

No. 1-14-2200

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. 12 CR 16249
)	
ADRIAN LOPEZ,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Neville concurred in the judgment.

O R D E R

¶ 1 *Held:* The automatic transfer provision of the Juvenile Court Act of 1987 (705 ILCS 405/5-130(1)(a) (West 2012)), did not deprive defendant of his right to due process. Defendant's mittimus must be corrected to conform to the one-act, one-crime rule.

¶ 2 Following a joint bench trial with his codefendant and brother Sergio, defendant Adrian Lopez was found guilty of aggravated battery with a firearm, two counts of possession of a firearm by a gang member, and seven counts of aggravated unlawful use of a weapon. He was sentenced to eight years in prison for aggravated battery with a firearm, two six-year prison

terms for possession of a firearm by a gang member and seven three-year prison terms for aggravated unlawful use of a weapon. All sentences were to be served concurrently.

¶ 3 Although defendant was 16 years old at the time of the offense, he was tried and sentenced as an adult in accordance with the automatic transfer provision set forth in section 5-130(1)(a) of the Juvenile Court Act of 1987 (Act) (705 ILCS 405/5-130(1)(a) (West 2012)). On appeal, defendant contends that section 5-130(1) of Act, which automatically transfers 15 and 16 year olds charged with aggravated battery with a firearm to adult court, deprived him of procedural and substantive due process. He also contends that certain convictions must be vacated pursuant to the one-act, one-crime rule. We affirm in part, and vacate in part.

¶ 4 Defendant's arrest and prosecution arose out of an August 13, 2012 incident during which the victim, Rolando Leon, was shot.

¶ 5 The victim testified that he was walking when a blue Buick Rendezvous pulled up and someone began asking him questions regarding whether he was "gang related." He ignored the questions and kept walking. The vehicle then pulled into an alley and blocked his path. Defendant was sitting in the back passenger seat. Ultimately, defendant shot a gun and the victim was hit in the "lower left leg." The vehicle then drove away.

¶ 6 Jesus Medina testified he was in the backseat with defendant and that codefendant was driving. Although defendant was not in a gang, defendant wanted to be affiliated with the Latin Kings gang. When they saw a "chubby" guy with a "shag" on the street, defendant questioned this person to determine his gang affiliation. Defendant ultimately shot this person. Codefendant then drove away. They later stopped the vehicle in an alley in order to urinate. Defendant began "tagging," *i.e.*, spray painting, a fence. A man "came out on the phone like screaming to 911"

that someone was tagging the fence, and relaying the SUV's license plates. Defendant tried to cover the plates with his body and instructed codefendant to drive away. The SUV was later pulled over by police. During cross-examination, Medina testified that defendant did not sit in the backseat.

¶ 7 Officer Junkovic testified that he and his partner responded to a "flash message" that people were tagging a building. The message stated that a blue Buick with a certain license plate was involved and that this vehicle was previously involved in a shooting. The officers subsequently curbed the vehicle. Defendant was sitting in the front passenger seat and had black paint on his hands.

¶ 8 Officer Vera, an evidence technician, testified that he photographed a gun located in a van "under the back seat in between [the] passenger and driver's side back seat in the middle."

¶ 9 Detective Jose Gomez testified that during a conversation with defendant, defendant stated that he was "riding around" with codefendant and friends, and that they drove down a certain street in "rival gang" territory and spotted the victim. Defendant stated that when he asked the victim "what he was about," the victim responded by asking who defendant was talking to. Defendant then stated that he shot toward the victim striking the victim in the ankle, but that he aimed at the ground and only wanted to scare the victim. Gomez was later present when defendant met with an assistant State's Attorney and made a written statement. Defendant's written statement was entered into evidence without objection.

¶ 10 The parties stipulated that defendant did not have a valid Firearm Owner's Identification Card on August 13, 2012. The parties also stipulated that a gunshot residue test performed on defendant's right hand was positive.

¶ 11 Ultimately, defendant was found guilty of aggravated battery with a firearm, two counts of possession of a firearm by a gang member, and seven counts of aggravated unlawful use of a weapon. He was sentenced to eight years in prison for aggravated battery with a firearm, two six-year prison terms for possession of a firearm by a gang member and seven three-year prison terms for aggravated unlawful use of a weapon. All sentences were to be served concurrently.

