

FIRST DIVISION  
November 2, 2015

No. 1-13-3509

**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. 13 CR 2099
	)	
MICHAEL LITTLE,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE LIU delivered the judgment of the court.  
Justice Cunningham and Justice Harris concurred in the judgment.

**ORDER**

¶ 1 *Held:* There was no improper double enhancement when, in sentencing defendant for armed habitual criminal, court referred to qualifying prior convictions but did not impose an enhanced sentence nor consider an improper aggravating factor.

¶ 2 Following a bench trial, defendant Michael Little was convicted of being an armed habitual criminal and of possession of a controlled substance with intent to deliver, and was sentenced to concurrent prison terms of eight years. On appeal, defendant contends that the court subjected him to improper double enhancement in sentencing him for the offense of armed

habitual criminal when it considered in aggravation the prior convictions that rendered him an armed habitual criminal. For the reasons stated below, we affirm.

¶ 3 Defendant was charged with armed violence, armed habitual criminal, possession of a controlled substance with intent to deliver, and two counts of unlawful possession of a weapon by a felon, all allegedly committed on or about December 30, 2012. The indictment alleged that he possessed a handgun and ammunition, having been previously convicted of manufacture or delivery of a controlled substance in case 97 CR 20123 and possession of a controlled substance in case 98 CR 21551. The indictment also alleged that he simultaneously possessed more than 15 grams but less than 100 grams of heroin.

¶ 4 At trial, three police officers testified. After a vehicle was stopped for a traffic violation, the front-seat passenger – defendant – made furtive movements despite a police instruction to show his hands. A briefcase that defendant was seen hiding under the seat was found to contain drug-processing supplies. A loaded handgun, a bag of a tan rocky substance, and a bag of a white rocky substance were found in the front-passenger doorjamb area. Defendant was arrested and a bag containing a white substance was found in his jacket. Defendant gave a post-arrest statement admitting to possessing the gun and to selling narcotics. The State presented certified copies of defendant's Class 1 and Class 2 felony convictions in cases 98 CR 21551 and 97 CR 20123 respectively. The parties stipulated to the chain of custody for a handgun, 13 rounds of ammunition, and three bags of suspected heroin. They also stipulated to the effect that the two bags from the vehicle contained 55.5 grams and 26.6 grams of a substance containing heroin while the bag from defendant's jacket did not contain a controlled substance. The court granted a directed finding as to armed violence, found defendant guilty of all other counts (with the counts

of unlawful possession of a weapon by a felon merged into armed habitual criminal), and ordered a presentencing investigation (PSI). The court later denied defendant's post-trial motion.

¶ 5 The PSI stated that defendant had three prior felony convictions: in 2005 for Class 4 possession of a controlled substance in case 04 CR 16677, in 1998 for Class 1 manufacture or delivery of a controlled substance in case 98 CR 21551, and in 1997 for Class 2 manufacture or delivery of a controlled substance in case 97 CR 20123. The PSI stated that defendant has a "fair" relationship with his father and had a "good" relationship with his mother until her 2013 death, and that his childhood was "fair" with some neglect but not abuse. Defendant has no full siblings and described a "close" relationship with some of his half-siblings. He has one child. He attended but did not complete high school, and stated in the PSI that he plans to seek his GED. He was unemployed as of his arrest but worked for two years as an office clerk for a university until his 2012 termination for "not getting along with other staff." Defendant claimed good physical and mental health, stated that he had not drunk alcohol for over 10 years, and admitted daily marijuana and "syrup" use until his arrest. He denied gang membership and stated that he spends his time "at strip clubs" and playing video games but also "helping the youth" and distributing food at a public park with his cousin.

¶ 6 At sentencing, the State amended the PSI to include a conviction for the Class 3 felony of forgery in DuPage County case 07 CF 3183. The State noted that defendant's offenses of armed habitual criminal and possession of a controlled substance with intent to deliver are both Class X felonies. The State argued that defendant's record including four prior felony convictions shows a disregard for public safety, that he was unemployed due to an admitted inability to "get along with the people he works with," that he uses marijuana and "syrup" daily, and by his admission does not contribute to society. The State sought a prison sentence of at least 15 years.

