2016 IL App (1st) 140635-U

SECOND DIVISION
May 3, 2016

No. 1-14-0635



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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 12651 |
| | ) | |
| KEITH NELSON, | ) | Honorable |
| | ) | Angela M. Patrone, |
| Defendant-Appellant. | ) | Judge Presiding. |

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PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Simon and Hyman concurred in the judgment.

**O R D E R**

¶ 1 *Held:* The trial court did not engage in improper double enhancement when it considered defendant's prior felony drug conviction as both a predicate offense and as an element of the second predicate offense required to sustain a conviction for armed habitual criminal, nor did the court consider an improper aggravating factor during sentencing when it referred to these same prior convictions.

¶ 2 Following a bench trial, defendant Keith Nelson was found guilty of being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2012)) and unlawful use of a weapon by a felon (UUWF) (720 ILCS 5/24-1.1(a) (West 2012)). The trial court merged the counts and sentenced

defendant to seven years' imprisonment on the Class X armed habitual criminal conviction. Defendant now challenges his conviction on the basis that the trial court engaged in impermissible double enhancement.

¶ 3 Defendant was charged by information with UUWF and the offense of armed habitual criminal after an incident on June 19, 2013, when Chicago police officers pursued defendant into a stranger's home and found him in possession of a loaded handgun. The information alleged, in part, that defendant committed the crime of armed habitual criminal when he knowingly possessed a firearm having been previously convicted of manufacturing and delivery of a controlled substance under case number 04 CR 28302 and UUWF under case number 08 CR 09220. The trial court found defendant guilty of both offenses. Defendant does not challenge the sufficiency of the evidence to sustain these convictions.

¶ 4 During the sentencing hearing, neither the State nor defendant presented additional evidence in aggravation or mitigation, relying solely on the information included in the presentence investigation report (PSI). Defense counsel requested only that the court give defendant the minimum sentence based upon the information contained therein. The court merged defendant's UUWF conviction into the Class X armed habitual criminal conviction. It sentenced him on the Class X offense to seven years' imprisonment. Defendant filed a motion to reconsider his sentence, which was denied.

¶ 5 On appeal, defendant contends the trial court engaged in two types of impermissible double enhancement: (1) it used his prior conviction for manufacturing and delivery of a controlled substance twice to prove both predicate offenses required under the armed habitual

criminal statute and (2) it considered the same prior convictions used as elements of the offense in aggravation during sentencing.

¶ 6 "[T]he double enhancement rule prohibits a single factor from being used twice with respect to the *same offense*." (Emphasis in original). *People v. Siguenza-Brito*, 235 Ill. 2d 213, 232 (2009) (quoting *People v. Phelps*, 211 Ill. 2d 1, 17 (2004)). There are two forms of double enhancement: (1) when the same factor is used twice to elevate the severity of the offense itself or (2) when a single factor is both an element of the offense and used as a basis for imposing a harsher sentence. *Singuenza-Brito*, 235 Ill. 2d at 232; *People v. Guevara*, 216 Ill. 2d 533, 545 (2005).

¶ 7 "The prohibition against double enhancements is a rule of statutory construction, premised on the assumption that the legislature considered the factors inherent in the offense in fashioning the appropriate range of punishment for that offense." *Guevara*, 216 Ill. 2d at 545 (citing *People v. Rissley*, 165 Ill. 2d 364, 390 (1995)). Where the legislature intends to enhance the penalty based upon some aspect of the crime, and such intention is clearly expressed, double enhancement is not prohibited. *Guevara*, 216 Ill. 2d at 545-46; *Rissley*, 165 Ill. 2d at 390. To determine the legislature's intent, reviewing courts should look to the language of the statute as the best indication of such intent, given its plain and ordinary meaning. *Phelps*, 211 Ill. 2d at 15. We review *de novo* the issue of double enhancement. *Id.* at 12.

¶ 8 Defendant first contends his conviction for armed habitual criminal should be reduced to UUWF as the trial court engaged in impermissible double enhancement of the first variety. He argues the court improperly used his prior conviction for manufacturing and delivery of a

controlled substance twice to prove both the predicate offenses required under the armed habitual criminal statute – once by itself, and then again as an element of the second predicate felony of unlawful use of a weapon by a felon. This court recently considered and rejected this argument in *People v. Johnson*, 2015 IL App (1st) 133663. For the reasons that follow, we see no reason to depart from our earlier decision in *Johnson*.

¶ 9 The armed habitual criminal statute provides, in relevant part, that a "person commits the offense of being an armed habitual criminal if he or she *** possesses *** any firearm having been convicted a total of 2 or more times of any combination" of certain predicate offenses, including "unlawful use of a weapon by a felon" or "any violation of the Illinois Controlled Substances Act *** that is punishable as a Class 3 felony or higher." 720 ILCS 5/24-1.7(a)(2), (3) (West 2012).

