2020 IL App (1st) 172985-U

No. 1-17-2985

Order filed January 29, 2020

Third 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. 16 CR 17583
	)	
ULYSSES DAVIS,	)	Honorable
	)	Michael B. McHale,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Ellis and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Where defendant's prior conviction did not constitute a qualifying offense for background-based Class X sentencing, the trial court committed plain error by imposing a Class X sentence. Defendant's sentence is vacated and the cause is remanded for resentencing.

¶ 2 Following a bench trial, defendant Ulysses Davis was convicted of aggravated domestic battery (720 ILCS 5/12-3.3(a-5) (West 2016)) and sentenced, based on his criminal history, as a Class X offender to 10 years in prison, to be followed by four years of mandatory supervised

release (MSR). On appeal, defendant contends that his criminal history did not qualify him for Class X sentencing. In the alternative, defendant contends that his sentence is excessive. Because we find defendant did not qualify for background-based Class X sentencing, we vacate his sentence and remand.

¶ 3 Defendant's conviction arose from the events of November 12, 2016. At trial, the State introduced evidence that on that date, while defendant and his girlfriend were in a car together, he choked her, bit her face several times, breaking the skin around her nose and cheeks, and bent her hand back, dislocating a joint. When she tried to flee on foot, defendant grabbed her from behind and took her back to the car. A passing police officer spotted defendant pulling at a woman who was leaning on a car's trunk, stopped to assist, and eventually arrested defendant. The trial court found defendant guilty of aggravated domestic battery, unlawful restraint, and three counts of domestic battery. The court subsequently denied defendant's posttrial motion.

¶ 4 At sentencing, the trial court merged all the guilty findings into the count of aggravated domestic battery, which is a Class 2 felony. See 720 ILCS 5/12-3.3(b) (West 2016). The State indicated to the trial court that defendant was "class x'ible [*sic*]" based on his criminal history. As relevant here, the presentence investigation report reveals that defendant's criminal history included two Class 2 felonies: (1) a conviction for a drug offense ("Other Amt Narcotic Sched I&II") on February 20, 2006, when defendant was 17 years old, and (2) a conviction for a drug offense ("MFG/DEL 1<15 GR HEROIN") on September 20, 2012, when he was 24 years old. Defense counsel asked the trial court to impose the minimum sentence, while the State urged the court not to do so, but rather, to impose a sentence "somewhere between the 6 and 30 that this defendant is facing." The trial court sentenced defendant to 10 years in prison and four years of

MSR. Defense counsel filed a motion to reconsider sentence, arguing that the sentence was excessive. The trial court denied the motion.

¶ 5 On appeal, defendant contends that his criminal history did not qualify him for Class X sentencing. Defendant's contention is based on the language of section 5-4.5-95(b) of the Unified Code of Corrections, which provides that when a defendant over the age of 21 is convicted of a Class 1 or Class 2 felony, Class X sentencing is mandatory if he has "twice been convicted in any state or federal court of an offense that contains the same elements as an offense now (the date the Class 1 or Class 2 felony was committed) classified in Illinois as a Class 2 or greater Class felony." 730 ILCS 5-4.5-95(b) (West 2016). Defendant admits that his 2012 conviction is a qualifying prior offense under the statute. But he asserts that his 2006 conviction, because it was entered when he was 17 years old, is not. He argues that due to revisions to the Juvenile Court Act which raised the age for exclusive juvenile court jurisdiction from 16 to 17 (see Pub. Act 98-61 (eff. Jan. 1, 2014) (amending 705 ILCS 405/5-120)), his 2006 conviction is not "an offense now [on November 12, 2016] classified in Illinois as a Class 2 or greater Class felony." Rather, according to his argument, it is an offense that on November 12, 2016, would have been resolved with delinquency proceedings in juvenile court and would not have been subject to criminal laws.

