2012 IL App (2d) 110406-U
No. 2-11-0406
Order filed June 28, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 08-CF-1739
KEVIN C. KELLER,	)	Honorable Steven G. Vecchio,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

Held: Pursuant to our decision in *People v. Maldonado*, 402 Ill. App. 3d 1068 (2010), defendant's Class X felony conviction for aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2), (c-16) (West 2006)) is reduced to a Class 1 felony conviction, and the cause is remanded to the trial court for a new sentencing hearing.

¶ 1 Defendant, Kevin C. Keller, appeals from a judgment dismissing his *pro se* postconviction petition. See 725 ILCS 5/122-2.1(a)(1) (West 2010). Defendant was charged by indictment with a Class X felony offense of aggravated DUI, in violation of sections 11-501(a)(2) and 11-501(c-16) of the Illinois Vehicle Code (Code) (625 ILCS 5/11-501(a)(2), (c-16) (West 2006)), and with a Class

4 felony offense of aggravated driving while license revoked (DWLR) in violation of section 6-303(d-3) of the Code (625 ILCS 5/6-303(d-3) (West 2006)). Defendant pled guilty to those offenses. Following a sentencing hearing, the trial court sentenced defendant to concurrent eight-year and three-year terms of imprisonment for the aggravated DUI and aggravated DWLR, respectively. Defendant filed a *pro se* postconviction petition about two years later, and the trial court summarily dismissed the petition. Defendant appeals from the judgment dismissing his postconviction petition, contending that: (1) under *Maldonado*, his Class X felony conviction for aggravated DUI under sections 11-501(a)(2) and 11-501(c-16), should be reduced to a Class 1 felony conviction and the cause be remanded for re-sentencing; and alternatively, (2) the trial court erred by summarily dismissing his *pro se* postconviction petition. The State agrees that defendant's conviction for aggravated DUI should be reduced to a Class 1, rather than a Class X felony conviction, and that the cause be remanded for re-sentencing on the Class 1 aggravated DUI conviction. Accordingly, we affirm defendant's three-year conviction for aggravated DWLR but vacate defendant's eight-year sentence under section 11-501(c-16) and remand the cause for re-sentencing on the Class 1 aggravated DUI conviction. Because we vacate the sentence and remand for re-sentencing, we need not address whether the trial court erred by summarily dismissing the postconviction petition, which alleged ineffective assistance of counsel at the sentencing hearing.

¶ 2 BACKGROUND

¶ 3 On September 25, 2008, defendant entered an open plea of guilty to the charges against him. The factual basis for the plea reveals that on May 8, 2008, at approximately 3:05 a.m., Loves Park police officer Jeff Petty (Petty) spotted defendant sitting in the driver's seat of his car. The car was running while parked in the parking lot of a hardware store, straddling two parking stalls. Petty saw

defendant in the driver's seat, and then he saw defendant bend down. Petty found defendant lying face down across the front seats and the car had been turned off and the keys had been tossed onto the dashboard. Petty asked defendant for his license. Defendant told him that he was in the lot trying to sleep it off. Petty smelled a strong odor of alcohol on defendant's breath and noted that his eyes were glassy. When asked how much he had to drink that night, defendant replied "way too much." Defendant told Petty that he had been drinking for several hours, and the last thing he remembered was driving down the street and then pulling off somewhere because he was too drunk. Petty asked defendant to step out of the vehicle, but defendant was unable to unlock and open the door without Petty's assistance. Defendant used the car for balance as he walked to the back of the car. Defendant refused to perform the standardized field sobriety tests or submit to chemical tests.

¶ 4 The State noted that defendant had previously been convicted of five prior DUI offenses and of three prior DWLR offenses. The trial court then accepted defendant's plea of guilty and continued the case for sentencing on the convictions.