¶ 7 The defense argued that all of defendant's offenses were non-violent and all but forgery were possessory, noting that he was not seen brandishing a gun or selling narcotics in this case. Arguing that defendant has an employment history, strong family relationships, and a history of volunteerism, the defense requested the minimum sentence. Defendant personally apologized to his family and the court "for being in this situation."

¶ 8 The court noted that defendant has "been in this situation before" and "does have some criminal history" but they were "possessory offenses, not crimes of violence." The court stated that it heard the trial evidence and then sentenced defendant to concurrent prison terms of eight years on the offenses of armed habitual criminal and possession of a controlled substance with intent to deliver. After the court admonished defendant of his appeal rights, he filed a motion to reconsider his sentence, arguing in relevant part that the court improperly considered in aggravation matters implicit in the offense. The court denied the motion without further findings, and this appeal timely followed.

¶ 9 On appeal, defendant contends that the trial court subjected him to improper double enhancement in sentencing him for the offense of armed habitual criminal when it considered in aggravation the prior convictions that rendered him an armed habitual criminal.

¶ 10 In *People v. Thomas*, 171 Ill. 2d 207 (1996), our supreme court considered the proposition "that the trial court could not use defendant's two prior Class 2 felony convictions both to qualify defendant for a Class X term under [the mandatory Class X offender statute] and as an aggravating factor in sentencing defendant beyond the minimum Class X term." *Id.* at 223. In rejecting that proposition, the *Thomas* court defined double enhancement: "Double enhancement occurs when a factor already used to enhance an offense or penalty is reused to subject a defendant to a further enhanced offense or penalty." *Id.* The supreme court held that a

trial court considering an aggravating factor within the applicable sentencing range "does not constitute an enhancement, because the discretionary act of a sentencing court in fashioning a particular sentence tailored to the needs of society and the defendant, within the available parameters, is a requisite part of every individualized sentencing determination.[Citation.] The judicial exercise of this discretion, in fashioning an appropriate sentence within the framework provided by the legislature, is not properly understood as an 'enhancement.' " *Id.* at 224-25. Moreover, our supreme court has repeatedly stated that, "although sentencing courts cannot consider an element inherent in the offense as an aggravating factor, that rule would not be rigidly applied, 'thereby restricting the function of a sentencing judge by forcing him to ignore factors relevant to the imposition of sentence.' " *Id.* at 226-27, quoting *People v. Saldivar*, 113 Ill. 2d 256, 268 (1986). Especially in light of the legislature's clear intent to punish recidivists more severely, the *Thomas* court held that:

"Although the legislature considered the prior convictions of certain defendants in establishing their eligibility for Class X sentencing, the legislature did not intend to impede a sentencing court's discretion in fashioning an appropriate sentence, within the Class X range, by precluding consideration of their criminal history as an aggravating factor. Rather, while the *fact* of a defendant's prior convictions determines his eligibility for a Class X sentence, it is the *nature and circumstances* of these prior convictions which, along with other factors in aggravation and mitigation, determine the exact length of that sentence." (Emphasis in original.) *Id.* at 227-28.

¶ 11 Here, as a threshold matter we are unconvinced that the trial court weighed defendant's prior convictions in aggravation as defendant contends. The court made two references to his criminal record before sentencing him, the first being in fact a comment on his immediately-preceding expression of remorse and the second reflecting defendant's mitigation argument that his prior offenses were non-violent and mostly merely possessory. To the extent the court considered the nature and circumstances of defendant's prior offenses, it did so in mitigation rather than aggravation.

