2014 IL App (1st) 112936-UB

THIRD DIVISION
Rule 23 Order filed December 18, 2013
Modified upon denial of rehearing June 30, 2014

No. 1-11-2936

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. 11 CR 803
	)	
TERRENCE DENNIS,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court's denial of defendant's motion to quash arrest and suppress evidence was proper under the fourth amendment; the trial court did not apply an improper double enhancement to find defendant eligible for a Class X sentence; the trial court properly ordered three years of mandatory supervised release.

¶ 2 Following a stipulated bench trial, defendant was convicted of violating section 6 of the Sex Offender Registration Act (Act) (730 ILCS 150/6 (West 2010)). He received, because of his

background, a Class X sentence of six years in prison under section 5-4.5-95(b) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-4.5-95(b) (West 2010)). The court also imposed a three-year mandatory supervised release (MSR) term. On appeal, defendant asserts that the trial court: (1) erred in denying his motion to quash arrest and suppress evidence when the arresting officer's actions amounted to an unlawful seizure; (2) applied an improper double enhancement to find him eligible for a Class X sentence; and (3) improperly ordered a three-year MSR term, which must be reduced to a two-year term. We affirm.

¶ 3 Defendant was charged by indictment with violating the Act "in that he, having been previously convicted of an aggravated criminal sexual abuse under case 02CR21636, changed his address and knowingly failed to report *** within 3 days of such change of address." In two counts, the State sought to sentence defendant as a Class 2 offender because he had been twice separately convicted of violating of the Act, in cases 05CR9210 and 07CR16558.

¶ 4 At the hearing on defendant's motion to quash arrest and suppress evidence, the parties stipulated that if called, Detective Patricia Dwyer would testify that in early November 2010 she received a report from Officer Craig Williams that he conducted a routine sex offender registration check at 712 North Latrobe and discovered that the building was vacant. After checking her records, Dwyer discovered that defendant had registered at the Latrobe address on June 15, 2010. She learned that defendant had failed to register a new address within 90 days subsequent to that or within 3 days of changing his address as required under the Act. Dwyer personally went to 712 North Latrobe and discovered it was a vacant building. She then issued an investigative alert for defendant.

¶ 5 Defendant testified that in the afternoon of December 14, 2010, he was walking north on North Cambridge Avenue in Chicago around 2 p.m. Police officers drove up and turned into a driveway, cutting off defendant's path. Defendant maintained that he had not done anything illegal. The officers got out of the car and announced their office. The officers asked defendant if he was trespassing, and then asked for his name. Defendant told the officers his name, and the officers "ran it" in their computer. The officers told defendant that he was wanted for failing to register as a sex offender and arrested him.

¶ 6 Officer Bryan Towey testified that he and his partner, Officer Galiardo, were conducting a drug investigation in the vicinity of 900 North Cambridge Avenue, near the Cabrini Green Public Housing Complex around 12:15 p.m. He and his partner observed several people on the block, and defendant was standing about 10 to 15 feet away from them. Towey approached defendant, and he began to walk away. The officers called defendant over, and conducted a "field interview." Towey asked defendant his name and if he lived in the complex. Defendant gave the officers his name and address. The officers conducted a L.E.A.D.S check on him, and learned that defendant had an open investigative alert for failure to register as a sex offender.

¶ 7 At the conclusion of the hearing, defendant argued that he was not doing anything illegal, and the officers had no probable cause to detain him and because defendant's statement was a product of his illegal seizure, the evidence should be suppressed. The State argued against the motion, stating that defendant was not in custody when he gave the officers his name and address. The court denied the motion, finding Officer Towey's testimony to be credible and an accurate statement of the facts of the case. It reasoned that asking defendant for his name and

address did not amount to custody, and the officers had probable cause to arrest defendant once the name check was completed. Thus, defendant's fourth amendment rights were not violated.

¶ 8 The court then admonished defendant regarding the rights he was waiving by agreeing to a stipulated bench trial. The parties stipulated that defendant was originally required to register annually as a sex offender because he was convicted of aggravated criminal sexual abuse on March 24, 2003, in case 02CR21636. Because defendant received a failure to register conviction on May 1, 2008, in case 07CR16558, he was subsequently required to register every 90 days as opposed to every year. (The State nol prossed the charge citing his 2005 conviction under the Act in case 05CR9210.) The court admonished defendant that he would be sentenced within the Class X range due to "his original convictions" and his "Class 2 narcotics conviction from 1997." The latter refers to his March 1998 conviction on the Class 2 felony of manufacture or delivery of a controlled substance in case 97CR11188.

