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2014 IL App (4th) 130796-U

NO. 4-13-0796

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

Order filed January 24, 2014

Modified upon denial of rehearing March 6, 2014

In re: JACOB K., a Minor,)	Appeal from
THE PEOPLE OF THE STATE OF ILLINOIS,)	Circuit Court of
Plaintiff-Appellee,)	McLean County
v.)	No. 12JD63
JACOB K.,)	
Respondent-Appellant.)	Honorable
)	Elizabeth A. Robb,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Appleton and Justice Harris concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where the plain language of the armed violence statute dictates the offense of armed violence may not be predicated on unlawful restraint, respondent's conviction and sentence for armed violence pursuant to a guilty but mentally ill plea were vacated while his remaining convictions were allowed to stand.
- ¶ 2 In December 2012, respondent, Jacob K. (born January 28, 1998), pleaded guilty but mentally ill to one count of armed violence (720 ILCS 5/33A-2(b) (West 2012)), a Class X felony; three counts of unlawful use of a weapon (720 ILCS 5/24-1(a)(4) (West 2012)), a Class 3 felony; three counts of unlawful possession of a handgun (720 ILCS 5/24-3.1(a)(1) (West 2012)), a Class 4 felony; and one count of aggravated unlawful restraint (720 ILCS 5/10-3.1(a) (West 2012)), a Class 4 felony. Following a March 2013 sentencing hearing, the trial court sentenced respondent to concurrent indeterminate terms in the Illinois Department of Juvenile Justice (DOJJ) on each count. Respondent appeals, arguing his conviction and sentence for

armed violence must be vacated because the plain language of the armed violence statute precludes the State from using unlawful restraint as the predicate offense. Alternatively, respondent contends if the plain language of the armed violence statute allows the offense to be predicated on the offense of unlawful restraint, his conviction for armed violence must still be vacated because it violates the proportionate penalties clause of the Illinois Constitution. We affirm in part and vacate in part.

¶ 3

I. BACKGROUND

¶ 4

On September 10, 2012, the State filed a petition for adjudication of wardship. The petition alleged respondent was delinquent by way of his commission of 16 separate criminal offenses, including three counts of armed violence predicated upon unlawful restraint, six counts of unlawful use of a weapon, three counts of unlawful possession of a handgun, one count of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1) (West 2012)), two counts of aggravated unlawful restraint, and one count of unlawful restraint (720 ILCS 5/10-3 (West 2012)).

¶ 5

The petition was filed after a September 2012 incident at Normal Community High School in which respondent was involved. Toward the end of his first period health class, respondent's teacher, Derrick Schonauer, gave the students free time. During this free time, respondent walked to the front of the classroom with his book bag. Respondent called the class to his attention. Respondent removed from his book bag a hatchet and a canteen full of kerosene. Respondent also pulled a Beretta 9-millimeter handgun out of his book bag and fired a round into the ceiling. Respondent and a classmate had a verbal exchange, which resulted in respondent aiming, but not firing, the handgun at the student. Respondent pointed the handgun in the direction of several other students and Schonauer, who was asking respondent to

relinquish possession of the gun.

¶ 6 When one of respondent's classmates became upset, respondent ordered the students to hug and console the classmate. As respondent turned his back to the class, 13 students were able to escape from the classroom through its door. Respondent ran to the door and briefly pointed the handgun into the hallway. Respondent reentered the classroom and fired three rounds into the ceiling. He then ordered the 17 remaining students and the teacher to form a line along the back wall of the classroom.

¶ 7 Respondent walked to the front of the classroom and set the handgun on a desk. Schonauer ran up and grabbed the handgun. In response, respondent jumped on Schonauer's back and a struggle over the weapon ensued. During this struggle, a shot was fired into an unoccupied corner of the classroom. Two students joined the struggle and assisted Schonauer in physically subduing respondent.

¶ 8 When police arrived, they took respondent into custody and seized the Beretta handgun, the canteen, and the hatchet. Police later searched respondent's book bag. During the search of the book bag, police recovered one large knife and its sheath, one folding-blade knife, one box of stick matches, two .22-caliber Ruger pistols, five ammunition clips loaded with 50 rounds of .22-caliber ammunition, and one ammunition clip loaded with 16 rounds of 9-millimeter ammunition.