¶ 12 On appeal, defendant first contends that section 5-130(1)(a) of the Act, which automatically transfers 15 and 16-year olds charged with aggravated battery with a firearm to adult court, violates procedural and substantive due process. He argues that the provision does not withstand constitutional scrutiny in light of a series of United States Supreme Court cases recognizing the fundamental differences between juvenile and adult offenders and that criminal procedural laws that fail to take a juvenile offender's age into account violate the eighth amendment's prohibition against cruel and unusual punishment.

¶ 13 In reviewing the automatic transfer provision, we keep in mind that "[a]ll statutes carry a strong presumption of constitutionality." *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005). The party challenging a statute has the burden to demonstrate that it is invalid. *People v. Graves*, 207 Ill. 2d 478, 482 (2003). "Whether a statute is constitutional is a question of law that we review *de novo*." *Id.*

¶ 14 The Act's automatic transfer provision states that:

"[t]he definition of delinquent minor under Section 5-120 of this Article shall not apply to any minor who at the time of an offense was at least 15 years of age and who is charged with: (i) first degree murder, (ii) aggravated criminal sexual assault, (iii) aggravated battery with a firearm as described in Section

12-4.2 or subdivision (e)(1), (e)(2), (e)(3), or (e)(4) of Section 12-3.05 where the minor personally discharged a firearm as defined in Section 2-15.5 of the Criminal Code of 1961 or the Criminal Code of 2012, ***." 705 ILCS 405/5-130(1)(a) (West 2012).

¶ 15 Defendant relies, in pertinent part, on three United States Supreme Court decisions, *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012), to support his argument that "the characteristics of juveniles have constitutional implications that extend beyond the Eighth Amendment."

¶ 16 In *Roper*, the Supreme Court held that imposing the death penalty on juvenile offenders under 18 years old violates the eighth amendment. *Roper*, 543 U.S. at 568. In reaching this conclusion, the Court discussed key differences between juveniles under 18 years old and adults, including a lack of maturity and an underdeveloped sense of responsibility, more vulnerability to negative influences and outside pressures, and a character that is not as well formed as that of an adult. *Id.* at 569-70. In *Graham*, the Court held that the eighth amendment forbids a sentence of life without parole for juvenile offenders who commit nonhomicide offenses because a sentence of life without parole "improperly denies the juvenile offender a chance to demonstrate growth and maturity." *Graham* 560 U.S. at 73-75. In *Miller*, the Court held that the eighth amendment forbids a sentencing scheme that mandates life in prison without parole for juveniles who commit homicide because such sentencing schemes "by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Miller*, 132 S. Ct. at 2467, 2469.

¶ 17 Although *Roper*, *Graham*, and *Miller* limited the range of penalties for juvenile offenders, defendant's challenge to the automatic transfer provision of the Act fails in light of our supreme court's decision in *People v. Patterson*, 2014 IL 115102. Defendant acknowledges our supreme court's holding in *Patterson*, but argues that the "Supreme Court's recent jurisprudence strongly suggests that juveniles have a procedural due process right to some sort of hearing before being treated the same way as adult offenders who committed the same offense."

¶ 18 In *Patterson*, our supreme court was not persuaded by the defendant's reliance on the eighth amendment analyses set forth in *Roper*, *Graham* and *Miller* as support for his due process arguments because "the applicable constitutional standards differ considerably between due process and eighth amendment analyses" and "a constitutional challenge raised under one theory cannot be supported by decisional law based purely on another provision." *Id.* ¶ 97. The court also concluded that the automatic transfer provision did not violate the eighth amendment's prohibition against cruel and unusual punishment because the automatic transfer provision is not punitive; rather, it is procedural in that it simply dictates the forum and process utilized to determine the culpability of juvenile offenders charged with certain crimes. *Id.* ¶¶ 100, 104-06. See also *People v. Jackson*, 2012 IL App (1st) 100398, ¶¶ 16-17 (finding that the automatic transfer provision did not deprive the defendant of his right to substantive or procedural due process).