¶ 6 Defendant acknowledges that this issue was not preserved for appellate review because he failed to raise an objection at his sentencing hearing and in a postsentencing motion. Nevertheless, he argues that the issue may be reached under the second prong of the plain error doctrine or because his trial counsel was ineffective. We agree with defendant that the instant case presents an issue of plain error. Under the plain error doctrine, a reviewing court may excuse a party's procedural default if a clear or obvious error has occurred and either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless

of the seriousness of the error, or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Staake*, 2017 IL 121755, ¶ 31. A sentence that is not statutorily authorized affects a defendant's substantial rights and is reviewable as second prong plain error. *People v. Foreman*, 2019 IL App (3d) 160334, ¶¶ 41, 42 (plain error doctrine allowed review of the defendant's claim that a prior conviction did not constitute a qualifying prior offense for Class X sentencing). However, before we consider application of the plain error doctrine, we must determine whether any error occurred. *People v. Wooden*, 2014 IL App (1st) 130907, ¶ 10. This is because " 'without error, there can be no plain error.' " *Id.* (quoting *People v. Smith*, 372 Ill. App. 3d 179, 181 (2007)).

¶ 7 Whether defendant's 2006 conviction constitutes a qualifying prior offense for purposes of mandatory Class X sentencing involves a question of statutory construction. As such, it is a question of law subject to *de novo* review. *People v. Baskerville*, 2012 IL 111056, ¶ 18. The primary objective when interpreting a statute is to ascertain and give effect to the intent of the legislature. *Id.* The best indicator of this intent is the statute's language, which is to be given its plain and ordinary meaning. *Id.* In determining the plain meaning of a statute, a court must consider the statute in its entirety and be mindful of the subject it addresses and the legislature's purpose in enacting it. *Id.* A court may not depart from the plain meaning of a statute and read into it exceptions, limitations, or conditions that are in conflict with the express legislative intent. *Id.* Only when the language of a statute is ambiguous may a court consider extrinsic aids, such as legislative history, to determine the meaning of the statutory language. *Foreman*, 2019 IL App (3d) 160334, ¶ 43.

¶ 8 The statute at issue here is section 5-4.5-95(b) of the Unified Code of Corrections (Code), which falls under the heading "General Recidivism Provisions" and provides as follows:

> "(b) When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now (the date the Class 1 or Class 2 felony was committed) classified in Illinois as a Class 2 or greater Class felony and those charges are separately brought and tried and arise out of different series of acts, that defendant shall be sentenced as a Class X offender." 730 ILCS 5/5-4.5-95(b) (West 2016).

This court has previously found that the language of this statutory section "is clear and unambiguous," and that its "focus is on the elements of the prior offense." *Foreman*, 2019 IL App (3d) 160334, ¶ 46. Because the statute is unambiguous, we need not consider its legislative history. *Id.* ¶ 43.

¶ 9 We agree with defendant that because his 2006 drug offense, had it been committed on November 12, 2016, would have been resolved with delinquency proceedings in juvenile court rather than criminal proceedings, it is not "an offense now *** classified in Illinois as a Class 2 or greater Class felony" and therefore, is not a qualifying offense for Class X sentencing. Section 5-4.5-95(b) unambiguously limits its application to situations where a defendant has previously twice been "convicted" and is silent with regard to adjudications of delinquency. See 730 ILCS 5/5-4.5-95(b) (West 2016). In contrast, a different, but similarly-worded section of the Code, section 5-5-3.2(b)(7), specifically provides for the consideration of prior juvenile adjudications as a reason for imposing an extended-term sentence. See 730 ILCS 5/5-5-3.2(b)(7) (West 2016) (allowing extended-term sentencing when a defendant "has been previously adjudicated a delinquent minor under the Juvenile Court Act of 1987 for an act that if committed by an adult would be a Class X

or Class 1 felony"). The difference between sections 5-4.5-95(b) and 5-5-3.2(b)(7) informs our decision. "When the legislature decides to authorize certain sentencing enhancement provisions in some cases, while declining to impose similar limits in other provisions within the same sentencing code, it indicates that different results were intended." *People v. Bailey*, 2015 IL App (3d) 130287, ¶ 13.

