

No. 1-14-0335

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).

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. 11 CR 9963
)	
KENNETH DIAMOND,)	Honorable
)	Luciano Panici,
Defendant-Appellant.)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 **Held:** We remand for resentencing because defendant's prior conviction for aggravated criminal sexual assault was improperly used as both an element of his conviction for failure to report as a sex offender and as a basis for Class X sentencing enhancement.

¶ 2 Following a bench trial, defendant Kenneth Diamond was found guilty of failure to report as a sex offender in violation of the Sex Offender Registration Act (Act) (730 ILCS 150 *et seq.* (West 2010)), and sentenced as a Class X offender to six years' imprisonment. On appeal, he contends that the trial court used his prior conviction for aggravated criminal sexual assault as

both an element of the charged offense and as a basis for Class X sentencing enhancement, resulting in improper double enhancement. We affirm defendant's conviction, vacate his sentence, and remand to the trial court for resentencing in the proper statutory range.

¶ 3 Defendant was charged with two counts of failing to report as a sex offender. The indictment alleged that defendant was previously convicted of aggravated criminal sexual assault (No. 91 CR 10635), but failed to report from March 13, 2002, through May 10, 2011. The indictment further stated that “the State shall seek to sentence [defendant] as a Class 2 offender because he was previously convicted of failure to register as a sex offender under case number 021C1-10451.”¹

¶ 4 The evidence at trial established that defendant was arrested for a traffic violation in Matteson on May 10, 2011. At the police station, officers “ran [defendant's] information over the computer” and learned that he was an unregistered sex offender. The State introduced certified copies of defendant's prior convictions for aggravated criminal sexual assault (No. 91 CR 1063501) and failure to report as a sex offender (No. 02 C1 1045101).² The trial court found defendant guilty on both counts of failing to report.

¶ 5 During sentencing, the State argued that defendant was subject to a Class X term due to two prior felonies: the 1991 conviction for aggravated criminal sexual assault and a 2003 conviction for dealing in methamphetamines. The latter conviction occurred in Indiana but was equivalent to a felony conviction in Illinois. See 720 ILCS 646/55 (West 2010). The court

¹ The original text of the indictment alleged that defendant had failed to register from October 30, 1997, through May 10, 2011. As these dates overlapped with the period of non-reporting that gave rise to defendant's prior conviction under the Act, the court permitted the State to amend the indictment during trial.

² Although these case numbers differ slightly from the case numbers listed in the indictment, our reading of the record indicates the numbers reference the same cases.

merged the counts and sentenced defendant to six years' imprisonment as a Class X offender. Defendant did not file a motion to reconsider sentence.

¶ 6 On appeal, defendant contends that his Class X sentence resulted from improper double enhancement because his prior conviction for aggravated criminal sexual assault is an element of the offense of failure to report as a sex offender, but was also used as one of the two prior felonies that made him eligible for Class X sentencing. Defendant argues that his sentence constitutes plain error, is void, or resulted from ineffective assistance of counsel.

¶ 7 The State argues that defendant forfeited review of this issue by failing to file a motion to reconsider sentence in the trial court. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) (“to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required”). Plain errors affecting sentencing may be addressed on review even when not properly preserved. *People v. Lewis*, 2014 IL App (1st) 122126, ¶ 27. However, the first inquiry before determining whether there was a plain error is to determine whether there was a clear and obvious error. *People v. Eppinger*, 2013 IL 114121, ¶ 19. Absent an error, there can be no plain error and defendant's forfeiture will be honored. *Id.* For the following reasons, the trial court erred in sentencing defendant.

¶ 8 In sentencing, a double enhancement occurs when either (1) the same factor is used as an element of an offense and as a basis for imposing a harsher sentence, or (2) the same factor is used twice to elevate the severity of the charged offense. *People v. Guevara*, 216 Ill. 2d 533, 545 (2005). The prohibition against double enhancement is a rule of statutory construction, “premised on the assumption that the legislature considered the factors inherent in the offense in determining the appropriate range of penalties for that offense.” *People v. Rissley*, 165 Ill. 2d 364, 390 (1995). However, where the legislature clearly expresses its intention for there to be a

double enhancement, there is no prohibition. *People v. Phelps*, 211 Ill. 2d 1, 15 (2004). As the double enhancement rule involves statutory construction, our standard of review is *de novo*. *Id.* at 12.