¶ 10 Here, the trial court based defendant's armed habitual criminal conviction on defendant's 2004 conviction for manufacturing and delivery of one to five grams of cocaine, a Class 1 offense (720 ILCS 570/401(c)(2) (West 2004)) and his 2008 conviction for UUWF. Both of these offenses are enumerated in section 24-1.7 of the armed habitual criminal statute as valid offenses upon which to base a conviction. See 720 ILCS 5/24-1.7(a)(2),(3). Similar to *Johnson*, we find the fact that the drug conviction was the felony on which defendant's UUWF conviction was based does not negate the validity of each of these offenses being used as separate predicate convictions under the instant offense. *Johnson*, 2015 IL App (1st) 133663, ¶ 16.

¶ 11 In *Johnson*, the defendant argued that his armed habitual criminal conviction should be reduced to UUWF as the trial court improperly used his conviction for residential burglary to

prove both predicate felonies of the armed habitual criminal offense – once by itself, and then again as an element of the second predicate felony of UUWF. *Id*., ¶ 13. The court explained:

> "Finding that a UUWF conviction could not be predicated on the same conviction (here, residential burglary) as that used for one of the predicate offenses required for an armed habitual criminal conviction, would render the armed habitual criminal statute illogical. If defendant's construction of the armed habitual criminal statute were to be accepted, any defendant whose armed habitual criminal conviction consisted of the offense of UUWF would then have to have a third conviction – one that did not serve as a predicate offense to his UUWF conviction. Defendant's conclusion reads into the armed habitual criminal statute an element that is not there: that a court can only use the predicate felony of UUWF if the UUWF conviction is based on a felony other than the one used as the second predicate felony for the armed habitual criminal conviction. In other words, when using UUWF as a predicate felony for an armed habitual criminal conviction, the offender would have to have at least three prior felony convictions instead of two. There is no such language in the armed habitual criminal statute, and we refuse to read it into the statute. See *People v. Christopherson*, 231 Ill. 2d 449, 454 (2008) (a court presumes the legislature did not intend to create absurd results). Accordingly, we find that there was no improper double enhancement in this case." *Id*., ¶ 18.

¶ 12 As in *Johnson*, defendant's armed habitual criminal conviction was based on two prior convictions – delivery of a controlled substance and UUWF – distinct offenses that are separately enumerated in the armed habitual criminal statute as valid offenses upon which to

base an armed habitual criminal conviction. The statute does not require a third conviction where one of the alleged predicate convictions was an element of the second alleged predicate that must be established to prove the charged offense of armed habitual criminal offense beyond a reasonable doubt. *Id.* Therefore, there was no impermissible double enhancement where the State alleged and proved defendant's qualifying drug conviction that was an element of the second qualifying predicate offense to establish armed habitual criminal. *Id.*, ¶ 16, 18.

¶ 13 Defendant next contends the trial court engaged in improper double enhancement of the second variety, when it considered the predicate felonies of his armed habitual criminal conviction as a basis for imposing a harsher sentence for the same offense. During sentencing, the court stated:

> "THE COURT: I have considered the factors in aggravation and mitigation, facts of the case. *** I am looking at the PSI and seeing that the Defendant has two prior convictions for delivery of controlled substance and possession of a firearm.
>
> I am looking at the social history of the Defendant, what he reports to be an unstable childhood. However, no involvement with the Department of Children and Family Services, denying any history of alcoholism or substance abuse.
>
> ***
>
> He did attend high school, but he did not graduate. Minimal alcohol use, some marijuana use, denying treatment for substance abuse.
>
> Under the facts of this case as I heard them, I believe the appropriate sentence would be seven years Illinois Department of Corrections."

Defendant argues the court's statements show it improperly considered his prior convictions for delivery of a controlled substance and UUWF in aggravation during sentencing. He asserts that, without these prior convictions, there were no factors in aggravation to consider.

¶ 14 As a threshold matter, the State contends that defendant has forfeited this argument on appeal because defendant failed to object at trial or raise this issue with sufficient specificity in a posttrial motion. Defendant responds that the issue has been preserved as he was not required to interrupt the trial court during sentencing to raise the error on appeal (*People v. Martin*, 119 Ill. 2d 453, 460 (1988)), and the issue was raised in a posttrial motion. He acknowledges that the posttrial motion mistakenly referred to an improper consideration of an aggravating factor "inherent in the offense of resisting a peace officer." He asserts, however, that the issue was preserved because there can be no confusion regarding the conviction the motion intended to challenge as he was not convicted of resisting a peace officer.

