviewing court held that the defendant’s convictions of aggravated battery and domestic battery, although based on separate acts, were part of the same course of conduct for purposes of applying section 5-8-2(a).

¶ 11 Here, too, defendant’s convictions of aggravated DUI and aggravated DWLR, while sufficiently distinct to support separate convictions, were nevertheless part of the same course of conduct. Therefore, defendant’s extended-term sentence for DWLR is unauthorized. Accordingly, we vacate the extended-term portion of the sentence and reduce the sentence to the statutory maximum nonextended term of three years’ imprisonment.

¶ 12 The judgment of the circuit court of Carroll County is affirmed in part and vacated in part.

¶ 13 Affirmed in part and vacated in part.