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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. 10 CR 6488
)	
WILLIE JOHNSON,)	Honorable
)	John J. Hynes,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's convictions and sentences affirmed over his forfeited sentencing claim.

¶ 2 This case is before this court a second time following our initial order remanding the case for resentencing on defendant's conviction after a bench trial for armed robbery while armed with a firearm. On remand, defendant, Willie Johnson, was sentenced to a maximum term of 30 years' imprisonment to be served with the undisturbed five-year concurrent terms imposed on his

convictions for unlawful use of a weapon by a felon and aggravated battery/great bodily harm which were to run consecutively to the term imposed on the armed robbery conviction. On appeal, Johnson contends that the trial court's finding of great bodily harm on remand, which requires that he serve 85% of his sentence, was erroneous and must be vacated because it falls outside of the sentencing scheme and is an increase in his sentence.

¶ 3 The details of the trial and original sentencing hearing are adequately stated in Johnson's prior direct appeal, *People v. Johnson*, 2013 IL App (1st) 120413, and, therefore, will only be discussed here to the extent necessary to address the issues raised. Suffice to say, Johnson was convicted of armed robbery, unlawful use of a weapon by a felon and aggravated battery, and sentenced to an aggregate term of 75 years' imprisonment. In connection with his original sentencing hearing, the trial court found that Johnson engaged in conduct that resulted in great bodily harm. On appeal, Johnson contested only the 50-year sentence imposed on his armed robbery conviction.

¶ 4 The record shows, in pertinent part, that Johnson was originally sentenced to that term after the court found him eligible for extended-term sentencing pursuant to section 5-5-3.2(b)(7) of the Unified Code of Corrections (Code) (730 ILCS 5/5-5-3.2(b)(7) (West 2010)). This court disagreed and found that Johnson was not eligible for extended-term sentencing because he did not commit a Class X felony in the 10 years preceding the instant Class X conviction, and accordingly, that the extended portion of Johnson's armed robbery sentence was void,¹ requiring a remand for resentencing on that conviction. *People v. Johnson*, 2013 IL App (1st) 120413, ¶ 21.

¹ We noted that our supreme court has since abrogated the void sentence doctrine. *People v. Castleberry*, 2015 IL 116916.

¶ 5 At the sentencing hearing held on remand, the State noted in aggravation that Johnson joined the Gangster Disciples Gang in 1998, and had five felonies as a juvenile. His adult criminal career started in 2006, when he was convicted of possession of a stolen motor vehicle and sentenced to three years' imprisonment, and in 2007, Johnson was convicted of residential burglary and sentenced to six years' imprisonment. The State also noted the facts of this case, which involved Johnson and another assailant confronting a Barraco's pizza deliveryman in Evergreen Park as he moved towards his car. Johnson placed his arm around the victim's neck and held a gun to his head while his accomplice rifled through the victim's car. Johnson ordered the victim to lie on the ground, and when he complied, Johnson hit him on top of the head with his gun. Johnson moved to hit him a second time, but the victim deflected it with his hands. Johnson then told the victim they were going for a walk, and as they started, the victim "ripped" away from Johnson and fled to Barraco's where police were contacted. When the police approached Johnson, he fled, but was eventually apprehended. A gun, which the victim recognized as the one used on him, was later found near the site of the incident with a bullet in the firing chamber.

¶ 6 In mitigation, defense counsel noted that at the age of 10 years, Johnson was forced to join a gang because he did not have parents that cared about him. Joining the gang led to his life of crime, getting kicked out of school, and everything that has brought him before the court. Johnson also smoked marijuana and took ecstasy to blunt the pain of the life he was living. Defense counsel further noted that Johnson was 25 years of age, and if he was sentenced to the minimum of 21 years, which would be served at 85%, he would be in his 50's before he got out of jail.

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¶ 7 The court then interjected that it was not sure if the situation presented would qualify for 85%, and that it was only 85% if there was "severe bodily injury." Defense counsel responded that the court found that Johnson committed an aggravated battery. The court replied that there was a difference between great bodily harm and severe bodily harm, and asked for the State's opinion. The State indicated that based on the court's ruling, 85% would not be triggered in this case.

¶ 8 Johnson then spoke in allocution. He stated that incarceration had changed him, and that he was sorry for everything that happened.

¶ 9 The court then called a recess, and afterwards announced that defense counsel was correct that Johnson was required to serve 85% where it made a finding of great bodily harm. The court then sentenced Johnson to a 30-year term on the armed robbery offense, plus a 15-year firearm enhancement. The court stated that it had considered the factors in aggravation and mitigation, then noted the facts of the case, which involved an armed robbery during which Johnson struck the victim in the head with a gun, then asked him to walk with him while armed with the gun, and the reasonable inference was that the gun, which had a bullet in the firing chamber, was going to be used to execute the victim. The court discussed Johnson's juvenile and adult criminal history, and stated that it was clear Johnson could not conform his conduct to the norms of society, and needed to be incarcerated for the protection of the public. The trial court further found that Johnson was required to serve his sentence at 85% because he "engaged in conduct that created the great bodily harm."