¶ 15 To preserve an issue on appeal, defendant must both object at trial and include the alleged error in a written posttrial motion. *People v. Johnson*, 238 Ill. 2d 478, 484 (2010). Failure to do so results in forfeiture of the error on appeal. *Id.* In limited circumstances, however, we may review unpreserved error under the plain error doctrine. *Id.* Regardless of whether an issue has been preserved or was forfeited but reviewable as plain error, the preliminary question in either analysis is whether an error has occurred. See *People v. Sargent*, 239 Ill. 2d 166, 189-90 (2010) ("As a matter of convention, our court typically undertakes plain-error analysis by first determining whether error occurred at all."). Where there is no error, the result under either

standard is the same: where an issue was preserved, defendant's claim fails; where the issue was forfeited, plain error does not exist without error (*People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)). We find no error here.

¶ 16 The trial court has broad discretionary power in imposing sentence and its sentencing decision is entitled to great deference. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000) (citing *People v. Fern*, 189 Ill. 2d 48, 53 (1999), *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977)). Further, we presume the court employed proper reasoning when fashioning a sentence. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶¶ 8, 9. However, a trial court generally may not consider a factor implicit in the offense itself as an aggravating factor during sentencing for that offense. *People v. Ferguson*, 132 Ill. 2d 86, 96 (1989). The prohibition against double enhancement is based upon the assumption that the legislature considered the factors inherent in the offense when designating the appropriate range of punishment for the offense. *Rissley*, 165 Ill. 2d at 390. We review *de novo* the legal question of whether a trial court relied on an improper factor during sentencing. *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8. Defendant bears the burden of establishing his sentence was based upon improper factors. *Id.*

¶ 17 The trial court did not improperly consider in aggravation the same two prior convictions used to establish the offense of armed habitual criminal. In imposing sentence, a court must consider a defendant's prior criminal history. *People v. Thomas*, 171 Ill. 2d 207, 227-28 (1996). In addition, the court must consider the "nature and circumstances of the crime, the defendant's conduct in commission of the crime, and the defendant's personal history, including his age,

demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education." *People v. Maldonado*, 240 Ill. App. 3d 470, 485-86 (1992).

¶ 18 In *Thomas*, 171 Ill. 2d 207, our supreme court found the trial court's use of prior convictions to impose a Class X sentence did not preclude the court from considering the same prior convictions a second time as an aggravating factor in sentencing. *Thomas*, 171 Ill. 2d at 229. The court explained:

> "Although the legislature considered the prior convictions of certain defendants in establishing their identity 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.

¶ 19 *Thomas* concluded that the trial court's consideration of 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 *** within the available parameters, is a requisite part of every individualized sentencing determination. [Citation.] The judicial exercise of this discretion *** is not properly understood as an 'enhancement.' " *Id.* at 224-25.

¶ 20 Although *Thomas* concerned the mandatory Class X sentencing statue rather than the Class X armed habitual criminal offense, the court's reasoning is nonetheless applicable. The fact

that a sentence is fashioned within the mandatory Class X sentencing statute as opposed to within the Class X sentencing range of the offense itself does not meaningfully distinguish *Thomas*. The question presented is the same in each case: whether the court's consideration of defendant's prior convictions in aggravation was double enhancement.

¶ 21 In considering defendant's drug and UUWF convictions, the court here properly considered defendant's criminal history. *Id.* at 227-28. Defendant had only two prior convictions, the drug and UUWF convictions, both used as predicate offenses for the armed habitual criminal conviction. Thus, in order to consider defendant's criminal history, the court necessarily had to consider these offenses. See *Id.*

¶ 22 Further, the court did not expressly state that it considered the two prior convictions in aggravation. The court is not required to refrain from any mention of the factors that are elements of an offense and a mere reference to these factors is not reversible error. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 50. In our view, it appears that the court was making the observation that there were no additional convictions for the court's consideration. There is no indication whatsoever that placed any added emphasis on these same two convictions that formed the essential elements of the offense giving rise to the sentence imposed especially where the court imposed a sentence one year above the minimum authorized sentence of six years.

¶ 23 Lastly, contrary to defendant's assertion, his criminal history was not the only potential aggravating factor before the court. The PSI included defendant's social history, which showed, as the court noted, defendant's "unstable childhood," his failure to complete high school, and his marijuana use. Evidence regarding a defendant's troubled childhood and educational disabilities

may be considered in both aggravation and mitigation. See *e.g. People v. Peeples*, 205 Ill. 2d 480, 552 (2002) (quoting *People v. Franklin*, 167 Ill. 2d 1, 27 (1995) ("although evidence with respect to a defendant's chaotic childhood *** 'could have evoked compassion in the jurors, it could have also demonstrated defendant's potential for future dangerousness and the basis for defendant's past criminal acts.' "); *People v. Johnson*, 183 Ill. 2d 176, 203-04 (1998) (educational disabilities may be used as a factor in both aggravation and mitigation).

¶ 24 Here, the court was advised and informed of not only the two prior convictions, but also "the facts of the case," and defendant's social history, factors that could be used in both aggravation and mitigation. These are proper sentencing considerations. The court's reference to, or consideration of, defendant's two prior convictions during sentencing was not error.

¶ 25 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 26 Affirmed.