NOTICE
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2015 IL App (4th) 130697-U

NO. 4-13-0697

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 30, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
SHAWN M. BAHRS,	)	No. 11CF204
Defendant-Appellant.	)	
	)	Honorable
	)	Richard P. Klaus,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Pope and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Because defendant failed to raise the issue in his postsentencing motion and because, in any event, section 5-4.5-95(b) of the Unified Code of Corrections (730 ILCS 5/5-4.5-95(b) (West 2010)) required the trial court to sentence him as a Class X offender, given his undisputed previous convictions, defendant has forfeited the issue of whether his present offense of aggravated driving under the influence of alcohol should have been classified as a Class 2 felony under section 11-501(d)(2)(C) of the Illinois Vehicle Code (625 ILCS 5/11-501(d)(2)(C) (West 2010)) instead of as a Class 1 felony under section 11-501(d)(2)(D) (West 2010)), and the doctrines of voidness and plain error do not avert this forfeiture.

(2) There is no contradiction between subsections (d)(2)(A) and (d)(2)(C) of section 11-501 (625 ILCS 5/11-501(d)(2)(A), (d)(2)(C) (West 2010)), and thus the rule of lenity does not entitle defendant to be sentenced as a Class 4 offender under subsection (d)(2)(A).

¶ 2 A jury found defendant, Shawn M. Bahrs, guilty of all three counts of an information. He appeals the 30-year prison term the trial court imposed on him for count I, which charged him with the Class 1 felony of aggravated driving under the influence (DUI) of

alcohol (625 ILCS 5/11-501(a)(2), (d)(2)(D) (West 2010)). He argues, first, that instead of being convicted of a Class 1 felony under section 11-501(d)(2)(D) of the Illinois Vehicle Code (625 ILCS 5/11-501(D)(2)(d) (West 2010)), he should have been convicted of a Class 2 felony under section 11-501(d)(2)(C) (625 ILCS 5/11-501(d)(2)(C) (West 2010)) because the present offense was only his fourth violation of section 11-501, not his fifth violation. We hold that defendant has forfeited this claim, having omitted it in his postsentencing motion. The doctrines of voidness and plain error do not avert the forfeiture, because regardless of whether he was guilty of a Class 1 felony under section 11-501(d)(2)(D) or a Class 2 felony under section 11-501(d)(2)(C), section 5-4.5-95(b) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-4.5-95(b) (West 2010)) required the trial court to sentence him as a Class X offender, given his undisputed previous convictions. It follows that 30 years' imprisonment is a statutorily authorized sentence, not a void sentence, and defendant really has no "substantial right[]" to a lesser sentence. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). In view of the legal reality that, regardless of whether he was guilty of a Class 1 felony or a Class 2 felony, he had to be sentenced as a Class X offender, we are unconvinced that the misclassification of his offense as a Class 1 felony instead of a Class 2 felony was so prejudicial to him as to amount to plain error.

¶ 3 Second, defendant makes an alternative argument that because subsections (d)(2)(A) and (d)(2)(C) of section 11-501 (625 ILCS 5/11-501(d)(2)(A), (d)(2)(C) (West 2010)) contradict one another, the rule of lenity requires that he be sentenced as a Class 4 offender under subsection (d)(2)(A) and, consequently, his Class X sentence is statutorily unauthorized and void. (Section 5-4.5-95(b) of the Unified Code made him eligible for Class X sentencing only if the present offense was at least a Class 2 felony.). We are unconvinced, however, that the two

subsections contradict one another. Without such a contradiction, there is no occasion for applying the rule of lenity.

¶ 4 Therefore, we affirm the trial court's judgment.

¶ 5 I. BACKGROUND

¶ 6 In July 2011, a jury found defendant guilty of aggravated DUI of alcohol (625 ILCS 5/11-501(a)(2), (d)(2)(D) (West 2010)), driving while his driver's license was revoked (625 ILCS 5/6-303(a) (West 2010)), and aggravated fleeing (625 ILCS 5/11-204.1(a)(4) (West 2010)). The trial court sentenced him to imprisonment for these offenses.

¶ 7 Because of incomplete admonitions, however, which invalidated defendant's waiver of counsel in the sentencing proceedings, we vacated his sentences on direct appeal, and we remanded the case for full compliance with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) and a new sentencing hearing. *People v. Bahrs*, 2013 IL App (4th) 110903, ¶ 1.