¶ 9 Under section 6 of the Act, sex offenders must report in person to the law enforcement agency with which they last registered no later than 90 days after the date of the last registration and every 90 days thereafter. 730 ILCS 150/6 (West 2010). A second or subsequent violation of the Act is a Class 2 felony. 730 ILCS 150/10(a) (West 2010). A defendant who has been convicted of two separately tried offenses that were Class 2 felonies or greater and had the same elements is eligible for Class X sentencing. 730 ILCS 5/5-4.5-95(b) (West 2010).

¶ 10 In *People v. Hall*, 2014 IL App (1st) 122868, a defendant was convicted for failure to report under section 6 of the Act who had two prior felony convictions: one for driving under the influence of alcohol, and another for aggravated criminal sexual assault. *Id.* ¶ 2. Based on these convictions, he was sentenced as a Class X offender. *Id.* On review, we concluded that “the use of the same conviction as an element of the offense and as a basis for imposing a Class X sentence amounted to an impermissible double enhancement” because “defendant was subject to the Act’s reporting requirements and Class X sentencing based [on] his prior conviction for aggravated criminal sexual assault.” *Id.* ¶¶ 13-14. The State argues that *Hall* was wrongly decided because the defendant’s conviction for aggravated criminal sexual assault was used to establish that he was subject to the Act’s reporting requirements but is not an element of the offense itself. We note, however, that we expressly rejected this argument in *Hall*. *Id.* ¶ 14 (“we reject the State’s argument that defendant’s prior conviction for aggravated criminal sexual assault was not used to “enhance” both the charge in the instant case and the sentence”). We

again rejected this argument in *People v. Brock*, 2015 IL App (1st) 133404, ¶ 42 (following *Hall*).³

¶ 11 Following our decisions in *Hall* and *Brock*, we find that defendant's Class X sentence resulted from improper double enhancement. Defendant was convicted of violating section 6 of the Act, in that he knowingly failed to report as a sex offender despite having been convicted of aggravated criminal sexual assault (No. 91 CR 10635). 730 ILCS 150/6 (West 2010). Defendant had a previous conviction for failure to report as a sex offender, making the conviction appealed here his second violation of the Act, and therefore, a Class 2 felony. 730 ILCS 150/10(a) (West 2010). Defendant was found eligible for Class X sentencing because he had previously been convicted of two separately tried offenses that were Class 2 felonies or greater, namely, aggravated criminal sexual assault (No. 91 CR 10635) and dealing in methamphetamines. 730 ILCS 5/5-4.5-95(b) (West 2010). Consequently, defendant's conviction for aggravated criminal sexual assault was improperly used twice: once as an element of the instant offense and again as one of the two prior felonies that established his eligibility for Class X sentencing. *Brock*, 2015 IL App (1st) 133404, ¶ 42; *Hall*, 2014 IL App (1st) 122868, ¶ 14.

¶ 12 Because we have determined the trial court erred in sentencing defendant, we next consider whether we may reverse the error under the plain-error rule. Improper double enhancement, as occurred here, is reviewable as plain error despite a defendant's failure to preserve the issue for review. *People v. Owens*, 377 Ill. App. 3d 302, 304 (2007) (sentencing issues affect a defendant's substantial rights and "may be addressed on review even when not properly preserved"). Moreover, although defendant's six-year sentence falls within the statutory ranges for both Class 2 felonies and Class X felonies, defendant's case must still be

³ After defendant filed his brief on appeal, this court granted defendant's motion to cite *Brock* as additional authority.

remanded for resentencing specifically within the Class 2 statutory range. *Hall*, 2014 IL App (1st) 122868, ¶ 15 (“even when a sentence imposed under an incorrect sentencing range fits within the correct range, the original sentence must be vacated because the trial court relied on the wrong sentencing range when imposing sentence”) (citing *Owens*, 377 Ill. App. 3d at 305-06). Accordingly, pursuant to our authority under Illinois Supreme Court Rule 615(a) (eff. August 27, 1999), we vacate the trial court’s sentencing order and remand the cause for a new sentencing hearing. This disposition makes it unnecessary for us to consider defendant’s ineffective assistance of counsel and voidness arguments.

¶ 13 For the foregoing reasons, we affirm defendant’s conviction, vacate his sentence, and remand to the trial court for resentencing in the proper statutory range.

¶ 14 Affirmed in part, vacated in part, and remanded.