¶ 9 At the police station, Detective William Angus of the Normal police department questioned respondent regarding the incident. Angus determined respondent was not acting completely normal based on respondent's nonverbal conduct and his responses to the detective's questions. Throughout the interview, Angus noticed respondent was starting to act more normally, which allowed Angus to obtain more information about the events leading up to the

incident.

¶ 10 At the time of the incident, respondent was suffering from severe auditory hallucinations. He had been suffering from these hallucinations for a number of years. The hallucinations became more severe as respondent grew older. The night before the incident, respondent suffered a hallucination during which a voice inside his head told him to dump everything out of his book bag and put a .22-caliber Ruger pistol inside the bag.

¶ 11 In November 2012, the State moved for a discretionary transfer to adult court. After holding a lengthy hearing on the propriety of prosecuting respondent in adult court, the trial court found the State did not "overcome the burden in demonstrating that a transfer to [a]dult [c]ourt is appropriate or in the [m]inor's or the public's best interest." Accordingly, the court denied the motion and the cause proceeded in juvenile court.

¶ 12 Respondent's fitness to stand trial was never in question, but his sanity at the time of the offense was questioned. At the December 2012 adjudication hearing, respondent's counsel indicated the State and respondent had come to a plea agreement on the petition for adjudication. Respondent agreed to plead guilty but mentally ill to one count of armed violence, three counts of unlawful use of a weapon, three counts of unlawful possession of a handgun, and one count of aggravated unlawful restraint. In exchange for his plea, the State agreed to drop the eight remaining charges. The State and respondent did not agree on a sentence. The State provided the trial court with the factual basis underlying the plea, which the court accepted. The court found the material it reviewed—two clinical psychiatric exams of respondent and a 6 1/2-hour videotape of respondent's interview at the police station following the incident—supported the plea of guilty but mentally ill.

¶ 13 Prior to sentencing, the parties and the trial court never ascertained whether the

charges in this case warranted mandatory consecutive sentences, although this issue was mentioned at the November 2012 discretionary transfer hearing. Following a March 2013 sentencing hearing, the trial court sentenced respondent to concurrent indeterminate terms in DOJJ on each count. The terms were not to exceed (1) the minor's twenty-first birthday on the armed violence conviction, (2) five years on his convictions for unlawful use of a weapon and aggravated unlawful restraint, and (3) three years on his convictions for unlawful possession of a handgun.

¶ 14 In April 2013, respondent timely filed a motion to reconsider sentence, arguing the trial court committed various sentencing errors. Respondent's counsel filed a certificate pursuant to Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013). The certificate indicated counsel had consulted with respondent regarding only the motion to reconsider sentence and not respondent's contentions of error in the plea of guilty. In May 2013, the trial court held a hearing and denied respondent's motion to reconsider sentence in open court.

¶ 15 Respondent appealed. Respondent thereafter filed an agreed motion for summary remand, arguing trial counsel's Rule 604(d) certificate failed to strictly comply with the rule. In July 2013, we allowed respondent's motion and remanded the cause to the trial court. *In re Jacob K.*, No. 4-13-0455 (summary remand order). The summary remand order provided:

"Respondent-appellant's motion for summary remand is hereby allowed. The cause is remanded to the circuit court for the filing of a corrected Supreme Court Rule 604(d) certificate indicating consultation about errors in both the plea and the sentence, the opportunity to file a new post-plea motion, if counsel concludes that a new motion is necessary, a hearing on the motion,

a new judgment, and strict compliance with [the] requirements of Rule 604(d)." *In re Jacob K.*, No. 4-13-0455 (summary remand order).

¶ 16 In August 2013, the trial court held a hearing to address this court's summary remand order. At the hearing, respondent's counsel told the court he filed a new, corrected Rule 604(d) certificate. Respondent's counsel then stated he did not intend to file a new postplea motion, and "having tendered a copy of [the new Rule 604(d) certificate] to the court, I think the court then can, essentially, send this matter back up for the appeal ***. I don't think there's anything else we need to do at this point in time at this court level." The court ensured respondent's counsel did not intend to file a new postplea motion and (1) directed the clerk to send the new 604(d) certificate and the transcript of the remand proceedings to the appellate court so the appeal could proceed, and (2) remanded respondent back to the custody of DOJJ.

