

No. 1-14-2504

**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).

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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 13955
	)	
VICTOR APOLLO,	)	Honorable
	)	Paula M. Daleo,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE MASON delivered the judgment of the court.  
Justices Lavin and Pucinski concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Defendant's misdemeanor conviction for obstructing identification is reversed because the evidence failed to establish he provided a false name or identification. We remand the cause for resentencing on defendant's felony conviction as he was improperly sentenced as a Class X offender.

¶ 2 Defendant Victor Apollo appeals from the judgment of the trial court finding him guilty of misdemeanor obstructing identification. Apollo also challenges his classification and sentence

as a Class X offender for his related felony convictions for aggravated battery. We reverse his obstruction conviction and remand for resentencing.

¶ 3 The offense of obstructing identification requires the State to prove that an individual "intentionally or knowingly furnishe[d] a false or fictitious name \*\*\* to a peace officer" who has lawfully detained or arrested that individual. 720 ILCS 5/31-4.5(a) (West 2012). Mere refusal to provide identifying information is not within the ambit of the statute. See *People v. Fernandez*, 2011 IL App (2d) 100473, ¶ 8. Here, all Apollo did when confronted by a police officer was refuse to tell the officer his name or produce identification. This is not a violation of the statute and the State concedes as much.

¶ 4 Apollo's refusal to cooperate ultimately escalated into a physical confrontation with both the initial officer and additional officers who arrived on the scene. This confrontation resulted in Apollo's convictions for aggravated battery to three different police officers as well as other related misdemeanor offenses. Apollo does not challenge the sufficiency of the evidence to sustain the convictions.

¶ 5 Based on information in Apollo's presentence investigation report (PSI) and the State's representation of Apollo's criminal history, the trial court sentenced him as a Class X offender, which requires that a defendant have at least two prior Class 2 felony convictions and carries a sentencing range of 6 to 30 years. Apollo was sentenced to seven years' imprisonment on the aggravated battery convictions and concurrent sentences of 364 days each (which Apollo had already served in pretrial detention) on his misdemeanor convictions, including the obstructing identification charge.

¶ 6 The issues in this appeal concern the effect of the erroneous misdemeanor conviction and whether Apollo was, in fact, subject to Class X sentencing. Although the erroneous misdemeanor conviction, standing alone, would not prompt this court to remand for a new sentencing hearing, that result is warranted by the trial court's error in sentencing Apollo as a Class X offender.

¶ 7 Apollo acknowledges he failed to preserve the sentencing error for review. He contends, however, that his claim is reviewable under the "substantial rights" second prong of the plain error doctrine (see *People v. Herron*, 215 Ill. 2d 167, 179 (2005)), as he was denied a fair sentencing hearing when he was mistakenly subjected to Class X sentencing.

¶ 8 Apollo has forfeited his sentencing claim on appeal as he failed to raise this objection during sentencing or include the alleged error in a written posttrial motion. See *People v. Wright*, 2015 IL App (1st) 123496, ¶ 31; *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The plain error doctrine, however, provides a narrow and limited exception to the general forfeiture rule. Ill S. Ct. R. 615(a) (eff. Jan. 1, 1967); *Herron*, 215 Ill. 2d at 177. In the context of sentencing, we may consider forfeited errors where the evidence is closely balanced or the error is so fundamental it arguably deprived defendant of a fair sentencing hearing. *People v. Thomas*, 178 Ill. 2d 215, 251 (1997). To obtain relief under the plain error exception, defendant bears the burden to demonstrate that a "clear or obvious error" has occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007); *Herron*, 215 Ill. 2d at 187.

¶ 9 Section 5-4.5-95 of the Unified Code of Corrections mandates enhanced Class X penalties for recidivist offenders. 730 ILCS 5/5-4.5-95 (West 2012). According to the statute, any adult defendant convicted of a Class 1 or Class 2 felony must be sentenced as a Class X offender "having twice been convicted \*\*\* of an offense that \*\*\* [is] now classified \*\*\* as a

Class 2 or greater Class felony" as long as the relevant offenses were "separately brought and tried and arise out of a different series of acts." 730 ILCS 5/5-4.5-95(b) (West 2012).

¶ 10 Apollo's claim of error rests on his assertions that (1) the trial court failed to verify the accuracy of the State's assertion that he was convicted "of at least two prior Class 2 offenses," and (2) the record establishes that he was previously convicted of only one Class 2 offense. The State responds that the criminal history as shown by the PSI and accompanying documents reflects Apollo was convicted of two Class 2 "Other Amt Narcotic Sched I &II" offenses (720 ILCS 570/401(d) (West 2012)) under case numbers 03 CR 09089 and 00 CR 18896.