¶ 19 We note that defendant "maintains, in order to preserve this issue for further appeal, that *Patterson* was wrongly decided." Be that as it may, this court is "required to follow [Illinois] supreme court precedent on an issue unless and until that conclusion is revisited by our supreme

court or overruled by the United States Supreme Court." (Internal quotation marks omitted.) *In re Shermaine S.*, 2015 IL App (1st) 142421, ¶ 32. Accordingly, defendant's argument must fail.

¶ 20 Defendant next contends that his convictions for aggravated unlawful use of a weapon pursuant to counts 9, 10, 12, 13, 14, 15, and 16 must be vacated pursuant to the one-act, one-crime rule because they are based on the same act as his convictions for possession of a firearm by a gang member under counts 6 and 7. Defendant further contends that one of his convictions for possession of a firearm by a gang member must be vacated pursuant to the one-act, one-crime rule because both convictions are based upon the possession of the same fireman and that this cause must be remanded to the trial court so that the court can determine which conviction for possession of a firearm by a gang member is "more serious."

¶ 21 Although defendant concedes that he waived this issue by failing to raise it before the trial court, we review one-act, one-crime issues pursuant to the second prong of the plain error doctrine because the potential for an unwarranted conviction and sentence threatens the integrity of the judicial process. See *People v. Harvey*, 211 Ill. 2d 368, 389 (2004).

¶ 22 To determine whether a violation of the one-act, one-crime rule has occurred, a reviewing court must determine whether the defendant's conduct involved multiple acts or a single act, and, if the conduct involved multiple acts, whether any of the offenses are lesser-included offenses. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). Multiple convictions are improper if they are based on precisely the same physical act. *Id.* We review *de novo* whether a defendant's convictions violate the one-act, one-crime rule. *People v. Csaszar*, 375 Ill. App. 3d 929, 943 (2007).

¶ 23 The State concedes that because defendant's convictions for aggravated unlawful use of a weapon are based upon the same act that was the basis for defendant's convictions for possession

of a firearm by a gang member, those convictions must be vacated pursuant to the one-act, one-crime rule. We accept this concession and vacate defendant's convictions for aggravated unlawful use of a weapon pursuant to the principles of the one-act, one-crime doctrine.

¶ 24 The State also concedes that one of defendant's convictions for possession of a firearm by a gang member must be vacated pursuant to the one-act, one-crime rule because both convictions are based upon a single act of possession of a firearm. The State contends, however, that this cause does not need to be remanded to the trial court for resentencing because neither conviction for possession of a firearm by a gang member is "more serious" than the other. The State argues that each conviction for possession of a firearm by gang member requires the same mental state and is subject to the same sentencing range, and, therefore, requests that defendant's conviction for possession of a firearm by a gang member under count 7 be vacated. See *People v. Eubanks*, 279 Ill. App. 3d 949, 963 (1996) (when multiple convictions are based on the same physical act, the State has the right to elect which conviction should be retained). Defendant responds, relying on *People v. Artis*, 232 Ill. 2d 156, 176 (2009), that "[s]everity, rather than the State's election" is the basis for determining which conviction should stand in such situations, and, consequently, the matter should be remanded to the trial court for such a determination.

¶ 25 Generally, when multiple convictions are obtained for offenses arising out of a single course of conduct, as in this case, the conviction for the less serious offense must be vacated. *People v. Lee*, 213 Ill. 2d 218, 226-27 (2004). When a reviewing court is unable to determine the more serious offense, a remand to the trial court is required so that the trial court can make this determination. *Artis*, 232 Ill. 2d at 177. However, under the circumstances presented, we find remand is unnecessary because both of defendant's convictions at issue were for the same

offense, and he received identical concurrent sentences for each conviction. See *People v. Price*, 221 Ill. 2d 182, 194-95 (2006) (finding remand was unnecessary where one-act, one-crime principles required the vacation of multiple theft convictions because both the statutory penalty and the concurrent sentences imposed were identical). Accordingly, we accept the State's suggestion and vacate defendant's conviction pursuant to Count 7.

¶ 26 Accordingly, we vacate defendant's convictions under counts 7, 9, 10, 12, 13, 14, 15, and 16. We affirm the judgment of the circuit court of Cook County in all other aspects.

¶ 27 Affirmed in part; vacated in part.