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 Respondent argues his conviction and sentence for armed violence is void because, based on the plain language of the statute, armed violence cannot be predicated upon unlawful restraint. We agree.

¶ 20 A. Jurisdiction

¶ 21 We must first address whether this court has jurisdiction to consider respondent's appeal. The State argues this court lacks jurisdiction to consider the appeal because respondent's motion to reconsider sentence is still pending before the trial court, citing *People v. Willoughby*, 362 Ill. App. 3d 480, 482, 840 N.E.2d 803, 805 (2005). In support of its argument, the State relies on the summary remand order's language directing the trial court to hold "a hearing on the

motion [and enter] a new judgment." The State argues this court must dismiss the appeal and remand the cause for a hearing and ruling on the motion to reconsider.

¶ 22 The record shows the trial court held a hearing to dispose of respondent's motion to reconsider sentence on May 20, 2013. After hearing the arguments of the parties, the court denied the motion in open court. This ruling is reflected in a May 20, 2013, docket entry. The record shows no other motions pending. Thus, at the time we ordered summary remand, no postplea motions were pending before the court and respondent's May 22, 2013, notice of appeal was sufficient to give this court jurisdiction over the cause. Ill. S. Ct. R. 606(a), (b) (eff. Feb. 6, 2013). Consequently, whether we have jurisdiction is dependent on the effect of our July 2013 summary remand order. In other words, did our summary remand order vacate the trial court's May 2013 denial of defendant's motion to reconsider and require a new hearing and judgment on the April 2013 motion to reconsider, or did the order require a new hearing and judgment *only if the respondent elected to file a new postplea motion?*

¶ 23 Our July 2013 summary remand order did not vacate the previous denial of respondent's motion to reconsider sentence. Rather, the order directed respondent's counsel to file a corrected Rule 604(d) certificate and a new postplea motion if, in fulfilling his duties under Rule 604(d), he concluded a new motion was necessary to bring additional alleged errors before the trial court. Because respondent's counsel decided, after complying with Rule 604(d), no new postplea motion was necessary and to stand on the previous motion, no new hearing or new judgment were required. To hold a new hearing and enter a new judgment on a previously argued and decided motion would serve no purpose. Thus, respondent's notice of appeal filed after counsel tendered his new Rule 604(d) certificate vested this court with jurisdiction over respondent's appeal.

¶ 24 B. Standard of Review and Principles of Statutory Construction

¶ 25 The question respondent presents is one of statutory construction, which we review *de novo*. *People v. Perry*, 224 Ill. 2d 312, 324, 864 N.E.2d 196, 204 (2007). Our primary objective in construing a statute is to ascertain and effectuate the legislature's intent. *Id.* at 323, 864 N.E.2d at 204. The best indication of the legislature's intent is the language of the statute, which should be given its plain and ordinary meaning. *People v. Giraud*, 2012 IL 113116, ¶ 6, 980 N.E.2d 1107. "When statutory language is plain and unambiguous, the statute must be applied as written without resort to aids of statutory construction." *People ex rel. Madigan v. Kinzer*, 232 Ill. 2d 179, 184, 902 N.E.2d 667, 671 (2009). Courts of review may not depart from a statute's plain language by reading into it exceptions, limitations, or conditions. *Id.* at 184-85, 902 N.E.2d at 671.

¶ 26 C. The Armed Violence Statute and Unlawful Restraint

¶ 27 Section 33A-2(b) of the Criminal Code of 2012 (Code) provides:

"(b) A person commits armed violence when he or she personally discharges a firearm that is a Category I or Category II weapon while committing any felony defined by Illinois law, except *** any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range." 720 ILCS 5/33A-2(b) (West 2012).

¶ 28 In this case, respondent was charged with armed violence predicated on the felony of unlawful restraint pursuant to section 33A-2(b). Section 10-3(a) of the Code defines the

offense of unlawful restraint, providing, "A person commits the offense of unlawful restraint when he or she knowingly without legal authority detains another." 720 ILCS 5/10-3(a) (West 2012). The Code also provides for an aggravated version of unlawful restraint in section 10-3.1(a), which states, "A person commits the offense of aggravated unlawful restraint when he or she commits unlawful restraint *while using a deadly weapon*." (Emphasis added.) 720 ILCS 5/10-3.1(a) (West 2012). As unlawful restraint has an aggravated version in which the use of a *deadly* weapon is an element of the offense, the issue before us is whether a deadly weapon is a dangerous weapon for purposes of the armed violence statute.