¶ 10 Johnson now appeals. He contends that the court's ruling that he was required to serve his sentence at 85% must be vacated because it falls outside Illinois' resentencing scheme and is an increase of his sentence reflecting judicial vindictiveness after his prior successful appeal.

Johnson also contends that the finding of great bodily harm was procedurally defaulted because the trial court failed to make such a finding during the original sentencing hearing.

¶ 11 Recognizing that he failed to preserve this issue for review (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), Johnson contends that we should review the matter under the second prong of plain error review. The plain error doctrine is a narrow and limited exception to the general forfeiture rule allowing a reviewing court to consider forfeited errors where the evidence was closely balanced or where the error was so egregious that defendant was deprived of a substantial right and thus a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). The burden of persuasion remains with defendant, and the first step in plain error review is to determine whether any error occurred. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). For the reasons that follow, we find none.

¶ 12 As noted, Johnson was originally sentenced on his armed robbery conviction to 50 years' imprisonment, plus a 15-year firearm enhancement. On remand, the trial court sentenced Johnson to the maximum Class X term of 30 years' imprisonment on this conviction, plus the 15-year firearm enhancement. The court also found that because there was great bodily harm, Johnson was required to serve his sentence at 85%, pursuant to section 3-6-3(a)(2)(iii) of the Code (730 ILCS 5/3-6-3(a)(2)(iii) (West 2012)). Johnson contends that this finding requires him to serve an additional 6 years of imprisonment over his prior sentence on which he was entitled to day-for-day credit.

¶ 13 We observe that the court's finding that Johnson was required to serve his sentence at 85% was made pursuant to section 3-6-3(a)(2)(iii) of the Code (730 ILCS 5/3-6-3(a)(2)(iii) (West 2012)). The truth-in-sentencing label is applied to this statute as it is a change in the statutory method the Department of Corrections uses to calculate good conduct credit. *People v.*

Salley, 373 Ill. App. 3d 106, 109 (2007). Section 3-6-3(a)(2)(iii) of the Code (730 ILCS 5/3-6-3(a)(2)(iii) (West 2012)), provides that a prisoner serving a sentence for armed robbery, when the court has made and entered a finding that the conduct leading to conviction for the enumerated offense resulted in great bodily harm to the victim, shall receive no more than 4.5 days of good conduct credit for each month of his imprisonment, *i.e.*, that he must serve his sentence at 85%.

¶ 14 Johnson, relying on *North Carolina v. Pearce*, 395 U.S. 711 (1969), which was adopted by our supreme court in *People v. Baze*, 43 Ill. 2d 298 (1969), and codified in section 5-5-4(a) of the Code (730 ILCS 5/5-5-4(a) (West 2012)), contends that when his sentence was vacated on direct review, the trial court was prohibited from imposing a more severe sentence on remand and that in doing so, the trial court displayed vindictiveness, an inference that can only be overcome by a showing that the greater sentence was imposed based on conduct on the part of Johnson after the time of the original sentencing proceeding.

¶ 15 We disagree with Johnson's contention that the trial court imposed a harsher sentence on remand. While the time Johnson will be incarcerated has increased, the term to which he was sentenced has decreased from 50 to 30 years. And it is the term of years he is required to serve—rather than the manner in which those years are to be served—that is relevant to our evaluation of whether the trial court imposed a more severe sentence on remand. For this conclusion, we find support in *People v. Robinson*, 383 Ill. App. 3d 1065, 1068 (2008), where defendant was convicted, in relevant part, of armed robbery and aggravated vehicular hijacking after a jury trial, and, after sentencing, the court found defendant was required to serve 85% of his sentence because he inflicted great bodily harm on one of the victims. On appeal, defendant argued that the truth-in-sentencing provision of section 3-6-3(a)(2)(iii) of the Code (730 ILCS 5/3-6-3(a)(2)(iii) (West 2004)) violated due process and increased the time he would remain

incarcerated. *Robinson*, 383 Ill. App. 3d at 1071. This court found that the truth-in-sentencing provision did not affect the sentence imposed, but rather determined the percentage of the actual sentence that defendant must serve, *i.e.*, the manner in which his sentence was to be carried out and not the actual sentence. *Robinson*, 383 Ill. App. 3d at 1071. Consistent with this principle, we find that the court's determination on remand that Johnson engaged in conduct that created great bodily harm triggered the 85% rule, and did not affect the actual sentence for purposes of section 5-5-4(a) of the Code (730 ILCS 5/5-5-4(a) (West 2012)). As such, it did not result in a more severe sentence.

