2014 IL App (2d) 130390-U
No. 2-13-0390
Order filed December 29, 20140

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 11-CF-2953
ARCHIE J. GRIFFIN,	)	Honorable Robert G. Kleeman,
Defendant-Appellant.	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: The trial court did not err in sentencing defendant as a Class X offender based on his two prior convictions of DUI.

¶ 2 A jury found defendant, Archie J. Griffin, guilty of aggravated driving while under the influence of alcohol (DUI) (see 625 ILCS 5/11-501(d)(2)(B) (West 2010)). Defendant also was convicted of a fourth or greater violation of driving while his license was suspended or revoked (see 625 ILCS 5/6-303(a), (d-3) (West 2010)).

¶ 3 Based on defendant's two prior convictions of nonaggravated DUI, the trial court elevated defendant's aggravated DUI conviction from a Class 4 felony to a Class 2 felony. In

turn, the court imposed a 12-year Class X prison term for the offense because defendant had two prior unrelated Class 2 or greater felony convictions. On appeal, defendant argues that Class 2 sentencing applies to a third aggravated DUI conviction, not to a third nonaggravated DUI conviction, like his. He contends that the court should have classified his aggravated DUI conviction as a Class 4 felony and that the Class X sentence is void, as it is unauthorized by statute. A similar challenge to a Class X sentence for aggravated DUI was addressed and rejected by the Appellate Court, Fourth District, in *People v. Halerewicz*, 2013 IL App (4th) 120388. Consistent with *Halerewicz*, we affirm.

¶ 4 I. BACKGROUND

¶ 5 Defendant was convicted of aggravated DUI and driving while his license was revoked, for which he received concurrent prison terms of 12 years and 3 years, respectively. On appeal, defendant challenges only the Class X sentence imposed on the aggravated DUI conviction, so we confine our discussion to the sentencing on that charge.

¶ 6 The aggravated DUI charge alleged that, on December 19, 2011, defendant drove or was in actual physical control of a motor vehicle while under the influence of alcohol and that defendant had at least two prior violations of section 11-501 of the Vehicle Code. The charge alleged violations of sections 11-501(a)(2), 11-501(d)(1)(A), and 11-501(d)(2)(B) of the Vehicle Code.

¶ 7 Section 11-501(a)(2) provides that "[a] person shall not drive or be in actual physical control of any vehicle within this State while *** under the influence of alcohol." 625 ILCS 5/11-501(a)(2) (West 2010). Ordinarily, a person "convicted of violating subsection (a) of this Section is guilty of a Class A misdemeanor." 625 ILCS 5/11-501(c)(1) (West 2010).

¶ 8 Section 11-501(d)(1)(A) provides that "(1) Every person convicted of committing a violation of this Section shall be guilty of aggravated [DUI] *** if: (A) the person committed a violation of subsection (a) or a similar provision for the third or subsequent time." 625 ILCS 5/11-501(a)(2) (West 2010). Ordinarily, aggravated DUI is a Class 4 felony (625 ILCS 5/11-501(d)(2)(A) (West 2010)), but section 11-501(d)(2)(B) provides in part that "[a] third violation of this Section or a similar provision is a Class 2 felony." 625 ILCS 5/11-501(d)(2)(B) (West 2010)). Defendant was sentenced as a Class X offender under section 5-4.5-95(b) of the Unified Code of Corrections (Unified Code) (formerly section 5-5-3(c)(8)), which imposes mandatory Class X status to defendants who are convicted of a Class 1 or Class 2 felony and have at least two prior convictions that were classified as Class 2 or greater felonies. 730 ILCS 5/5-4.5-95(b) (West 2010).

¶ 9 II. ANALYSIS

¶ 10 On appeal, defendant argues that his conviction of aggravated DUI is a Class 4 felony rather than a Class 2 felony. Defendant concludes that, because his conviction is only a Class 4 felony, his criminal history does not render him eligible for Class X sentencing under section 5-4.5-95(b) of the Unified Code.

¶ 11 The State responds that defendant has forfeited his claim by raising it for the first time on appeal. Ordinarily, the failure to raise an issue in the trial court results in forfeiture of that issue on appeal. *People v. Enoch*, 122 Ill. 2d 176, 185-86 (1988). Defendant concedes that he did not raise the sentencing issue below, but he argues that we should address it because the Class X sentence is not authorized by statute, and therefore is void. Our supreme court has repeatedly held that forfeiture does not apply to a claim alleging a void judgment or sentence, neither of which is subject to forfeiture and either of which "may be attacked at any time or in any court,

either directly or collaterally." *People v. Thompson*, 209 Ill. 2d 19, 25 (2004). Although forfeiture does not bar defendant's claim, we conclude that his interpretation of the statute lacks merit.