¶ 9 It was stipulated that Detective Dwyer would testify that she interviewed defendant on December 14, 2010, around 3:45 a.m. at the 18th district. Defendant told her he moved to 1430 North Mayfield, and that he tried to register. He also stated that he was in compliance with the Act. Dwyer contacted the Chicago Police Criminal Registration Unit and learned that on August 23, 2010, defendant went to the registration desk attempting to register the address of 1430 North Mayfield in Chicago, and was told that the address was within 500 feet of a prohibited zone, and that he could not register the address. Defendant admitted to receiving notice that the address could not be registered. He also admitted to receiving a copy of a map of the area, which he signed. The State presented defendant's Illinois Sex Offender Registration Act registration form dated June 15, 2010, and the signed map presented to defendant on August 23, 2010.

¶ 10 The parties also stipulated that Craig Williams would testify that on October 28, 2010, he went to 712 North Latrobe Avenue in Chicago and discovered it was a vacant building.

¶ 11 The trial court found defendant guilty of violating the Sex Offender Registration Act and sentenced him to six years in prison.

¶ 12 The first issue on appeal is whether Officer Towey violated defendant's fourth amendment right against unlawful seizure when he approached defendant and asked him his name, and if this information should be suppressed.

¶ 13 We review a trial court's ruling on a motion to suppress evidence pursuant to a two-part test. *People v. Colyar*, 2013 IL 111835, ¶24. First, the reviewing court affords "great deference to the trial court's factual findings, and will reverse those findings only if they are against the manifest weight of the evidence." *Id*. We review *de novo* the ultimate question of whether the arrest should be quashed and the evidence suppressed. *Id*.

¶ 14 Both the fourth amendment to the United States Constitution (U.S. Const., amend. IV) and article I, section 6, of the Illinois Constitution (Ill. Const. 1970, art. I, § 6) protect individuals from unreasonable searches and seizures. *People v. Garcia*, 2012 IL App (1st) 102940, ¶4. For purposes of the fourth amendment, an individual is "seized" when an officer " 'by means of physical force or show of authority, has in some way restrained the liberty of a citizen.' " *People v. Luedemann*, 222 Ill. 2d 530, 550 (2006) quoting *Terry v. Ohio*, 392 U.S. 1, 19 n. 16, 88(1968). In this context, a seizure occurs only when a reasonable person would not feel free to leave. *Id.* at 550. The analysis requires an objective assessment of the police conduct and does not depend upon the subjective perception of the defendant. *Id*. at 551.

¶ 15 In *Luedemann*, our supreme court described three levels of police-citizen encounters. In doing so, it explained that not every encounter between the police and a citizen results in a seizure. *Id*. at 544. Thus, the courts have divided police-citizen encounters into three tiers: (1) arrests, which must be supported by probable cause; (2) brief investigative detentions (*Terry* stops), which must be supported by a reasonable, articulable suspicion of criminal activity; and (3) encounters that involve no coercion or detention and thus do not implicate the fourth amendment (consensual encounters). *Id*. As to a consensual encounter, the law is clear that a police officer does not violate the fourth amendment by merely approaching a person in a public place and asking him questions if he is willing to listen. *Id*. at 549. The police have the right to approach citizens and ask potentially incriminating questions. *Id*.

¶ 16 In this case, the trial court did not err when it denied defendant's motion to quash arrest and suppress evidence. Defendant testified that the police officers cut off his progress by blocking a driveway and the sidewalk with their squad car. The police officers, on the other hand, testified that they merely asked defendant to answer some questions and he agreed to do so. The trial court accepted the State's version of events and we find that this was not against the manifest weight of the evidence.

¶ 17 Under the State's version of events this was a consensual encounter--the police merely approached defendant and asked him his name and address; therefore, defendant's fourth amendment rights were not infringed. Thus, the trial court properly denied defendant motion to quash arrest and suppress evidence as Officer's Towey's action never amounted to a "seizure" within the meaning of the fourth amendment.