¶ 8 On June 11, 2013, on remand, the trial court admonished defendant pursuant to Rule 401(a), and, this time, he chose to be represented by counsel.

¶ 9 The trial court held a new sentencing hearing on July 24, 2013. According to the presentence investigation report, defendant had a lengthy criminal history, including the following previous convictions of DUI and aggravated DUI:

1986	DUI	McHenry County	85-TR-20753
1988	DUI	Cook County	X9-494-428
1999	Agg. DUI	Lee County	99-CF-51 (Class 4)
2000	Agg. DUI/3d	DuPage County	00-CF-1704 (Class 3).

¶ 10 The trial court imposed the same sentences as before: 30 years' imprisonment for count I of the information, which charged defendant with the Class 1 felony of aggravated DUI (625 ILCS 5/11-501(a)(2), (d)(2)(D) (West 2010)); 3 years' imprisonment for count II, which charged him with the Class 4 felony of driving while his driver's license was revoked (625 ILCS 5/6-303(a) (West 2010)); and 3 years' imprisonment for count III, which charged him with the Class 4 felony of aggravated fleeing or attempting to elude a police officer (625 ILCS 5/11-204.1(a)(4) (West 2010)). The court ordered that the sentence on count III would run consecutively to the sentence on count I and that the sentence on count II would run concurrently with the sentences on counts I and III. Defendant filed a motion to reduce the sentences, which the court denied, and this appeal followed.

¶ 11 On April 29, 2015, we allowed defendant's motion to supplement the record with a decision the McHenry County circuit court entered on December 4, 2014, in McHenry County case No. 85-TR-20753. In its order, the McHenry County circuit court granted defendant's section 2-1401 petition to vacate his DUI conviction in that case, on the ground of lack of personal jurisdiction. 735 ILCS 5/2-1401 (West 2012). (The Village of Spring Grove apparently was unable to rebut defendant's claim that "he was not the person before the trial court in this action nearly thirty years ago.")

¶ 12 II. ANALYSIS

¶ 13 A. Judicial Notice

¶ 14 Defendant sees nothing wrong with our taking judicial notice of the order the McHenry County circuit court entered on December 4, 2014, in case No. 85-TR-20753: the order in which the court vacated his conviction of DUI, thereby reducing his total number of convictions of that offense from five to four (counting the present DUI).

¶ 15 The State, however, objects to the judicial notice. The State cites *Cannon v. William Chevrolet/Geo, Inc.*, 341 Ill. App. 3d 674, 680 (2003), in which the appellate court declined to consider some motions *in limine*, which the defendants claimed they had filed in the trial court. The motions, which were appended to the defendants' brief, lacked the circuit clerk's file stamp and were nowhere to be found in the certified record on appeal. *Id.* The appellate court said: "This court cannot consider an unofficial copy of a portion of the record." *Id.*

¶ 16 *Cannon* is distinguishable because defendant is not asking us to consider a motion he supposedly filed in this case and which is absent from the record. Instead, he is asking us to take judicial notice of a decision by another court, in another case. The State does not dispute that the order of December 4, 2014, actually exists in the record of McHenry County case No. 85-TR-20753. The State merely objects that the order is not part of the certified record on appeal in the present case. See Ill. S. Ct. R. 324 (eff. May 30, 2008) (preparation and certification by the circuit clerk of the record on appeal). If this were a valid objection—if documents necessarily had to be disregarded unless they were in the certified record on appeal—there would be no such thing as taking judicial notice of documents. But, clearly, there is such a thing as taking judicial notice of certain documents. The supreme court and the appellate court have taken judicial notice of public records, including decisions by other courts. See *City of Chicago v. Pooh Bah Enterprises, Inc.*, 224 Ill. 2d 390, 396 n.3 (2006); *Pfaff v. Chrysler Corp.*, 155 Ill. 2d 35, 71 (1992); *IFC Credit Corp. v. Rieker Shoe Corp.*, 378 Ill. App. 3d 77, 81 (2007); *Primax Recoveries, Inc. v. Atherton*, 365 Ill. App. 3d 1007, 1012 (2006). "[A] reviewing court may take judicial notice of a written decision that is part of the record of another court because these decisions are readily verifiable facts that are capable of instant and unquestionable demonstration." (Internal quotation marks omitted.) *Bank of America, N.A. v. Kulesza*, 2014 IL

App (1st) 132075, ¶ 21. See also *Wilder Chiropractic, Inc. v. State Farm Fire & Casualty Co.*, 2014 IL App (2d) 130781, ¶ 75 ("[W]e may take such notice of another court's decision."). In accordance with these precedents (none of which the State cites, by the way), we will take judicial notice of the decision the McHenry County circuit court entered on December 4, 2014, in McHenry County case No. 85-TR-20753. Indeed, we already have granted defendant's motion to supplement the record with that court's decision.