¶ 12 The propriety of a Class X sentence presents a question of statutory interpretation, which we review *de novo*. *People v. Zimmerman*, 239 Ill. 2d 491, 497 (2010). The principles guiding our analysis are well established. Our primary objective is to ascertain and give effect to legislative intent, the surest and most reliable indicator of which is the statutory language itself, given its plain and ordinary meaning. *People v. Perry*, 224 Ill. 2d 312, 323 (2007). In determining the plain meaning of statutory terms, we consider the statute in its entirety, keeping in mind the subject it addresses and the apparent intent of the legislature in enacting it. Where the language of the statute is clear and unambiguous, we must apply it as written, without resort to extrinsic aids to statutory construction. *Perry*, 224 Ill. 2d at 323.

¶ 13 If the statutory language is ambiguous, making construction of the language necessary, we construe the statute so that no part of it is rendered meaningless or superfluous. *Perry*, 224 Ill. 2d at 323. We do not depart from the plain language of the statute by reading into it exceptions, limitations, or conditions that conflict with the expressed intent. *Perry*, 224 Ill. 2d at 323-24. The traditional canons or maxims of statutory construction are not rules of law, but rather are "aids in determining legislative intent and must yield to such intent." *Perry*, 224 Ill. 2d at 324 (quoting *In re Application of the County Treasurer*, 214 Ill. 2d 253, 259 (2005)).

¶ 14 Defendant argues that the plain language of section 11-501(d)(2)(B) indicates a legislative intent to classify a third *aggravated* DUI offense as a Class 2 felony. Defendant interprets the term "this Section" in section 11-501(d)(2)(B) to refer only to subsection (d) of section 11-501(d). Defendant concludes that, because he was convicted of two prior

nonaggravated DUIs under section 11-501(a), his most recent conviction of aggravated DUI under section 11-501(d) is his first, and therefore, only a Class 4 felony. The State responds that the term "this Section" refers to section 11-501 in its entirety, and because defendant has three violations of section 11-501, his most recent conviction is elevated to a Class 2 felony. Defendant does not dispute that, if his aggravated DUI conviction is a Class 2 felony, his criminal history renders him eligible for Class X sentencing under section 5-4.5-95(b) of the Unified Code.

¶ 15 We agree with the State that *Halerewicz* provides the rationale for rejecting defendant's interpretation of section 11-501 of the Vehicle Code. In *Halerewicz*, the defendant was convicted of his sixth DUI offense, and the trial court sentenced him as a Class X offender based on section 11-501(d)(2)(E) of the Vehicle Code, which provides that "[a] sixth or subsequent violation of this Section or similar provision is a Class X felony." *Halerewicz*, 2013 IL App (4th) 120388, ¶ 12; see 625 ILCS 5/11-501(d)(2)(E) (West 2010). On appeal, the defendant argued that Class X sentencing was improper because it only applies to six or more *aggravated* DUI convictions and that his most recent aggravated DUI conviction was not his sixth such conviction. *Halerewicz*, 2013 IL App (4th) 120388, ¶ 29. Similar to defendant in this case, the defendant in *Halerewicz* argued that section 11-501(d)(2)(E) includes, for purposes of counting the number of prior violations, only aggravated DUIs under subsection (d) and not nonaggravated DUIs under subsection (a). *Halerewicz*, 2013 IL App (4th) 120388, ¶ 29.

¶ 16 The defendant argued that the statutory language of section 11-501(d)(2)(E), *i.e.*, "[a] sixth or subsequent violation of this Section or similar provision is a Class X felony," is ambiguous in that the phrase "this Section" can refer to either a nonaggravated DUI under subsection (a) of section 11-501 or an aggravated DUI under subsection (d) of section 11-501.

According to the defendant, he should not become eligible for Class X sentencing until his sixth or subsequent conviction for aggravated DUI, and not just his sixth total DUI violation. The Appellate Court, Fourth District, restated the defendant's argument as follows: "the statute should be read as two separate sections comprised of nonaggravated and aggravated DUIs." *Halerewicz*, 2013 IL App (4th) 120388, ¶ 33.

¶ 17 Rejecting the defendant's interpretation that the phrase "this Section" refers just to subsection (d) of section 11-501, the *Halerewicz* court gave three reasons for reading the phrase "this Section" to refer to section 11-501 as a whole. First, the DUI statute does not refer to subsection (d) as a "section." Instead, the statute specifically and repeatedly refers to that provision as "subsection (d)." *Halerewicz*, 2013 IL App (4th) 120388, ¶ 34 (citing 625 ILCS 5/11-501(d)(2)(F), (d)(2)(G), (d)(2)(H), (d)(2)(I), (d)(2)(J), (d)(3) (West 2010)).