¶ 18 The second issue on appeal is whether defendant's prior conviction for aggravated criminal sexual abuse was improperly used both as an element of the offense and as a basis for imposing a mandatory Class X sentence, resulting in an improper double enhancement.

¶ 19 Generally, a defendant must preserve a claim of sentencing error for appellate review with both a contemporaneous objection and a written postsentencing motion raising the issue, or the issue is forfeited on review. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Here, defendant did not object to the court's consideration of the sentencing factors at the sentencing hearing, nor did he file a written motion to reconsider his sentence. However, defendant cites *People v. Chaney*, 379 Ill. App. 3d 524, 528 (2008), in arguing against forfeiture, asserting that an impermissible double enhancement renders a sentence void, that voidness may be raised at any time, and that we should review his legal claim *de novo*. For the reasons stated below, we find no improper double enhancement so that the judgment is not erroneous, much less void.

¶ 20 An improper double enhancement takes place when either a single factor is used both as an element of an offense and as a basis for imposing a harsher sentence than might otherwise have been imposed, or the same factor is used twice to elevate the severity of the offense itself. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 232 (2009). The danger posed by the first kind of double enhancement is that the legislature already considered the element in defining the offense and determining its penalty so that using that element again serves to increase the penalty twice. Defendant contends that he has suffered a double enhancement of the first kind, in that his aggravated criminal sexual abuse conviction is an element of the instant offense but is also being used as one of the two prior felonies to impose Class X sentencing on a Class 2 offense.

¶ 21 Defendant was charged with violating section 6 of the Act in that, having previously been convicted of aggravated criminal sexual abuse in case 02CR21636, he changed his residence and failed to report that change of address. 730 ILCS 150/6 (West 2010). The Act states that "[a]ny person who is convicted for a violation of this Act for a second or subsequent time is guilty of a Class 2 felony." 730 ILCS 150/10(a) (West 2010). Defendant was eligible to be sentenced as a Class 2 offender because he was previously convicted of a failure to register violation in May 2008 in case 07CR16558, making this a subsequent violation of the Act.[1] He was then found eligible for Class X sentencing pursuant to section 5-4.5-95(b) of the Unified Code, which provides that a defendant convicted of a Class 2 felony shall be sentenced as a Class X offender if he or she was previously convicted of two separately committed and tried offenses of Class 2 felony or greater. 730 ILCS 5/5-4.5-95(b) (West 2010). Specifically, defendant's qualifying prior convictions were manufacture or delivery of a controlled substance and aggravated criminal sexual abuse.

¶ 22 As stated above, the heart of defendant's contention is that his aggravated criminal sexual abuse conviction is improperly being used twice: once as an element of the instant offense and again as one of the two prior felonies for Class X sentencing. However, we find that his aggravated criminal sexual abuse conviction is not an *element* of the instant offense. It was used only to determine what, if any, sentencing enhancement applied. The offense under the Act is defined thus: "Any person who is required to register under this Article who violates any of the provisions of this Article and any person who is required to register under this Article who seeks

[1] While this conviction followed his conviction under the Act in case 05CR9210, the instant record shows that defendant was sentenced in case 07CR16558 for a Class 3 felony. The record does not indicate the content of that charge or whether the conviction was by trial or plea.

to change his or her name under Article 21 of the Code of Civil Procedure is guilty of" a Class 3 felony, or a Class 2 felony if previously convicted of violating the Act. 730 ILCS 150/10(a) (West 2010).

¶ 23 We consider it key that the statutory element of the offense at issue is not a prior criminal conviction but that defendant *is required to register under the Act*. Our legislature is eminently capable of creating a prior-conviction element when it so intends, and the Criminal Code is replete with offenses aggravated or elevated by prior convictions as such. *See, e.g.*, 720 ILCS 5/16-1(b) (West 2010)(theft otherwise a Class A misdemeanor elevated to Class 4 felony by certain prior convictions); 720 ILCS 5/24-1.1 (West 2010)(unlawful use of a weapon by a felon, including element that "the person has been convicted of a felony under the laws of this State or any other jurisdiction.") We also consider it key that the Act requires registration on several grounds, only some of which are criminal convictions, and that the other grounds notably include being found not guilty by reason of insanity of enumerated offenses. 730 ILCS 150/2(A) (West 2010). In sum, the element at issue in the instant offense is the status of being a person required to register under the Act, however that status arose.