¶ 17 B. Forfeiture

¶ 18 Defendant challenges his sentence on count I because, given the adjudicated lack of personal jurisdiction in McHenry County case No. 85-TR-20753, this was only his fourth DUI, not his fifth DUI, and thus, contrary to the information, count I was a Class 2 felony (625 ILCS 5/11-501(d)(2)(C) (West 2010)) rather than a Class 1 felony (625 ILCS 5/11-501(d)(2)(D) (West 2010)).

¶ 19 The second, alternative argument defendant makes is that section 11-501 of the Illinois Vehicle Code (625 ILCS 5/11-501 (West 2010)) is internally inconsistent, in one subsection classifying his offense as a Class 4 felony (625 ILCS 5/11-501(d)(2)(A) (West 2010)) and in another subsection classifying it as a Class 2 felony (625 ILCS 5/11-501(d)(2)(C) (West 2010)). Consequently, he requests us to vacate his sentence on count I and remand this case with directions to resentence him for a Class 4 felony—or, if we disagree there is an inconsistency in section 11-501, at least resentence him for a Class 2 felony on the ground that this was only his fourth DUI.

¶ 20 The State responds that defendant has forfeited these arguments. To preserve a sentencing issue for review, a defendant must raise the issue in a motion filed within 30 days after imposition of the sentence. *People v. Tyus*, 2011 IL App (4th) 100168, ¶ 85 (citing 730

ILCS 5/5-4.5-50(d) (West 2010)). The trial court resentenced defendant on July 24, 2013, and two days later, he filed a postsentencing motion: a timely motion, but one in which he made none of the arguments he makes now.

¶ 21 For two reasons, defendant disputes the asserted forfeiture of his sentencing issues. First, he claims the sentence on count I is statutorily unauthorized and hence void. "An argument that an order or judgment is void is not subject to waiver," that is, forfeiture. *People v. Thompson*, 209 Ill. 2d 19, 27 (2004). Second, he invokes the doctrine of plain error. He argues that under section 11-501(d)(2)(A) of the Illinois Vehicle Code (625 ILCS 5/11-501(d)(2)(A) (West 2010)), he had a substantial right to receive a sentence no greater than that which a Class 4 offender would have received and that sentencing him as a Class X offender was fundamentally unfair. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). Let us consider whether the doctrines of voidness and plain error avert the forfeiture of defendant's sentencing issues.

¶ 22 C. Voidness and Plain Error

¶ 23 1. *His Fourth DUI, Not His Fifth DUI*

¶ 24 Defendant argues that his conviction of the Class 1 felony of DUI of alcohol (625 ILCS 5/11-501(d)(2)(D) (West 2010)) is void because when driving under the influence of alcohol on February 7, 2011, as count I charged him with doing, he had accumulated only three previous convictions, not four previous convictions, of violating section 11-501 of the Illinois Vehicle Code (625 ILCS 5/11-501 (West 2010)) and hence the present violation was only his fourth violation. Section 11-501(d)(2)(D) provided: "A *fifth* violation of this Section or a similar provision is a Class 1 felony, for which a sentence of probation or conditional discharge

may not be imposed." (Emphasis added.) 625 ILCS 5/11-501(d)(2)(D) (West 2010). That section, according to defendant, was inapplicable. Instead, he maintains, his DUI on February 7, 2011, was a Class 2 felony under section 11-501(d)(2)(C) (625 ILCS 5/11-501(d)(2)(C) (West 2010): "A *fourth* violation of this Section or a similar provision is a Class 2 felony, for which a sentence of probation or conditional discharge may not be imposed." (Emphasis added.). On December 4, 2014, in McHenry County case No. 85-TR-20753, the circuit court vacated the 1985 conviction of driving under the influence, concluding that, at the time of the conviction, the court lacked personal jurisdiction over defendant. See *R.W. Sawant & Co. v. Allied Programs Corp.*, 111 Ill. 2d 304, 309 (1986) ("[A] judgment, order[,] or decree entered by a court which lacks jurisdiction of the parties *** is void ***." (Internal quotation marks and emphasis omitted.)). The court thereby reduced the number of judicially determined violations from five to four.