¶ 10 Moreover, in *People v. Taylor*, 221 Ill. 2d 157, 159, 163, 173 (2006), our supreme court distinguished the question of the constitutionality of using juvenile adjudications as functional equivalents of convictions for enhancement purposes under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), from the question of whether juvenile adjudications constitute "convictions" under the Criminal Code of 1961. In doing so, the *Taylor* court observed that in the absence of a statute expressly defining a juvenile adjudication as a conviction, Illinois courts have consistently held that juvenile adjudications do not constitute convictions. *Id.* at 176. Noting that "[i]t is readily apparent that the legislature understands the need for specifically defining a juvenile adjudication as a conviction when that is its intention," the *Taylor* court found that because the legislature had not done so in the statutory sections at issue in that case, it was "constrained to find that [the legislature] had no intent to do so." *Id.* at 178.

¶ 11 In arguing against our conclusion, the State asserts that a criminal conviction entered in criminal court must be given full effect under the Code, even if the defendant was a juvenile at the time he committed the prior offense. The State relies on three cases, all of which interpreted sections of the Code other than section 5-4.5-95(b): *Fitzsimmons v. Norgle*, 104 Ill. 2d 369 (1984); *People v. Bryant*, 278 Ill. App. 3d 578 (1996); and *People v. Banks*, 212 Ill. App. 3d 105 (1991). None of these cases dictates a result in the instant case.

¶ 12 *Fitzsimmons* involved section 5-5-3(c)(2) of the Code, which, at that time, provided that probation was precluded as a sentence for various felonies, including "[a] Class 2 or greater felony if the offender had been convicted of a Class 2 or greater felony within ten years of the date on which he committed the offense for which he is being sentenced." Ill. Rev. Stat. 1981, ch. 38, ¶ 1005-5-3(c)(2)(F). The defendant in *Fitzsimmons* had committed burglary, a Class 2 felony, when he was 14 years old, but had been tried and sentenced as an adult. *Fitzsimmons*, 104 Ill. 2d at 371-72. Upon his subsequent conviction for a Class 2 felony, the trial court sentenced the defendant to probation, ruling that, because the first conviction occurred while the defendant was a juvenile, it was not the type of conviction the statute contemplated as foreclosing probation. *Id.* at 372. The State filed a petition for a writ of *mandamus* to require the trial court to impose a sentence of imprisonment. *Id.* Our supreme court awarded the writ, holding that the Code did not draw a distinction between convictions rendered while the defendant was a juvenile and those which occurred after the defendant is no longer subject to the authority of the juvenile court. *Id.* at 372-73.

¶ 13 *Fitzsimmons* is not controlling here. First, the statute at issue in *Fitzsimmons* did not contain language requiring the trial court to examine how the prior offense would "now" be classified. It has since been amended to add such language. See 730 ILCS 5/5-5-3(c)(2)(F) (West 2016) (providing that probation may not be imposed for a Class 2 or greater felony if the offender, within the prior 10 years, had been convicted of a Class 2 or greater felony for an offense that contained "the same elements as an offense now (the date of the offense committed after the prior Class 2 or greater felony) classified as a Class 2 or greater felony"). Second, in 1981, when the *Fitzsimmons* defendant pled guilty to his second Class 2 felony, the Juvenile Court Act had not yet been revised to raise the age for exclusive juvenile court jurisdiction through the age of 17. See Pub. Act 98-61

(eff. Jan. 1, 2014) (amending 705 ILCS 405/5-120). As such, even if the trial court had considered, in 1981, how the defendant's prior offense would "now" be classified, it would not have contemplated the defendant's having been under 18 as a factor. In short, *Fitzsimmons* concerned different statutory language and was decided more than 30 years prior to the amendment of the Juvenile Court Act. It is not analogous to the instant case.