¶ 5 At the sentencing hearing held on January 30, 2009, the State noted that defendant had another previous DUI conviction that did not appear in the pre-sentence report. The State recommended a sentence of 8 to 10 years in prison based on defendant's previous criminal history. The court sentenced defendant to concurrent eight-year and three-year terms of imprisonment for the aggravated DUI and aggravated DWLR, respectively. Defendant did not file a motion to reconsider his sentence or withdraw the guilty plea, and he did not appeal the convictions and sentences.

¶ 6 On January 24, 2011, defendant filed a *pro se* postconviction petition, in which he alleged that his constitutional right to the effective assistance of counsel had been denied because his trial counsel failed to investigate and call witnesses to testify in mitigation at the sentencing hearing.

¶ 7 On April 6, 2011, the trial court summarily dismissed the petition. The court found that defendant failed to make the requisite showing of either deficient performance or sufficient prejudice pursuant to the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984). This timely appeal followed.

¶ 8 ANALYSIS

¶ 9 Defendant claims that, pursuant to our decision in *Maldonado*, his Class X conviction must be reduced to a Class 1 conviction and the case should be remanded to the trial court for a new sentencing hearing. We agree.

¶ 10 Defendant pled guilty to the offense of aggravated DUI, having previously been convicted of DUI five times, in violation of sections 11-501(a)(2) and 11-501(c-16) of the Code. In 2005, the legislature amended the DUI statute. Among other things, it added section 11-501(c-16), which made a sixth or subsequent DUI conviction a Class X felony offense. Section 11-501(c-1)(4) also was added, which made a fifth or subsequent DUI conviction a Class 1 felony offense. In *Maldonado*, we found the two sections conflicted because they made a sixth or subsequent DUI both a Class X felony and a Class 1 felony. *Maldonado*, 402 Ill. App. 3d at 1073-74. We resolved this conflict by applying the "rule of lenity" and reduced the defendant's Class X DUI conviction under section 11-501(c-16) to a Class 1 felony under section 11-501(c-1)(4), and remanded the cause for a new sentencing hearing. *Maldonado*, 404 Ill. App. 3d at 1074-75. See also *People v. Clark*, 404 Ill. App. 3d 141, 143 (2010) (reaffirming *Maldonado*).

¶ 11 The legislature has since amended the DUI statute with the passage of Public Act 95-578, making a fifth DUI a Class 1 felony and a sixth DUI a Class X felony (625 ILCS 5/11-501(d)(2)(D), (E) (West 2008) (effective June 1, 2008)). In the present case, the DUI occurred on May 8, 2008,

and thus, defendant is in the same position as the defendant in *Maldonado*, and the same ruling should apply. The State concurs that defendant's conviction for aggravated DUI should be affirmed but under section 11-501(c-1) (4), not section 11-501(c-16), making defendant's aggravated DUI conviction a Class 1, rather than a Class X felony.

¶ 12 Defendant did not raise this issue in his postconviction petition. Generally, a claim not raised in the defendant's postconviction petition cannot be raised for the first time on appeal. *People v. Jones*, 213 Ill. 2d 498, 505 (2004). Nevertheless, defendant's DUI sentence is void for not conforming to statutory requirements (see *People v. Maldonado*, 386 Ill. App. 3d 964, 967 (2008)), and a voidness claim can be raised for the first time on appeal, including a collateral appeal (see *People v. Brown*, 225 Ill. 2d 188, 199 (2007) (citing *People v. Thompson*, 209 Ill. 2d 19, 26 (2004)). As such, defendant's claim may be raised for the first time on appeal.

¶ 13 CONCLUSION

¶ 14 Therefore, we affirm defendant's DWLR conviction and sentence and defendant's DUI conviction but specify that it is under section 11-501(c-1)(4) of the DUI statute, not section 11-501(c-16). We vacate defendant's DUI sentence and remand for re-sentencing in accordance with this decision. The judgment of the circuit court of McHenry County is affirmed in part and vacated in part, and the cause is remanded for re-sentencing.

¶ 15 Affirmed in part and vacated in part; cause remanded.