¶ 25 Because the 1985 conviction in McHenry County was void *ab initio* (see *Jayko v. Fraczek*, 2012 IL App (1st) 103665, ¶ 3), defendant reasons that his conviction of a Class 1 felony in the present case likewise is void. He cites *People v. Hauschild*, 226 Ill. 2d 63, 80 (2007); *Thompson*, 209 Ill. 2d at 24; and *People v. Arna*, 168 Ill. 2d 107, 113 (1995), all of which hold that *a sentence* unauthorized by statutory law is void.

¶ 26 A "sentence" is "the punishment assigned to a defendant found guilty by a court." The New Oxford American Dictionary 1553 (2001). The punishment for count I was not the designation of the offense as a "Class 1 felony." Rather, the punishment was 30 years' imprisonment. Unless that punishment was statutorily unauthorized, *Hauschild*, *Thompson*, and *Arna* are inapplicable. Defendant admits that if he was guilty of a Class 2 felony under section 11-501(d)(2)(C) (625 ILCS 5/11-501(d)(2)(C) (West 2010)), statutory law authorized the 30-

year prison term the trial court imposed on him. He says in his reply brief: "The State does correctly note, however, that once this Court changes the class designation to a Class 2 felony, [defendant] may still be eligible to be sentenced as a Class X offender." Quite apart from section 11-501(d)(2)(D) of the Illinois Vehicle Code (625 ILCS 5/11-501(d)(2)(D) (West 2010)), the applicability of which defendant debates, section 5-4.5-95(b) of the Unified Code (730 ILCS 5/5-4.5-95(b) (West 2010)) indisputably gave the court authority to sentence him to 30 years' imprisonment. Section 5-4.5-95(b) provided:

> "(b) 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. This subsection does not apply unless:
>
> (1) the first felony was committed after February 1, 1978 (the effective date of Public Act 80-1099);
>
> (2) the second felony was committed after conviction on the first; and
>
> (3) the third felony was committed after conviction on the second.

> A person sentenced as a Class X offender under this subsection (b) is not eligible to apply for treatment as a condition of probation as provided by Section 40-10 of the Alcoholism and Other Drug Abuse and Dependency Act (20 ILCS 31/40-10)." 730 ILCS 5/5-4.5-95(b) (West 2010).

¶ 27 Even if the trial court had disregarded the 1985 conviction from McHenry County (setting aside the problem of how the court could reasonably have been expected to do so without the benefit of the McHenry County circuit court's order of December 4, 2014), and even if the court had labeled the present offense as a "Class 2 felony" instead of a "Class 1 felony," defendant still would have had the criminal history described by section 5-4.5-95(b)—as we understand him to admit. Therefore, section 5-4.5-95(b) still would have required the court to "sentence[] [him] as a Class X offender." *Id.* In the sentencing hearing in 2011, the prosecutor and the court noted that, regardless of whether the present offense was defendant's third, fourth, or fifth DUI, he was eligible for Class X sentencing, given his criminal record. The statutorily authorized punishment for a Class X felony was imprisonment for not less than 6 years and not more than 30 years. 730 ILCS 5/5-4.5-25(a) (West 2010). We conclude, then, that the court had authority under section 5-4.5-95(b) to sentence defendant to imprisonment for 30 years.

¶ 28 2. *Internal Inconsistency*

¶ 29 Another reason, according to defendant, why the sentence on count I is void is that section 11-501 of the Illinois Vehicle Code (625 ILCS 5/11-501 (West 2010)) is internally inconsistent and thus, under the rule of lenity, the trial court had statutory authority to punish him only as a Class 4 offender, not as a Class X offender. "The rule of lenity requires that any

ambiguity in a criminal statute must be resolved in the way that favors the accused." *People v. Maldonado*, 402 Ill. App. 3d 1068, 1074 (2010).

¶ 30 We decide *de novo* whether a statute is ambiguous. *People v. Artis*, 232 Ill. 2d 156, 161 (2009) (issues of law are decided *de novo*); *Lake County Board of Review v. Property Tax Appeal Board*, 192 Ill. App. 3d 605, 618 (1989) ("[A] determination of the existence of an ambiguity generally is a question of law ***."). Section 11-501 provides in part as follows:

> "(a) A person shall not drive or be in actual physical control of any vehicle within this State while:
>
> (1) the alcohol concentration in the person's blood or breath is 0.08 or more based on the definition of blood and breath units in Section 11-501.2 [(625 ILCS 5/11-501.2 (West 2010))]; [or]
>
> (2) under the influence of alcohol[.]
>
> * * *
>
> (c) Penalties.
>
> (1) Except as otherwise provided in this Section, any person convicted of violating subsection (a) of this Section is guilty of a Class A misdemeanor.
>
> * * *
>
> (d) Aggravated driving under the influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof.