¶ 12 Defendant relies upon the following definition of a double enhancement, and particularly its first prong: "A double enhancement occurs when either (1) a single factor is used both as an element of an offense and as a basis for imposing a harsher sentence than might otherwise have been imposed, or (2) the same factor is used twice to elevate the severity of the offense itself." *People v. Guevara*, 216 Ill. 2d 533, 545 (2005). However, the generic language of the first prong does not inexorably lead to the proposition that a double enhancement exists whenever the trial court considers prior convictions as an aggravating factor when sentencing *within* a statutory range enhanced by those convictions. In this context, we find *Thomas* highly relevant. While *Thomas* concerns the mandatory Class X offender statute rather than the offense of armed habitual criminal, the *Thomas* court *was* faced squarely with the aforesaid issue: whether considering prior convictions as an aggravating factor within a statutory range enhanced by those convictions constitutes a double enhancement. We are particularly persuaded by *Thomas*'s definition of double enhancement, its well-considered distinction between elevating an offense or extending a sentencing range on the one hand and on the other hand the necessity of sentencing a defendant within the applicable range based on all the circumstances, and its emphasis that our

supreme court does not rigidly apply the rule that a sentencing court should not consider an element inherent in the offense as an aggravating factor.

¶ 13 Stated another way, this case falls firmly into the line of cases where we determine whether the trial court improperly found aggravation in an element of the offense. In such cases, we have based our determinations on a consideration of the particular circumstances rather than any categorical rule. We presume that the court employed proper legal reasoning in sentencing, and the defendant bears the burden of establishing that a sentence was based on an improper consideration. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶¶ 8, 9. We also keep in mind that the trial court is expected to state on the record the factors that led to its sentencing decision, which "was not intended to be a trap for the trial court" by mentioning in its findings a factor inherent in the offense. *Id.*, ¶ 17. We review *de novo* the legal question of whether a trial court relied on an improper factor in sentencing a defendant. *Id.*, ¶ 8.

¶ 14 Defendant cites *Abdelhadi*, where this court reviewed a sentence for aggravated arson and found an improper aggravation based on causing or threatening serious harm, when:

"The trial court's recitation of the aggravating factors mirrored the factors that the State argued in aggravation. The mirroring \*\*\* shows not that the trial court merely mentioned the threat of harm to others in its summary of the circumstances of the case or in stressing the seriousness of the offense, but that the trial court actually considered that threat of harm as a factor in aggravation. Even in the presence of other, legitimate aggravating factors like the defendant's being on probation at the time of the offense and his criminal history, we conclude that the trial court's reliance on the threat of 'harm to others' was improper." *Id.*, ¶ 12.

¶ 15 However, we consider the circumstances in *People v. Morrow*, 2014 IL App (2d) 130718, where we did not find improper aggravation, more applicable to the instant case:

"Here, defendant contends that the trial court's repeated remarks regarding his previous convictions constituted a double enhancement. But looking at the record as a whole, it is clear that the court's comments went only to the nature and circumstances of the offense and other proper factors. Unlike in *Abdelhadi* \*\*\*, the court did not rely on the mere fact that defendant had at least five previous convictions in aggravation to impose a harsher sentence than it would have otherwise imposed. Unlike in [*Abdelhadi*], where the court specifically stated that it was considering an element of the offense in aggravation, here the court never specifically stated that it was using the prior convictions in aggravation. \*\*\* Instead, \*\*\* the court's comments show that it was discussing the prior convictions in order to address defendant's likelihood to engage in criminal activity in the future, his inability to learn from prior punishments, the need for deterrence, and the protection of society. These were legitimate concerns that the court was entitled to consider when imposing a sentence. Indeed, instead of using the prior convictions as a factor in aggravation, the court specifically stated that it was 'assessing risk' and it tailored its comments as a response to defendant's attempts to discount his recidivism as a series of 'mistakes.' " *Id.*, ¶ 19.

¶ 16 Here, as noted above, the trial court's comments on defendant's prior convictions were an assessment of his statement of remorse and an assessment of the nature or circumstances of his prior convictions, both matters properly considered in sentencing. Moreover, unlike *Abdelhadi*, the court's sentencing findings mirrored defendant's mitigation argument rather than the State's

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argument in aggravation. Under such circumstances, we find no impropriety in defendant's sentencing.

¶ 17 Accordingly, the judgment of the circuit court is affirmed.

¶ 18 Affirmed.