¶ 18 Second, the appellate court observed that "[i]f the General Assembly intended to limit the application of Class X sentences to only aggravated DUI violations under subsection 11-501(d), it knew how to do so. Indeed, specific subsections are repeatedly referenced throughout section 11-501." *Halerewicz*, 2013 IL App (4th) 120388, ¶ 34 (citing 625 ILCS 5/11-501(c), (d), (e), (g) (West 2010)). However, in the case of subsection 11-501(d), the General Assembly specifically used the phrase "this Section," not "this subsection," when specifying what constitutes a qualifying violation for calculating Class X eligibility. *Halerewicz*, 2013 IL App (4th) 120388, ¶ 34.

¶ 19 Third, the appellate court noted that "the legislature's use of the capitalized 'S' in the phrase 'this Section' supports our finding." *Halerewicz*, 2013 IL App (4th) 120388, ¶ 34 (citing *People v. Kennedy*, 372 Ill. App. 3d 306, 308 (2007) (finding section 6-303(d-3) of the Vehicle Code is not ambiguous where the term "this Section" as used in subsection (d-3) refers to section

6-303)). Thus, the appellate court concluded that "the plain language of section 11-501(d)(2)(E) shows the phrase 'this Section' was intended to encompass all of section 11-501." *Halerewicz*, 2013 IL App (4th) 120388, ¶ 34

¶ 20 The *Halerewicz* court also rejected the notion that a bifurcated interpretation of the statute was necessary to avoid absurd results from sudden escalations in DUI penalties, which is the same argument defendant makes in this appeal. Like defendant in this case, the defendant in *Halerewicz* pointed out that the sentencing scheme implemented a "sudden jump" from a Class A misdemeanor for a first DUI offense to a Class 2 felony for a third DUI offense. However, this "sudden escalation" shows the General Assembly's intent to penalize repeat offenders more severely. Indeed, a " 'statute which imposes additional punishment upon conviction for a second or subsequent conviction is highly penal and must be strictly construed and that such "enhanced penalty" statutes are enacted as a warning to a first offender of the consequences of a second conviction.' " *Halerewicz*, 2013 IL App (4th) 120388, ¶ 35 (quoting *People v. Harrison*, 225 Ill. App. 3d 1018, 1022 (1992)).

¶ 21 The *Halerewicz* court held that "general violations of section 11-501, specifically nonaggravated DUIs, may be used to elevate an offense to a Class X felony for sentencing purposes." *Halerewicz*, 2013 IL App (4th) 120388, ¶ 36. Although the defendant's most recent offense was not his sixth *aggravated* DUI, section 11-501(d)(2)(E) of the Vehicle Code authorized the Class X sentence that was imposed. *Halerewicz*, 2013 IL App (4th) 120388, ¶ 37.

¶ 22 The *Halerewicz* court addressed section 11-501(d)(2)(E) of the Vehicle Code, which provides that "[a] sixth or subsequent violation of this *Section* or similar provision is a Class X felony." (Emphasis added.) *Halerewicz*, 2013 IL App (4th) 120388, ¶ 12; see 625 ILCS 5/11-501(d)(2)(E) (West 2010). Defendant's present challenge involves section 11-501(d)(2)(B),

which similarly provides that "[a] third violation of this *Section* or a similar provision is a Class 2 felony." (Emphasis added.) 625 ILCS 5/11-501(d)(2)(B) (West 2010)). We agree with the *Halerewicz* court's thorough statutory interpretation of section 11-501(d)(2)(E) and conclude that it also applies to section 11-501(d)(2)(B). Accordingly, we hold that, under the unambiguous language of the statute, general violations of section 11-501, specifically nonaggravated DUIs, may be used to elevate an offense to a Class 2 felony for sentencing purposes under section 11-501(d)(2)(B). See *Halerewicz*, 2013 IL App (4th) 120388, ¶ 36. Although defendant's most recent offense was not his third *aggravated* DUI, section 11-501(d)(2)(B) of the Vehicle Code made the offense a Class 2 felony. See *Halerewicz*, 2013 IL App (4th) 120388, ¶ 37. In turn, defendant's criminal history rendered him eligible for a Class X sentence for aggravated DUI under section 5-4.5-95(b) of the Unified Code. We note that, other than his statutory interpretation argument, defendant does not challenge his sentence as excessive.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, the judgment of the circuit court of Du Page County is affirmed.

¶ 25 Affirmed.