¶ 24 We therefore find that the danger of the first class of double enhancement – that the legislature already considered the element in defining the offense and determining its penalty – does not exist here. Because the Act requires registration by persons convicted of offenses less than a Class 2 felony (*e.g.*, 730 ILCS 150/2(B)(1); 720 ILCS 5/11-9.1(c)(1) (West 2010) (Class A misdemeanor)), and even by persons found not guilty by reason of insanity, the legislature clearly did not rely on the severity of a Class 2 felony conviction such as defendant's in establishing the penalty under section 10 of the Act.

¶ 25 In *People v. Brown*, 182 Ill. App. 3d 491 (1989), a defendant who committed felony theft while on bond awaiting sentencing for a burglary conviction and was sentenced consecutively contended on appeal that he suffered a double enhancement because it was the burglary conviction that rendered his theft a felony. We disagreed and affirmed the sentencing, finding that "the factor which mandated the consecutive sentence was the commission of a criminal offense while out on bond, not the prior burglary conviction. The factor which elevated the misdemeanor to a felony was not the same factor which resulted in the consecutive sentence." *Brown*, 182 Ill. App. 3d at 493. In other words, we distinguished the status of being under bond from the burglary conviction that created that status so that they were not the same factor or element for double-enhancement purposes.

¶ 26 We similarly conclude that it was defendant's registrant status under the Act, which arose from but is not the same as his conviction for aggravated criminal sexual abuse, that was elemental here so that said conviction was free to be used for Class X eligibility. When this indictment listed defendant's aggravated criminal sexual abuse conviction, it was merely identifying the basis of his registrant status. It did not thereby convert that conviction into a statutory element, nor conflate the status with how that status was created. In sum, we conclude that the aggravated criminal sexual abuse conviction was not an element of the instant offense so that there was no improper double enhancement.[2]

[2] In his petition for rehearing, defendant refers to *People v. Ware*, 2012 IL App (1st) 111801-U (unpublished order under Supreme Court Rule 23), in which another division of this court agreed with the instant contention, while acknowledging that *Ware* is an unpublished and thus unciteable case. Ill. S. Ct. R. 23(e)(1) (eff. July 1, 2011). Here, unlike *Ware*, defendant has an additional prior Class 2 felony, leading to a different result.

¶ 27 Finally, defendant contends that his three-year mandatory supervised release (MSR) must be reduced to a two-year term because he was convicted of a Class 2 felony, but sentenced as a Class X offender.

¶ 28 The MSR statute provides that the "mandatory supervised release term shall be written as part of the sentencing order," with the MSR term for a Class X felony being three years and two years for a Class 2 felony. 730 ILCS 5/5-8-1(d)(1),(2) (West 2010). Defendant argues that because he was convicted of a Class 2 felony, he should receive two years. However, his prior convictions made him eligible to be sentenced as a Class X felon and thus subject to the three-year MSR term. This court has repeatedly held that a defendant sentenced as a mandatory Class X offender receives the Class X MSR term of three years. See *People v. Wade*, 2013 IL App (1st) 112547, ¶¶ 36-38 (recognizing that defendants subject to Class X sentences are subject to the Class X three-year MSR term); *People v. Brisco*, 2012 IL App (1st) 101612, ¶¶ 59-62; *People v. Lampley*, 2011 IL App (1st) 090661-B, ¶¶ 47-49; *People v. Allen*, 409 Ill. App. 3d 1058, 1078 (2011); *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011); *People v. McKinney*, 399 Ill. App. 3d 77, 81-83 (2010); *People v. Holman*, 402 Ill. App. 3d 645, 652-53 (2010); *People v. Lee*, 397 Ill. App. 3d 1067, 1072-73 (2010); *People v. Watkins*, 387 Ill. App. 3d 764, 766-67 (2009); and *People v. Anderson*, 272 Ill. App. 3d 537, 541–42 (2009). We will not depart from these well-reasoned decisions. Therefore, we hold that the court properly imposed a three-year MSR term.

¶ 29 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 30 Affirmed.