¶ 29 For purposes of section 10-3.1(a) of the Code, a "deadly" weapon is "dangerous to life or one likely to produce death or great bodily injury, or one that may be used for the purpose of offense or defense and capable of producing death." (Internal quotations omitted.) *People v. Stanley*, 369 Ill. App. 3d 441, 445, 860 N.E.2d 343, 348 (2006). Section 33A-1(c) of the Code defines what "armed with a dangerous weapon" means for purposes of the armed violence statute. Section 33A-1(c) states, in pertinent part:

"(1) 'Armed with a dangerous weapon'. A person is considered armed with a dangerous weapon for purposes of this Article, when he or she carries on or about his or her person or is otherwise armed with a Category I, Category II, or Category III weapon.

(2) A Category I weapon is a handgun, sawed-off shotgun, sawed-off rifle, any other firearm small enough to be concealed upon the person, semiautomatic firearm, or machine gun. A Category II weapon is any other rifle, shotgun, spring gun, other firearm, stun gun or taser ***, knife with a blade of at least 3 inches in

length, dagger, dirk, switchblade knife, stiletto, axe, hatchet, *or other deadly or dangerous weapon* or instrument of like character." (Emphasis added.) 720 ILCS 5/33A-1(c) (West 2012).

¶ 30 Respondent argues a "deadly" weapon, as referred to in section 10-3.1(a) of the Code, is inherently a "dangerous" weapon for purposes of the armed violence statute. The State responds the use of different terms by the legislature in each statute is significant, and to allow respondent's interpretation would require the court to depart from and expand the plain language of section 33A-2(b) to encompass the possession or use of either a dangerous weapon *or a deadly weapon*. The State urges if "the legislature had meant to say something like that, it could have easily done so." See 720 ILCS 5/33A-1(c)(2) (West 2012) (mentioning "other deadly or dangerous weapon").

¶ 31 We agree a "deadly" weapon is inherently a "dangerous" weapon for purposes of the armed violence statute. A deadly weapon, by its very definition, is a dangerous weapon—a deadly weapon is one *dangerous* to life. We acknowledge all dangerous weapons may not necessarily be deadly, but we decline to find a deadly weapon is not also dangerous. This conclusion does not, as the State urges, require us to expand the language of the armed violence statute to encompass possession or use of either a dangerous weapon *or* a deadly weapon. In fact, we conclude the legislature intended this result when it defined "armed with a dangerous weapon" in section 33A-1 of the armed violence statute. Section 33A-1(c)(2) defines Category I and Category II weapons. Category II weapons are defined to include a wide range of weapons, as well as "other deadly or dangerous weapon[s]." 720 ILCS 5/33A-1(c)(2) (West 2012). By defining "armed with a dangerous weapon" to include "other deadly *** weapons," we conclude the legislature intended to bring deadly weapons within the armed violence statute's purview.

Therefore, based on the plain language of the armed violence statute, the offense of armed violence may not be predicated upon unlawful restraint.

¶ 32 The State cites *People v. Murphy*, 261 Ill. App. 3d 1019, 635 N.E.2d 110 (1994), in support of its argument the plain language of the armed violence statute does not exclude unlawful restraint from the permissible predicate felonies. In *Murphy*, the appellate court ultimately held armed violence cannot be predicated on unlawful restraint because of the proportionate penalties issue identified in *People v. Wisslead*, 94 Ill. 2d 190, 446 N.E.2d 512 (1983). *Murphy*, 261 Ill. App. 3d at 1023, 635 N.E.2d at 112-13. Before reaching this conclusion, the *Murphy* court accepted the State's argument aggravated unlawful restraint does not require the use of a " 'dangerous weapon' " as defined in the armed violence statute. *Id.*, 635 N.E.2d at 112 The *Murphy* court explained, "a person can commit aggravated unlawful restraint by using a 'deadly' weapon, rather than a 'dangerous weapon,' and not simultaneously commit armed violence." *Id.*