¶ 11 Apollo concedes that his conviction under 03 CR 09089 was a Class 2 conviction. He argues, however, that he was not convicted of a second Class 2 offense under case number 00 CR 18896, but rather pled guilty to and received probation for a Class 4 possession of a controlled substance offense (720 ILCS 570/402(c) (West 2012)).

¶ 12 The criminal history provided to the trial court indicates that a conviction and sentence was entered on September 29, 2000, under case number 00 CR 18896, for two offenses under the Illinois Controlled Substances Act (the Act): (1) a Class 2 manufacturing and delivery conviction for "Other Amt Narcotic Sched I & II" under section 401(d) of the Act and (2) a Class 4 conviction for possession of a controlled substance under section 402(c) of the Act. The criminal history shows Apollo received 24 months' probation for each conviction. Apollo argues this demonstrates that he pled guilty or was convicted of the lesser Class 4 possession offense and not the Class 2 manufacturing offense.

¶ 13 Generally, Class 2 felonies carry a standard sentencing range of three to seven years' imprisonment. 730 ILCS 5/5-4.5-35(a) (West 2012). Probation is an authorized sentence for a

Class 4 possession offense. 730 ILCS 5/5-4.5-45(d) (West 2012). However, 24 months' probation is also an authorized sentence for a section 401(d) manufacturing offense since Apollo's criminal history demonstrates this was his first adult drug conviction. See 730 ILCS 5/5-4.5-35(d) (West 2000); but see 730 ILCS 5/5-5-3(F) (West 2000). Therefore, standing alone, a sentence of 24 months' probation on the Class 2 manufacturing conviction in case number 00 CR 18896 is not dispositive of Apollo's argument that he actually pled guilty and was sentenced to the lesser Class 4 offense, as probation is an authorized sentence for both convictions.

¶ 14 However, by agreement, the parties supplemented the record with a handwritten order of probation, issued on September 29, 2000, in case number 00 CR 18896. The order establishes Apollo received 24 months' probation under this case number for the offense of "PCS" under "720 ILCS 570/402(c)." The parties also supplemented the record with a later order issued May 31, 2001, terminating probation as unsuccessful.

¶ 15 The order of probation supports Apollo's assertion that he was convicted of the Class 4 offense. Further, the PSI mentions only a conviction for "Possess Amount Controlled Subst" under the earlier case number. Notably, neither the PSI nor the probation order reference the section 401(d) manufacturing conviction under case number 00 CR 18896 listed in the criminal history. Therefore, we agree with Apollo that the record establishes he pled guilty to and was sentenced to probation on the Class 4 offense of possession of a controlled substance in case number 00 CR 18896 and he was not, in fact, convicted or sentenced for a Class 2 manufacturing offense. The State has not shown otherwise. *People v. Williams*, 149 Ill. 2d 467 (1992).

¶ 16 Apollo was not subject to Class X sentencing as he was previously convicted of only one Class 2 or greater offense. The court, therefore, erroneously enhanced the class of the aggravated

battery offense from a Class 2 to a Class X, changing the sentencing range from 3 to 7 years to 6 to 30 years. The court's misapplication of the Class X statute amounted to plain error because it affected Apollo's fundamental right to liberty and thus we vacate the sentence imposed and remand the cause for resentencing. *People v. McMann*, 305 Ill. App. 3d 410, 414 (1999); *People v. Hausman*, 287 Ill. App. 3d 1069, 1071-72 (1997).

¶ 17 Further, we caution trial courts against relying on the parties' representation of a defendant's criminal history. Instead, we urge courts, as is their duty, to review and determine the accuracy of the information contained in the PSI and accompanying criminal history data in order to ensure that defendant is provided a fair sentencing hearing. See *People v. LaPointe*, 88 Ill. 2d 482, 494-95 (1981) (quoting *People v. Adkins*, 41 Ill. 2d 297, 300-01 (1968) (sentencing court must " 'exercise care to insure the accuracy of information considered and to shield itself from what might be the prejudicial effect of improper materials.' ").

¶ 18 Given this determination, we need not address Apollo's contentions that his counsel was ineffective and that the trial court relied on his unlawful obstruction conviction in fashioning the sentence.

¶ 19 For the foregoing reasons, we reverse Apollo's misdemeanor conviction for obstructing identification, vacate his Class X sentence, and remand the cause for resentencing.

¶ 20 Reversed in part; vacated in part; remanded.