

2012 IL App (2d) 101076-U
No. 2-10-1076
Order filed February 15, 2012
Modified upon denial of rehearing February 6, 2013

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Boone County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 09-CF-156
)	
KEVIN K. PEREZ,)	Honorable
)	John H. Young,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

**ORDER
MODIFIED UPON DENIAL OF REHEARING**

¶ 1 *Held:* Defendant was not eligible for probation or periodic imprisonment for aggravated DUI: even if, as defendant asserted, defendant's sentence was controlled by the Unified Code of Corrections and not the Vehicle Code, the former, like the latter, prohibited probation or periodic imprisonment, as defendant had been convicted of an offense classified as a Class 2 felony within the previous 10 years.

¶ 2 Defendant, Kevin K. Perez, was indicted for aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(d)(2)(C) (West 2008)). The indictment alleged that, on March 11, 2009, defendant committed DUI (625 ILCS 5/11-501 (a)(2) (West 2008)); defendant had three

prior convictions of DUI; and the offense was a Class 2 felony, for which probation was not available. Defendant was also charged with aggravated DUI, based on the commission of DUI while his license was revoked (625 ILCS 5/11-501(d)(1)(G) (West 2008)), and with aggravated driving with a revoked license (DWLR) (625 ILCS 5/6-303(d) (West 2008)). Defendant sought a ruling that he was eligible for probation for a conviction on the first charge of aggravated DUI. The trial court ruled that he was not. After a stipulated bench trial, defendant was convicted of the charges. The trial court vacated the second aggravated DUI conviction as having merged into the first. On October 13, 2010, defendant was sentenced to a prison term of three years and six months for aggravated DUI and a concurrent one-year prison term for aggravated DWLR. After the trial court declined to reconsider his sentence, he timely appealed.

¶ 3 On appeal, defendant contends that the trial court erred when it ruled that he was not eligible for probation for aggravated DUI. (Because only one charge of aggravated DUI is involved, we will refer to it as “aggravated DUI.”) Defendant argues that, on July 1, 2009, after he committed the offense but before he was sentenced, section 5-5-3(c) of the Unified Code of Corrections (the Corrections Code) (730 ILCS 5/5-5-3(c) (West 2008)) was amended, thereby making probation an option in the trial court’s discretion. He maintains that the court’s error denied him his right to elect to be sentenced under the new law, thus entitling him to a new sentencing hearing. We disagree and affirm.

¶ 4 As pertinent here, section 501(d)(2)(C) of the Illinois Vehicle Code (the Vehicle Code) states, “A fourth [DUI] is a Class 2 felony, for which a sentence of probation or conditional discharge may not be imposed.” 625 ILCS 5/11-501(d)(2)(C) (West 2008)). After January 1, 2009, but before July 1, 2009, section 5-5-3 of the Corrections Code stated (as pertinent here):

“(a) Except as provided in Section 11-501 of the Illinois Vehicle Code, every person convicted of an offense shall be sentenced as provided in this Section.

* * *

[c] (2) A period of probation, a term of periodic imprisonment or conditional discharge shall not be imposed for the following offenses. ***:

* * *

(F) A Class 2 or greater felony if the offender had been convicted of a Class 2 or greater felony within 10 years of the date on which the offender committed the offense for which he or she is being sentenced, except as otherwise provided in Section 40-10 of the Alcoholism and Other Drug Abuse and Dependency Act.” 730 ILCS 5/5-5-3(a)(1), (c)(2)(F) (West 2008).

¶ 5 Effective July 1, 2009, an amendment to the Corrections Code (Pub. Act 95-1052, § 90 (eff. July 1, 2009)) deleted section 5-5-3(a). It also revised subsection (c)(2)(F) to read:

(2) A period of probation, a term of periodic imprisonment or conditional discharge shall not be imposed for the following offenses. ***:

* * *

(F) A Class 2 or greater felony if the offender had been convicted of a Class 2 or greater felony, including any state or federal conviction for an offense that contained, at the time it was committed, 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, within 10 years of the date on which the offender committed the offense for which he or she

is being sentenced, except as otherwise provided in Section 40-10 of the Alcoholism and Other Drug Abuse and Dependency Act.” 730 ILCS 5/5-5-3(c)(2)(F) (West Supp. 2009).

¶ 6 Defendant notes that, because the amendment took effect after the offense at issue but before he was sentenced, he had the right to elect whether to be sentenced under the pre-July 1, 2009, law or under the post-July 1, 2009 law (see *People v. Gancarz*, 228 Ill. 2d 312, 317 (2008)). He asserts that the difference is crucial because, under the former law, section 11-501(c)(2)(F) made him ineligible for probation, whereas under the present law, that section no longer applies to him, making him eligible for probation.