¶ 33 *Murphy* is inapposite. *Murphy* was decided in 1994, when the armed violence statute defined the offense as follows: "A person commits armed violence when, while armed with a dangerous weapon, he commits *any felony defined by Illinois Law*." (Emphasis added.) 720 ILCS 5/33A-2 (West 1992). Since the time *Murphy* was decided, the General Assembly has amended the armed violence statute three times, (see Pub. Act 91-404, § 5 (eff. Jan. 1, 2000); Pub. Act 95-688, § 4 (eff. Oct. 23, 2007); Pub. Act 96-1551, Art. 1, § 960 (eff. July 1, 2011)), including the amendment in Public Act 95-688, which we find dispositive in this case. This amendment excluded from permissible predicate felonies under the armed violence statute "any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that

increases the sentencing range." 720 ILCS 5/33A-2(b) (West 2012); see Pub. Act 95-688, § 4 (eff. Oct. 23, 2007). Unlawful restraint has an aggravated version in which the use of a deadly weapon, which is inherently a dangerous weapon, is an element of the offense, and as such, the offense of armed violence may not be predicated upon unlawful restraint.

¶ 34 Since the above analysis resolves the parties' contentions, we need not address whether respondent's conviction and sentence for armed violence predicated on unlawful restraint violates the proportionate penalties clause of the Illinois Constitution.

¶ 35 D. The Remedy

¶ 36 The parties disagree concerning what remedy is warranted where, as here, a conviction and sentence pursuant to a plea agreement is void. Respondent argues the proper remedy is to vacate his remaining convictions and to "allow him to withdraw his guilty plea, if he so desires," citing *People v. Gregory*, 379 Ill. App. 3d 414, 422, 883 N.E.2d 762, 769 (2008).

¶ 37 *Gregory* involved a defendant who was sentenced to probation after he pleaded guilty to burglary in exchange for the State's agreement to dismiss a charge for retail theft and a sentencing cap of three years' imprisonment. *Id.* at 416, 883 N.E.2d at 764. Following probation revocation proceedings, a new judge resentenced defendant. *Id.* at 417, 883 N.E.2d at 765. This court held the agreed sentencing cap was not provided for under the applicable statute—the sentencing cap was three years less than the six-year minimum to which defendant was subjected. *Id.* at 420, 883 N.E.2d at 768. Because the trial court originally entered a sentence not authorized by statute, the plea agreement was void. *Id.* at 421, 883 N.E.2d at 768. This court held defendant's burglary conviction was therefore void, as it was based on a void plea agreement. *Id.* at 422, 883 N.E.2d at 769. Since the plea agreement and conviction were void, specific performance of the plea agreement was not a viable option. *Id.* Accordingly, the court

found "the appropriate remedy [was] to vacate defendant's conviction and allow him to withdraw his guilty plea, if he so desire[d]." *Id.*

¶ 38 *Gregory* is factually distinguishable from the present case based on the fact *Gregory* involved an adult defendant who pleaded guilty in exchange for a sentencing cap that was unauthorized by statute. In this case, the parties made no agreement as to sentence. Further, in *Gregory*, the defendant pleaded guilty to only one offense, whereas here, respondent pleaded guilty to seven offenses in addition to armed violence predicated on unlawful restraint. We decline to apply *Gregory*, as the analysis there centered on the parties' agreed sentence and whether the agreed sentence was an essential part of the agreement. *Id.* at 419-21, 883 N.E.2d at 767-68. Moreover, the *Gregory* court's decision to allow the defendant to withdraw his guilty plea made sense in light of the fact the defendant pleaded guilty to only one offense and could not enjoy the benefit of his bargain—the three-year sentencing cap—as it was not authorized by statute.

¶ 39 In response, the State argues the proper remedy is to vacate only the conviction and sentence for armed violence and allow the remaining convictions and sentences to stand. The State contends the judgment is void "only to the extent that it exceeds what the law permits," citing *People v. Brown*, 225 Ill. 2d 188, 205, 866 N.E.2d 1163, 1173 (2007). We agree with the State. In this case, the trial court entered a conviction and sentence on a statutorily unauthorized offense (armed violence predicated upon unlawful restraint). As the law does not permit this conviction and sentence, this portion of the judgment is void and must be vacated.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we affirm the trial court's judgment as to respondent's convictions for unlawful use of a weapon, unlawful possession of a handgun, and aggravated

unlawful restraint and vacate respondent's conviction and sentence for armed violence.

¶ 42 Affirmed in part and vacated in part.