

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).

2014 IL App (4th) 120989-U

NO. 4-12-0989

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

Order filed March 19, 2014

Modified upon denial of rehearing March 10, 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
ROBIN E. PACKINGHAM,	)	No. 09CF932
Defendant-Appellant.	)	
	)	Honorable
	)	Leslie J. Graves,
	)	Judge Presiding.

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JUSTICE KNECHT delivered the judgment of the court.  
Presiding Justice Appleton and Justice Steigmann concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court affirmed because defendant received the benefit of his fully negotiated plea agreement, and his MSR term will be corrected; no new sentencing hearing is required.

¶ 2 In March 2010, as part of a fully negotiated plea agreement, defendant, Robin E. Packingham, pleaded guilty to one count of residential burglary (720 ILCS 5/19-3(a) (West 2008)) and was sentenced to 10 years in prison, with a 3-year term of mandatory supervised release (MSR) (the MSR term that attaches to Class X sentences). Defendant took no direct appeal. In June 2011, defendant filed a *pro se* postconviction petition alleging his constitutional rights were violated because the trial court improperly imposed a Class X sentence when he lacked the prior convictions required for the imposition of such sentence. In December 2011, the State filed a motion to dismiss. In October 2012, the trial court denied defendant's postconviction petition at the second stage, after counsel had been appointed and an amended

postconviction petition filed. Defendant appeals, asserting the trial court erred in denying his postconviction petition because he (1) does not have the two qualifying prior felony convictions required for the imposition of a Class X sentence and (2) received ineffective assistance of trial counsel. Our prior decision, before modification, vacated defendant's sentence and remanded for a new sentencing hearing. We were in error to do so. Defendant entered into and received the benefit of a fully negotiated plea. We affirm the trial court and remand, directing the trial court to amend the sentencing order to reflect only that defendant is not sentenced as a Class X offender and only a two-year MSR term applies.

¶ 3

### I. BACKGROUND

¶ 4 In November 2009, the State charged defendant by information with residential burglary (720 ILCS 5/19-3(a) (West 2008)) (count I), burglary (720 ILCS 5/19-1(a) (West 2008)) (count II), and resisting a peace officer (720 ILCS 5/31-1 (West 2008)) (count III), based on conduct of September 20, 2009. In March 2010, as part of a fully negotiated plea agreement, defendant pleaded guilty to one count of residential burglary (720 ILCS 5/19-3(a) (West 2008)) in exchange for the dismissal of the other two charges and a 10-year prison sentence, followed by a 3-year term of MSR. Defendant took no direct appeal.

¶ 5

In June 2011, defendant filed a *pro se* postconviction petition alleging his constitutional rights were violated because the trial court improperly imposed a Class X sentence when he lacked the prior convictions required for the imposition of such sentence. Defendant requested his sentence be reduced to a seven-year prison term, with a two-year MSR term or "whatever lesser term" the court deemed appropriate. In December 2011, the State filed a motion to dismiss defendant's *pro se* postconviction petition, asserting (1) the petition failed to provide grounds which would constitute a substantial denial of defendant's rights and (2) the

sentencing issue was waived because defendant did not raise it on direct appeal. Counsel was appointed for defendant and an amended petition was filed in August 2012, raising the issue of ineffective assistance of counsel for the failure of trial counsel to explain to defendant he would be sentenced as a Class X offender.

¶ 6 In September 2012, the State filed a memorandum in support of its motion to dismiss defendant's postconviction petition, claiming (1) defendant waived his improper sentence argument because he did not raise it in a direct appeal and (2) trial counsel was not ineffective because he "still functioned as counsel for Defendant in negotiating his plea" and did not "completely abandon his duty to represent Defendant." At the October 2012 hearing on defendant's postconviction petition, the State informed the trial court defendant was eligible for a Class X sentence, but neither party set forth defendant's prior convictions qualifying him for Class X sentencing. The court denied defendant's petition, finding "the facts surrounding the sentencing of Defendant as a Class X offender were clearly made a matter of record" and, further, defendant waived this issue for failing to assert it on direct appeal. Additionally, the court found defendant's ineffective-assistance-of-counsel claim failed to meet the first prong of the *Strickland v. Washington*, 466 U.S. 668 (1984), test.

¶ 7 This appeal followed.

¶ 8 II. ANALYSIS

¶ 9 On appeal, defendant argues the trial court erred in denying his postconviction petition because he (1) does not have the two qualifying prior felony convictions required for the imposition of a Class X sentence and (2) received ineffective assistance of trial counsel.

