2018 IL App (1st) 160814-U

No. 1-16-0814

Order filed November 9, 2018

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 12847
	)	
DEMETRIUS HENDERSON,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 *Held*: The State failed to prove defendant guilty of being an armed habitual criminal where one of his two prior convictions was not a qualifying predicate offense; the mittimus is corrected to reflect that defendant must serve two, rather than three, years of mandatory supervised release.

¶ 2 Following a bench trial, defendant Demetrius Henderson was found guilty of one count of being an armed habitual criminal (AHC) and four counts of unlawful use of a weapon by a felon (UUWF). The trial court sentenced defendant to 6 ½ years in prison to be followed by

3 years of mandatory supervised release (MSR), specifying that the sentence was imposed on count 2, which was one of the counts charging UUWF, and indicating that all other counts merged. On appeal, defendant contends that (1) the State failed to prove him guilty of AHC because one of the two prior convictions upon which the charge of AHC was predicated was not a qualifying offense; (2) his term of MSR should be reduced to the two-year term applicable to his Class 2 conviction for UUWF; and (3) two of his four "convictions" for UUWF must be vacated based on one-act, one-crime principles.

¶ 3 For the reasons that follow, we vacate the trial court's guilty finding on the count charging AHC, order correction of the mittimus to reflect a two-year term of MSR, and affirm in all other respects. [1]

¶ 4 Defendant's conviction arose from the events of June 27, 2014. Following his arrest, defendant was charged by information with one count of AHC, four counts of UUWF, and one count of possession of a controlled substance.

¶ 5 At trial, Chicago police officer Mark Jakob testified that around 8:35 p.m. on the day in question, he, along with 8 to 10 other members of the narcotics division, executed a search warrant of a house at 6424 South Hoyne Avenue. Jakob, who had a photograph of defendant, saw defendant on the house's porch, along with one or two other men and an infant. Jakob approached defendant on foot, presented him with a copy of the search warrant, and detained him.

¶ 6 Jakob and the other officers entered the house with defendant's permission. During the ensuing search, officers recovered suspect heroin in a pantry. Following this discovery, Jakob

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

gave defendant *Miranda* warnings and placed him into custody. When he asked defendant if he had any other narcotics or illegal items inside the house, defendant answered that there was a handgun in the basement underneath a washing machine. From that location, an officer recovered a .40 caliber handgun loaded with 10 live rounds. Jakob thereafter had a second conversation with defendant, during which defendant said he was holding the gun for a friend who was out of town.

¶ 7 Chicago police officer Jose Gonzalez, a member of the team that executed the search warrant, testified that he took photographs of evidence at the scene. In court, he identified a photograph of a piece of mail addressed to defendant. The envelope was stamped with the date June 22, 2010.

¶ 8 The parties stipulated that Chicago police officer Boonserm Srisuth would have testified that he recovered the handgun and kept it in his constant care and custody until he inventoried it at the police station, and that Chicago police officer V. Stinar would have testified that he recovered the suspect heroin and kept it in his constant care and custody until he inventoried it at the police station. The parties further stipulated that if called, a forensic scientist at the Illinois State Police Crime Laboratory would have testified that he received seven items in a heat-sealed condition, and that five of those items tested positive for 1.1 grams of heroin. The State introduced two certified copies of conviction, stating as follows:

> "We will be seeking to admit the certified copies of conviction for the defendant under case No. 09 CR 15072, which the defendant was convicted of aggravated battery to an individual over the age of 60, and 09 CR 1591701, which the defendant was convicted of a residential burglary."

The certified statements of conviction are not included in the common law record on appeal.

¶ 9 Defendant made a motion for a directed finding, which the trial court denied.

¶ 10 Pierre Haymer, defendant's cousin, testified that on the evening in question, he and defendant were at 6424 South Hoyne Avenue with their "whole family," including defendant's mother, sisters, and cousins. While he and defendant were on the porch, police approached and handcuffed them. They took Haymer to the living room and defendant to the kitchen. Haymer could not hear what was going on in the kitchen because "a lot of things [were] being thrown around so it was kind of noisy." According to Haymer, the house was not defendant's. Rather, the house belonged to defendant's mother, sisters, niece, nephews, and uncles. In addition, Haymer stated that defendant's uncle, "Joe Joe," lived in the house's basement.

¶ 11 The trial court acquitted defendant of the charge of possession of a controlled substance, but found him guilty of AHC and all four counts of UUWF. Defendant filed a motion for a new trial. After hearing argument, the trial court denied the motion.

¶ 12 At sentencing, the court orally announced that it was sentencing defendant to 6 ½ years in prison to be followed by 3 years of MSR. The mittimus reflects that the sentence was imposed on count 2, which was one of the counts charging UUWF, identifies that offense as a Class 2 felony, and indicates that the term of MSR was 3 years. The half-sheet further specifies that the sentence was imposed on count 2, that the other counts merged, and that the sentence included 3 years of MSR. Similarly, the court sheet from the day of sentencing reflects that defendant was sentenced on count 2 to 6 ½ years in prison and 3 years of MSR, and that the "balance of counts merge."