¶ 16 In support of his contrary conclusion, Johnson cites *People v. Blanck*, 286 Ill. App. 3d 583 (1997). In that case, defendant was originally sentenced to 13 years' imprisonment, and on remand, the trial court found that it had the authority to impose an extended term and sentenced defendant to a 30-year sentence. *Blanck*, 286 Ill. App. 3d at 583-85. Here, the court originally sentenced Johnson to 50 years' imprisonment, but, on remand, decreased that sentence to 30 years' imprisonment. Thus, *Blanck* is factually distinguishable.

¶ 17 We also find Johnson's reliance on *People v. Kilpatrick*, 167 Ill. 2d 439 (1995), and *People v. Hills*, 78 Ill. 2d 500 (1980), misplaced. In *Kilpatrick*, 167 Ill. 2d at 440-41, defendant entered an open plea of guilty to home invasion and attempted murder, and following a sentencing hearing, was sentenced to consecutive terms of nine and six years' imprisonment. Defendant filed a motion to reconsider, and the trial court then imposed a "single" sentence of 15 years' imprisonment. *Kilpatrick*, 167 Ill. 2d at 440-4. The supreme court observed that section 5-8-1(c) of the Code (730 ILCS 5/5-8-1(c) (West 1992)) forbids an increase in a sentence once it is imposed. *Kilpatrick*, 167 Ill. 2d at 446. The supreme court noted, relying on *People v. Rivera*, 212 Ill. App. 3d 519, 525 (1991), that consecutive sentences are not treated as a single sentence

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under section 5-8-1(c) of the Code, and that the trial court contravened the explicit dictates of that section when it impermissibly increased the sentences for defendant's two convictions, from six and nine years for each offense, to 15 years' incarceration. *Kilpatrick*, 167 Ill. 2d at 446-47. The circumstance that the total number of years' imprisonment remained the same, *i.e.*, 15 years, did not negate the fact that defendant's sentence was increased, from six and nine years to 15 years in prison. *Kilpatrick*, 167 Ill. 2d at 447. The supreme court further noted that this increase delayed the date on which defendant could request parole, thereby prejudicing him. *Kilpatrick*, 167 Ill. 2d at 447.

¶ 18 We find that *Kilpatrick's* conclusion that consecutive sentences are not treated as a single sentence for purposes of section 5-8-1(c) of the Code supports our conclusion that the manner in which a sentence is served is irrelevant for purposes of that section. Rather, as explained above, it is the actual sentence that is considered in determining whether there was an increase in sentence, and here, the original sentence was 50 years' incarceration, which was reduced to a 30-year term.

¶ 19 In *Hills*, 78 Ill. 2d at 505, the trial court sentenced defendant to a penitentiary term not less than two, nor more than six years, and stated that defendant was to receive credit for all time spent in custody as a result of this offense, but later timely ordered that defendant be denied credit for time spent on probation. The supreme court found that the court's order denying him credit for time spent on probation, improperly increased his sentence in violation of 5-8-1(c) of the Code. *Hills*, 78 Ill. 2d at 507-08. We find *Hills* factually inapposite to the case at bar as it involved credit for time spent on probation, and not the truth-in-sentencing, good conduct credit provision, which involves the manner in which defendant serves his sentence, and not credit for time served on probation.

¶ 20 Because we conclude that the trial court did not impose a more severe sentence on remand, section 5-5-4(a) of the Code, explaining under what circumstances a greater sentence may be imposed, is inapplicable. Stated differently, where the trial court did not increase Johnson's sentence, the presumption of vindictiveness does not apply. And the trial court's finding of great bodily harm so as to trigger the truth-in-sentencing statute did not evince vindictiveness in any event. As we have noted, the trial court originally made its finding of great bodily harm during Johnson's original sentencing hearing. Thus, Johnson's contention that this finding was made for the first time on remand is contrary to the record. Further, on remand, the trial court did not initially find that Johnson was required to serve his sentence at 85% but only did so after counsel informed the court that he believed Johnson had to serve his sentence on the armed robbery conviction at 85%. The trial court later agreed with that interpretation, and ordered Johnson to serve his sentence at 85%. The exchange between the parties and the conclusion drawn by the court are devoid of evidence showing vindictiveness on the part of the trial court as contemplated by *Pearce*.

¶ 21 In the alternative, Johnson contends that trial counsel was ineffective for failing to include the issue in a motion to reconsider sentence. He contends that his sentence on remand was an egregious violation of his due process rights to a fair sentencing hearing, and that there is a reasonable probability that if counsel had advanced the instant argument in a written motion to reduce sentence, the trial court would have granted the motion to reconsider. He further contends that Illinois reviewing courts have found ineffective assistance of counsel where counsel neglected to present a defendant's strongest defense or a patently meritorious claim. Johnson, however, does not present any argument on his ineffective assistance of counsel issue, but, rather, merely concludes that both prongs of *Strickland* have been met. Johnson's failure to

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present argument on this issue is in violation of Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013), and, accordingly, is forfeited. *People v. Phillips*, 215 Ill. 2d 554, 565 (2005).

¶ 22 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 23 Affirmed.