(1) Every person convicted of committing a violation of this Section shall be guilty of aggravated driving under the influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof if:

(A) the person committed a violation of subsection (a) or a similar provision for the third or subsequent time;

(B) the person committed a violation of subsection (a) while driving a school bus with persons 18 years of age or younger on board; [or]

(C) the person in committing a violation of subsection (a) was involved in a motor vehicle accident that resulted in great bodily harm or permanent disability or disfigurement to another, when the violation was a proximate cause of the injuries[.]

* * *

(2)(A) Except as provided otherwise, a person convicted of aggravated driving under the influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof is guilty of a Class 4 felony.

(B) A third violation of this Section or a similar provision is a Class 2 felony. ***

(C) A fourth violation of this Section or a similar provision is a Class 2 felony, for which a sentence of probation or conditional discharge may not be imposed. ***

(D) A fifth violation of this Section or a similar provision is a Class 1 felony, for which a sentence of probation or conditional discharge may not be imposed." 625 ILCS 5/11-501(a)(1), (a)(2), (c)(1), (d)(1)(A), (d)(1)(B), (d)(1)(C), (d)(2)(A), (d)(2)(B), (d)(2)(C), (d)(2)(D) (West 2010).

¶ 31 Defendant argues the above-quoted statute is ambiguous as to whether a fourth violation of section 11-501 is a Class 4 felony under subsection (d)(2)(A) (625 ILCS 5/11-501(d)(2)(A) (West 2010)) or a Class 2 felony under subsection (d)(2)(C) (625 ILCS 5/11-501(d)(2)(C) (West 2010)). He says: "The statute *** define[s] a 'third or subsequent' DUI as 'aggravated' DUI, a Class 4 felony, but then define[s] a fourth DUI violation as a non-probationable Class 2 felony."

¶ 32 Actually, that statement is not entirely accurate. Subsection (d)(1)(A) (625 ILCS 5/11-501(d)(1)(A) (West 2010)) does indeed say that a "third or subsequent" violation of subsection (a) (625 ILCS 5/11-501(a) (West 2010)) is aggravated DUI, but it does *not* say that "a third or subsequent" violation is a Class 4 felony. Granted, on the one hand, subsection (d)(2)(A) (625 ILCS 5/11-501(d)(2)(A) (West 2010)) says: "Except as provided otherwise, a person

convicted of aggravated driving under the influence *** is guilty of a Class 4 felony," and on the other hand, subsection (d)(2)(C) says: "A fourth violation of this Section or a similar provision is a Class 2 felony, for which a sentence of probation or conditional discharge may not be imposed." But those two subsections contradict one another only if one disregards the initial clause in subsection (d)(2)(A) (625 ILCS 5/11-501(d)(2)(A) (West 2010), "Except as provided otherwise." "If possible, the court must give effect to every word, clause, and sentence [in the statute]; it must not read a statute so as to render any part inoperative, superfluous, or insignificant ***." *People v. Ellis*, 199 Ill. 2d 28, 39 (2002). Even though defendant was convicted of aggravated DUI, he was not guilty of a Class 4 felony, because subsection (d)(2)(C) provided otherwise: under subsection (d)(2)(C), a fourth violation was a Class 2 felony. By contrast, someone who had committed aggravated driving under the influence by, for example, driving a school bus with children on board (625 ILCS 5/11-501(d)(1)(B) (West 2010)) or causing a motor vehicle accident (625 ILCS 5/11-501(d)(1)(C) (West 2010)) might have been guilty of a Class 4 felony under subsection (d)(2)(A).

¶ 33 So, we disagree with defendant that section 11-501 is internally inconsistent and that he should have been sentenced as a Class 4 offender. We find no plain error in the sentence on count I, which was a statutorily authorized sentence. Therefore, we honor the forfeiture of the sentencing issues that defendant raises in this appeal.

¶ 34 III. CONCLUSION

¶ 35 For the foregoing reasons, we affirm the trial court's judgment. We award the State $50 in costs against defendant. See 55 ILCS 5/4-2002(a) (West 2012).

¶ 36 Affirmed.