¶ 13 Defendant's first contention on appeal is that the State failed to prove him guilty of AHC because one of the two prior convictions upon which the charge of AHC was predicated was not a qualifying offense. The State concedes the issue.

¶ 14 In order to prove defendant guilty of AHC, the State was required to establish that he possessed a firearm after having been convicted of two or more offenses that were (1) defined as forcible felonies, (2) specifically enumerated in the statute defining AHC, or (3) Class 3 or higher felony drug offenses. 720 ILCS 5/24-1.7(a) (West 2014). Here, the information alleged that defendant had been convicted of residential burglary and "aggravated battery to a person 60 years of age or older," and at trial, the State submitted certified statements of convictions reflecting those offenses. The first of these prior offenses, residential burglary, is a forcible felony. See 720 ILCS 5/2-8 (West 2014) (listing forcible felonies). However, the second of these prior offenses, aggravated battery to a person 60 years of age or older, is not a forcible felony (see *People v. Schmidt*, 392 Ill. App. 3d 689, 695-96 (2009) (aggravated battery that does not result in great bodily harm or permanent disability does not fall within "residual clause" of statute defining forcible felonies)), is not specifically enumerated in the AHC statute (see 720 ILCS 5/24-1.7(a)(2) (West 2014) (listing offenses)), and is not a drug offense. As such, we agree with the parties that defendant's conviction for aggravated battery to a person 60 years of age or older could not serve as a predicate offense for AHC. Accordingly, we vacate the guilty finding on the count charging AHC.

¶ 15 Next, defendant contends that his term of MSR should be reduced from a three-year term, which would have been applicable to a Class X conviction for AHC, to a two-year term, which is

appropriate for a Class 2 conviction for UUWF.[2] We agree with defendant. As defendant observes, the MSR term applicable to Class 2 felonies is two years. 730 ILCS 5/5-4.5-35(l), 5-8-1(d)(2) (West 2014). Since defendant stands convicted of a Class 2 offense, his MSR term should be two years. Pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967), we order the clerk of the circuit court to correct the mittimus to reflect a two-year term of MSR. See *People v. Latona*, 184 Ill. 2d 260, 278 (1998) (a mittimus may be amended at any time); *People v. Smith*, 2016 IL App (1st) 140039, ¶ 19 (the appellate court may correct the mittimus without remanding to the trial court).

¶ 16 Finally, defendant contends that two of his four "convictions" for UUWF must be vacated based on one-act, one-crime principles. He argues that counts 2 and 4 are based upon the exact same physical act of possessing a firearm and that counts 3 and 5 are based upon the exact same physical act of possessing ammunition. Defendant observes that the sole distinction between counts 2 and 4 and between counts 3 and 5 is sentence enhancement language included in counts 2 and 3 indicating that the State would seek to sentence him as a Class 2 offender because he was on parole or MSR at the time he committed the offense. Defendant asserts that because his parole status was not proved beyond a reasonable doubt, the corresponding pairs of counts have been rendered indistinguishable. Although defendant did not raise this issue in the trial court, forfeited arguments relating to the one-act, one-crime doctrine are reviewable under the second prong of the plain-error rule because the potential for a surplus conviction implicates

[2] We note that in his opening brief, defendant contended that his Class 2 conviction for UUWF should be reduced to a Class 3 conviction because the State failed to prove he was on parole or MSR at the time he committed the crime, and that his corresponding term of MSR should be reduced from three years to one year. However, in his reply brief, he conceded that his UUWF conviction does constitute a Class 2 felony because it was predicated on a prior forcible felony, *i.e.*, residential burglary. As such, while defendant still maintains that his term of MSR should be reduced, he now argues that it should be reduced to two years.

the integrity of the judicial process. *People v. Nunez*, 236 Ill. 2d 488, 493 (2010); *People v. Harvey*, 211 Ill. 2d 368, 389 (2004).

¶ 17 Where a defendant is charged with multiple crimes that are derived from the same act, he may only be convicted for the most serious offense. *People v. King*, 66 Ill. 2d 551, 566 (1977). A "conviction," however, requires both a finding of guilt and a sentence. 730 ILCS 5/5-1-12 (West 2014). Here, the mittimus, half-sheet, and court sheet all reflect that although the trial court found defendant guilty of four counts of UUWF, it merged all those counts into count 2 and entered a single conviction and sentence on that count. As such, there is no violation of the one-act, one-crime doctrine. See *In re Samantha V.*, 234 Ill. 2d 359, 378 (2009) (finding that the trial court violated the one-act, one-crime doctrine when it found the respondent guilty of two counts of aggravated battery but failed to merge the counts or otherwise indicate on the record that the adjudication of delinquency was based on only one count); *People v. Kraus*, 318 Ill. App. 3d 774, 789 (2000) (where the circuit court merged two guilty findings and sentenced the defendant only on the more serious offense, there was only one conviction and thus no violation of the one-act, one-crime rule).

¶ 18 For the reasons explained above, we vacate the trial court's guilty finding on count 1, which charged AHC, and order the clerk of the circuit court to correct the mittimus to reflect a two-year term of MSR. The judgment of the circuit court is affirmed in all other respects.

¶ 19 Affirmed in part, vacated in part; mittimus corrected.