¶ 10 A. Standard of Review

¶ 11 At the second stage of postconviction proceedings, the trial court is tasked with determining whether a defendant's "petition and any accompanying documentation make a substantial showing of a constitutional violation." *People v. Edwards*, 197 Ill. 2d 239, 246, 757 N.E.2d 442, 446 (2001). We review the dismissal of a postconviction petition without an evidentiary hearing *de novo*. *People v. Longbrake*, 2013 IL App (4th) 120665, ¶ 12, 996 N.E.2d 1263.

¶ 12 B. Class X Sentence

¶ 13 Defendant first asserts the trial court erred in denying his postconviction petition because he does not have the two qualifying convictions necessary for the imposition of a Class X sentence and, thus, the portion of his sentence in excess of the statutory limits of a Class 1 felony sentence is void. The State concedes defendant should not have been sentenced as a Class X offender, and the sentence is void to the extent it exceeds the statutory limits of a Class 1 felony sentence (730 ILCS 5/5-8-1(d)(2) (West 2008)) by providing for a three-year MSR term.

¶ 14 A sentence not authorized by statute is void and may be challenged at any time. See *People v. Brown*, 225 Ill. 2d 188, 205, 866 N.E.2d 1163, 1173 (2007) ("a sentence, or portion thereof, not authorized by statute is void \*\*\* [but] only to the extent that it exceeds what the law permits. The legally authorized portion of the sentence remains valid"). Here, defendant pleaded guilty to one count of residential burglary, a Class 1 felony, in exchange for the dismissal of two other charges and was sentenced to 10 years' imprisonment, followed by a 3-year MSR term, a Class X sentence.

¶ 15 Section 5-4.5-95(b) of the Unified Code of Corrections (730 ILCS 5/5-4.5-95(b) (West 2012), formerly 730 ILCS 5-5-3(c)(8) (West 2008)) provides as follows:

"When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now (the date the Class 1 or Class 2 felony was committed) classified in Illinois as a Class 2 or greater Class felony and those charges are separately brought and tried and arise out of different series of acts, that defendant shall be sentenced as a Class X offender."

The statute is clear and unambiguous: two prior Class 2 or greater felony convictions are required before a Class X sentence may be imposed.

¶ 16 In this case, the trial court noted, "the facts surrounding the sentencing of Defendant as a Class X offender were clearly made a matter of record." Our review of the record belies this finding. The prison record attached to defendant's brief reflects only one Class 1 felony conviction, in Sangamon County case No. 99-CF-978. The State admits it was unable to locate any prior Class 2 or greater felony convictions other than the one shown on the prison record attached to defendant's brief. The portion of defendant's sentence in excess of the statutory limits for a Class 1 felony is void. However, defendant entered into a fully negotiated plea of guilty to residential burglary for a sentence of 10 years. Two other charges were dismissed. Defendant received the benefit of his bargain.

¶ 17 The sentencing range for a nonextended Class 1 felony (other than second degree murder) is not less than 4 years and not more than 15 years, followed by a 2-year term of MSR. 730 ILCS 5/5-4.5-30 (a), (l) (West 2008). Defendant was sentenced to 10 years' imprisonment, followed by a 3-year term of MSR. The 10-year prison sentence imposed in this case is within

the statutory limits for a Class 1 felony. The trial court apparently held the erroneous belief defendant had two qualifying felonies subjecting him to Class X sentencing. This false impression could only have impacted the length of the MSR term imposed upon defendant, but not the prison sentence. Defendant cannot accept the benefits of a fully negotiated plea agreement and then seek remand for resentencing without seeking to withdraw his plea of guilty. Defendant is entitled to a reduction of his MSR term to two years.

¶ 18 C. Ineffective-Assistance-of-Counsel Claim

¶ 19 Defendant further argues the trial court erred in denying his postconviction petition without an evidentiary hearing because he was prejudiced by trial counsel's deficient performance. Specifically, defendant asserts, had counsel discussed the Class X sentencing requirements with him, he would have informed counsel he did not have the required prior convictions and, thus, would not have been sentenced as a Class X offender.

¶ 20 No evidentiary hearing is required. Defendant entered into a fully negotiated plea for a 10-year sentence. He received a 10-year sentence. We have corrected the erroneous imposition of a three-year MSR term. Defendant has suffered no prejudice.

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated, we affirm the trial court and remand for a correction of the written sentencing order.

¶ 23 Affirmed; cause remanded with directions.