

residential burglary, a Class 1 offense (count I). Relying on defendant's 2002 convictions for residential burglary, arson, and two burglaries, all parties agreed defendant was subject to mandatory Class X sentencing. In May 2013, the trial court sentenced defendant to eight years in prison.

¶ 5 In July 2013, defendant filed a postconviction petition, claiming (1) his attorney incorrectly advised him about the applicable sentencing credit he would receive and the facility in which he would be confined, and (2) his mandatory Class X sentence should be vacated because the applicable statute was repealed in 2009. The circuit court summarily dismissed his petition. This appeal followed.

¶ 6

II. ANALYSIS

¶ 7 The circuit court appointed the office of the State Appellate Defender (OSAD) to represent defendant in this appeal. OSAD does not challenge the judgment entered as a result of defendant's postconviction petition. Instead, OSAD argues defendant's mandatory Class X sentence is void. The State agrees. Because defendant's prior convictions relied upon to justify the application of the Class X sentencing provisions do not meet the statutory requirements, the sentence must be vacated as void. In particular, defendant's prior convictions from 2002 do not meet the sequencing requirements set forth in the statute.

¶ 8 Section 5-4.5-95(b) of the Unified Code of Corrections provides as follows:

"(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:

(2) the second felony was committed after conviction on the first[.]” 730 ILCS 5/5-4.5-95(b) (West 2012).

¶ 9 Defendant's four prior offenses were all committed in 2002, but he was not convicted of any of them until 2003. Therefore, none of these prior offenses, no matter which offense is chosen, would satisfy the statutory requirement that "the second felony was committed after conviction on the first." 730 ILCS 5/5-4.5-95(b)(2) (West 2012). Both sides agree mandatory Class X sentencing should not have been imposed upon defendant.

¶ 10 The only issue of contention in this appeal is identifying the appropriate remedy. Defendant claims this court should remand for resentencing as a Class 2 felony. On the other hand, the State claims this court should remand for consideration of a new plea agreement with the residential burglary count reinstated.

¶ 11 To support its argument, the State relies on the Second District's decision in *People v. Hare*, 315 Ill. App. 3d 606, 610 (2000), wherein the court held that an entire plea agreement is void if an essential term is void. In *Hare*, the defendant was subject to mandatory Class X sentencing for burglary because of his prior burglary convictions. *Hare*, 315 Ill. App. 3d at 607-08. However, the State agreed to recommend a four-year sentence and to drop charges in two other burglary cases in exchange for the defendant's guilty plea. The court accepted the

agreement and imposed the agreed sentence. *Hare*, 315 Ill. App. 3d at 607-08. Later, the court *sua sponte* vacated its judgment on the basis that the agreement provided for a sentence lower than the Class X minimum, making the sentence void. *Hare*, 315 Ill. App. 3d at 608. The defendant argued the State should be bound to recommend the minimum available Class X sentence of six years. *Hare*, 315 Ill. App. 3d at 608. The trial court disagreed, and after a bench trial, sentenced defendant to a 20-year sentence. *Hare*, 315 Ill. App. 3d at 609. On appeal, the defendant argued he should have been entitled to the six-year minimum sentence. *Hare*, 315 Ill. App. 3d at 608. The Second District disagreed, holding the specific sentence length was an essential term of the plea agreement and, if an essential term of a contractual agreement is unenforceable, the entire agreement is unenforceable. *Hare*, 315 Ill. App. 3d at 610.

¶ 12 In line with defendant's argument here, we find mandatory Class X sentencing was not an essential term of the plea agreement in this case. We arrive at that conclusion after reviewing the transcript of defendant's plea hearing. There, the trial court first admonished defendant about "the charge itself," as well as the potential range of punishment the charge would carry. In doing so, the court noted, "the law requires that the court sentence you as if this were a Class X felony, so what that means is, this charge, if you plead guilty, the court must sentence you to a term in the Department of Corrections." The following exchange occurred:

"THE DEFENDANT: Well, so I'm pleading guilty to a Class X felony?"

THE COURT: You're pleading guilty to burglary, which is a Class 2 felony, but because of your prior record, the court must sentence you as if it were a Class X felony, okay? That's what the

law says. So it was—it is a mandatory minimum of 6 years up to a possible maximum of 30 years. Those are the penalty ranges."

Defendant indicated he understood the court's admonishments. Defendant stated he had no "questions on the penalty range." The court next addressed the plea agreement, stating:

"THE COURT: Now, the plea today is what we call an open plea, and that just simply means there is no agreement between the parties as to a definite term of years. So if you plead guilty, we're going to have another hearing, a sentencing hearing in a few weeks, and at that hearing, I'll listen to both sides, and then the court will decide the penalty, but it's going to be somewhere between six and 30 years. Do you understand that?"

THE DEFENDANT: Yes, sir."

The court continued with admonishments regarding the waiver of defendant's rights associated with the entry of a guilty plea in accordance with Illinois Supreme Court Rule 402(a) (eff. July 1, 2012). The court asked defendant if anyone had promised him "anything in return for [his] guilty plea today other than the fact that they're dismissing the other charge in this case? Any other promises made to [him]?" Defendant said no.

¶ 13 Based upon this exchange, it is apparent to this court that the only term of the plea agreement was the State's dismissal of the residential burglary charge (count I) in exchange for defendant's plea to the Class 2 felony burglary charge (count II), *i.e.*, the "fourth type of guilty plea" (*People v. Lumzy*, 191 Ill. 2d 182, 187 (2000) (discussing differences between open, negotiated, and partially negotiated plea agreements)). It is likewise apparent from defendant's response to the trial court's admonition about the mandatory Class X sentencing provisions that

he was not aware of the Class X requirement until the judge mentioned it in the hearing. Defendant's question, addressed to the court, about the class of felony to which he was pleading, indicated that the potential sentencing provisions were not included terms of the plea agreement. Because mandatory Class X sentencing provisions were not an element of the plea agreement, the voiding of defendant's sentence will have no affect on the plea agreement itself. That is, the plea agreement remains intact after voiding defendant's sentence because the sentence was separate from the terms of defendant's plea, and defendant is not required to withdraw his plea in order to challenge his sentence. *Lumzy*, 191 Ill. 2d at 187; *People v. Diaz*, 192 Ill. 2d 211, 226 (2000). Thus, we vacate defendant's sentence and remand for resentencing. On remand, the trial court should resentence defendant on the existing plea agreement in accordance with the applicable range of punishment for defendant's Class 2 felony.

¶ 14

III. CONCLUSION

¶ 15 For the reasons stated, we vacate defendant's sentence and remand for resentencing on defendant's existing guilty plea in accordance with all applicable sentencing guidelines.

¶ 16 Judgment vacated; caused remanded with directions.