¶ 14 *Banks* and *Bryant* also do not change our analysis. In *Banks*, 212 Ill. App. 3d at 105-06, the defendant was adjudicated a habitual criminal. The adjudication was made pursuant to the Habitual Criminal Act (HCA), which provided, in relevant part, that a defendant who had been "twice convicted in any state or federal court of an offense that contains the same elements as an offense now classified in Illinois as a Class X felony, criminal sexual assault or first degree murder, and is thereafter convicted of a Class X felony, criminal sexual assault or first degree murder," be adjudged an habitual criminal. Ill. Rev. Stat. 1987, ch. 38, ¶ 33B-1 (now codified at 730 ILCS 5/5-4.5-95(a) (West 2016)). On appeal, the defendant in *Banks* contended that the adjudication was inappropriate because he committed three of his four prior convictions when he was only 15 years old. *Id.* at 106. This court rejected that argument, stating as follows:

> "Any conviction may be used as a former conviction under the habitual criminal statute. No exception is made for convictions obtained while the defendant was a juvenile. We see no indication in the Juvenile Court Act or the Criminal Code of 1961 that criminal convictions obtained while the defendant is a minor should be treated any differently than criminal convictions of an adult. It seems to us that a conviction is a conviction." *Id.* at 107.

¶ 15 In *Bryant*, 278 Ill. App. 3d at 580, the defendant was adjudicated a habitual criminal pursuant to the HCA and sentenced to life in prison. On appeal, he contended that that his sentence constituted an unconstitutional double enhancement because the trial court determined that his

guilty pleas in cases which were transferred from juvenile court constituted a former conviction for purposes of the HCA. *Id.* at 586. This court found the argument to be without merit, noting that the HCA referenced "[a]ny convictions." *Id.* (quoting 720 ILCS 5/33B-1(c) (West 1992)). Citing *Banks,* the *Bryant* court concluded, "This includes convictions obtained while a defendant was a juvenile." *Id.* (citing *Banks*, 212 Ill. App. 3d at 105).

¶ 16 *Banks* and *Bryant* were decided, respectively, in 1991 and 1996, well before the Juvenile Court Act was amended to raise the age for exclusive juvenile court jurisdiction through the age of 17. See Pub. Act 98-61 (eff. Jan. 1, 2014) (amending 705 ILCS 405/5-120). Thus, the *Banks* and *Bryant* defendants' prior offenses would have been considered "convictions" under the laws in effect 1991 and 1996. In contrast, under the law in effect after January 1, 2014, the prior offenses would not have resulted in convictions, but rather, juvenile adjudications. Because *Banks* and *Bryant* predate the amendment to the Juvenile Court Act, they do not direct our decision in the instant case.

¶ 17 Here, had defendant committed his 2006 drug offense under the laws in effect on November 12, 2016, the juvenile court would have had exclusive jurisdiction. See Pub. Act 98-61 (eff. Jan. 1, 2014) (amending 705 ILCS 405/5-120). The offense would have led to a juvenile adjudication rather than a Class 2 felony conviction. As such, we find that defendant's 2006 drug offense is not "an offense now *** classified in Illinois as a Class 2 or greater Class felony" and should not have been considered a qualifying offense for Class X sentencing by background. Where the Class X sentence was not statutorily authorized and affected defendant's substantial rights (see *Foreman*, 2019 IL App (3d) 160334, ¶ 42), the trial court committed plain error in sentencing defendant as a Class X offender based on his criminal background. Accordingly, we

vacate defendant's Class X sentence and remand to the circuit court for resentencing as a Class 2 offender.

¶ 18 In light of our determination, we need not address defendant's alternative contention that his sentence is excessive.

¶ 19 For the reasons explained above, we vacate defendant's Class X sentence. We remand to the circuit court for resentencing as a Class 2 offender.

¶ 20 Sentence vacated; remanded.