¶ 7 The construction of a statute raises an issue of law that we resolve *de novo*. *In re Donald A.G.*, 221 Ill. 2d 234, 246 (2006). We seek to ascertain and effectuate the legislature’s intent and, when possible, we should give the statute its plain and ordinary meaning. *Id.*

¶ 8 Defendant notes that section 5-5-3 of the Corrections Code establishes sentencing ranges for various classes of offenses, including Class 2 felonies such as aggravated DUI. He notes further that, before Public Act 95-1052 took effect, section 5-5-3(a) qualified the reach of section 5-5-3 by specifying that sentencing for offenses listed in section 11-501 of the Vehicle Code was governed by that section, not the Corrections Code. Defendant argues that, by repealing section 5-5-3(a) of the Corrections Code, the legislature intended to make sentencing for DUI offenses, such as aggravated DUI, controlled solely by the Corrections Code. Thus, he maintains, aggravated DUI is not subject to section 11-501(d)(2)(C)’s bar on probation. Defendant concludes that, when he was sentenced, section 5-5-3 controlled and allowed the trial court to sentence him to probation.

¶ 9 Defendant also points out that his 2008 DUI offense, as well as the other three DUIs, was a “DT” (traffic) prosecution, not a “CF” (criminal felony) prosecution, and therefore, was “in fact a

misdemeanor” and “not a felony.” We reject the premise that a particular designation in a caption has a legal effect on a classification of an offense. We recognize that a prosecutor has the discretion to decide what charges to bring against an individual as well as what charges not to bring. See *People v. Hughes*, 2012 IL 112817 ¶ 80. That discretion, however, does not extend to changing the legal classification of the charge brought; the classification of an offense is set by the legislature. See *People v. Dean*, 363 Ill. App. 3d 454, 467 (2006) (citing *People v. Wright*, 194 Ill. 2d 1, 24 (2000)). So too are the penalties. *Id.* In other words, a prosecutor can “charge” a felony or a misdemeanor, but he or she cannot change the classification of the offense.

¶ 10 In the present case, therefore, that defendant received misdemeanor sentences for his prior DUIs does not mean that his offenses were misdemeanors. Defendant’s 2008 DUI offense, at the time it was committed, contained the same relevant elements as his current aggravated DUI offense. See 625 ILCS 5/11-501(a) (West 2008)). Because the 2008 DUI violation was his third, it was classified as a Class 2 felony. See 625 ILCS 11-501(d)(2)(B) (West 2008)) (“A third violation of this Section *** is a Class 2 felony.”).

¶ 11 Even if defendant were correct about the effect of Public Act 95-1052 on section 11-501 of the Vehicle Code, his conclusion does not follow. If, *arguendo*, the Corrections Code alone determines his sentence, a prison term is still mandatory. Section 5-5-3(c)(2)(F), as amended, states plainly that probation may not be imposed for a Class 2 felony if, within the previous 10 years, the defendant has been convicted of a Class 2 or greater felony. In 2008, defendant was found guilty of a third DUI offense. See 625 ILCS 5/11-501(d)(2)(B) (West 2008)). Therefore, under either section 11-501 of the Vehicle Code or section 5-5-3 of the Corrections Code, defendant was ineligible for probation.

¶ 12 Defendant argues alternatively that, even if section 11-501(d)(2)(C) of the Vehicle Code survived the amendment to section 5-5-3 of the Corrections Code, nothing in the former section prevented the trial court from sentencing defendant to periodic imprisonment. There are two flaws in this argument. First, defendant's pretrial motion does not appear in the record, and nothing else in the record shows that defendant ever argued that periodic imprisonment was a permissible sentence. Thus, we must assume that defendant never raised the periodic-imprisonment argument at the trial level. See *Foutch v. O'Bryant*, 99 Ill. 2d 384, 391-92 (1984) (any doubts arising from incompleteness of record on appeal must be construed in favor of judgment on appeal). Thus, defendant has forfeited this argument. See generally *People v. Glasper*, 234 Ill. 2d 173, 203 (2009). Second, section 5-5-3(c)(2)(F) bars a sentence of periodic imprisonment, as well as one of probation or conditional discharge, in this case anyway.

¶ 13 We affirm the judgment of the circuit court of Boone County.

¶ 14 Affirmed.