

2012 IL App (2d) 110609-U  
No. 2-11-0609  
Order filed December 4, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Kendall County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10-CF-360
	)	
ADAM M. SOLIS,	)	Honorable
	)	John A. Barsanti,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE BURKE delivered the judgment of the court.  
Presiding Justice Jorgensen and Justice Schostok concurred in the judgment.

**ORDER**

¶ 1 *Held:* (1) Defendant was legally subject to an extended-term sentence, as the predicate offense for that sentence was not the same predicate that enhanced his present offenses from misdemeanors to felonies; (2) we vacated defendant's less serious conviction of domestic battery (insulting or provoking contact), as both were based on the same act.

¶ 2 Defendant, Adam M. Solis, appeals from his convictions of two counts of domestic battery (one based on bodily harm and one based on contact of an insulting or provoking nature) (720 ILCS 5/12-3.2(a)(1) (West 2010)), both of which were elevated to Class 4 felonies based on prior convictions. See 720 ILCS 5/12-3.2(b) (West 2010) ("Domestic battery is a Class 4 felony if the

defendant has any prior conviction under this Code for domestic battery [citation] or violation of an order of protection \*\*\*\*”). He asserts (1) that the court improperly imposed an extended-term sentence, using the same convictions to elevate the class of the offenses and as the predicate for an extended-term sentence and (2) that we should vacate the lesser conviction under the one-act, one-crime doctrine. The State confesses error as to the second issue. We accept the confession of error, but hold, regarding the first point, that a proper predicate conviction existed for imposition of an extended-term sentence. We therefore affirm defendant’s more serious conviction (domestic battery/bodily harm) and vacate the second.

¶ 3

#### I. BACKGROUND

¶ 4 Defendant was indicted on one count of aggravated domestic battery (strangling) (720 ILCS 5/12-3.3(a-5) (West 2010)), one count of domestic battery causing bodily harm, and two counts of domestic battery making contact of an insulting or provoking nature. The domestic battery counts charged the offenses as Class 4 felonies on the basis that defendant had previously been convicted of domestic battery in Kane County case Nos. 09-CF-606, 09-CF-355, 00-CF-2357, and 00-CF-444, and of violation of an order of protection in Kane County case Nos. 00-CF-2357 and 00-CF-1908.

¶ 5 Defendant had a bench trial. On April 28, 2011, the court found him guilty of two counts of domestic battery (one of bodily harm and one of contact of an insulting or provoking nature).

¶ 6 The sentencing hearing took place on June 1, 2011. The court asked about which conviction or convictions the State was using to elevate the class of the offenses to a Class 4 felonies:

“THE COURT: \*\*\* Looking at the charging document and trying to recall at the trial, the aspect of the prior convictions which are alleged, there was no proof of that at the trial, correct?”

[THE STATE]: Correct \*\*\*.

THE COURT: Now, then, are the parties going to put on proof at sentencing hearing or do we have a stipulation?

[THE STATE]: It's contained in the presentence report, your Honor, those prior convictions for the domestic batteries.

We also have certified copies of conviction on all of the counts that we have alleged.”

¶ 7 The court asked defense counsel if she had any objection to its taking judicial notice of the Kane County convictions. She responded, “As long as they're certified, no.” Concerning the sentencing range, the State argued that defendant was eligible both for Class 4 convictions and for an extended term:

“Your Honor, we first submit the certified copies on 09 CF 606 and by reference 09 CF 355. Both of those cases resulted in conviction of the defendant for the triggering offense, it was a felony, that being domestic battery.

I've tendered to the court 606 and by reference we would also tender 00 CF 2357. I know that alleges 6 or 7 different offenses where the defendant had been convicted of either domestic battery, violation of an order of protection, or other triggering offense. Those two should be sufficient to put the defendant into the Class 4 penalty range.

What we would point out is that this defendant has been convicted of a Class 4. He is clearly extended term eligible not only based on the fact that he has prior Class 4's and we believe—excuse me—Class 4's for these offenses. In addition, he was on parole at the time that this offense occurred.”

¶ 8 The State tendered to the court certified copies of the convictions in case Nos. 09-CF-606 and 00-CF-2357. The exhibits are a group of orders from case Nos. 09-CF-606 and 00-CF-2357; nothing from case No. 09-CF-355 appears in the record on appeal. The copies of the orders from No. 09-CF-606 showed that, on August 19, 1999, defendant pleaded guilty to domestic battery, charged as a Class 4 felony. The court imposed sentence that same day. The copies of the orders from No. 00-CF-2357 showed that, on October 3, 2000, defendant pleaded guilty to violation of an order of protection and domestic battery, charged as a Class 4 felony. The court in that case also imposed sentence that same day.

¶ 9 The parties also discussed defendant's series of prior sentences of imprisonment, with defense counsel noting that all of them were too short for him to have been placed in a substance-abuse treatment program.

¶ 10 After hearing further argument, the court explained the factors that it was considering:

“[W]hat I came away with on the presentence report is a very extensive criminal history and it's hard to determine \*\*\* the way some of these are reported as to exactly what it is but he has multiple \*\*\* DV convictions \*\*\*. He's got several felony convictions. I went through several violations of orders of protection convictions \*\*\* as the presentence report seem to indicate \*\*\*. \*\*\* [T]here is clearly a thread running through all of this of violence[.]”

Further, the court ruled that an extended term would be proper:

“I believe that the section that would apply would be 730 ILCS 5/5-5-3.2 \*\*\*(b)(1). \*\*\* [That is], when the defendant's convicted of any felony after having been previously convicted in Illinois or any other jurisdiction of the same or similar class felony or greater class felony when such conviction has occurred within 10 years after the previous conviction

\*\*\* excluding time spent in custody and such charge separately brought and tried arise out of the different series of acts.

\*\*\*

“[L]ooking at the defendant’s previous conviction [*sic*], I think that his criminal history would allow the court to sentence him under that provision of the extended term statute and that’s what I’m going to do.”

¶ 11 The court sentenced him to four years’ imprisonment with four years’ MSR, an extended-term sentence. Defendant filed a timely motion for reconsideration of the sentence, in which he did not allege any legal error. The court denied the motion, and defendant timely appealed.

¶ 12 II. ANALYSIS

¶ 13 On appeal, defendant asserts that the court improperly used as a basis to impose the extended term the same convictions it had already used to elevate the offenses from misdemeanors to Class 4 felonies. See *People v. Hobbs*, 86 Ill. 2d 242, 244-46 (1981) (holding that such a double enhancement is improper). He recognizes that he did not raise the matter in his postsentencing motion, and thus might be argued to have forfeited it, but asserts that the sentence imposed was not authorized by statute, so that forfeiture is not possible.

¶ 14 However, in reply to the State, defendant concedes that one conviction listed in the presentence report,<sup>1</sup> in case No. 07-CF-304, gives every appearance of being a proper predicate conviction for an enhanced sentence. The relevant sentencing provision is as follows:

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<sup>1</sup>Page 4 of the presentence report, the page that lists the relevant conviction, is missing from the record on appeal. We obtained a copy of the page from defense counsel and have provided the same to the State.

“(b) The following factors, related to all felonies, may be considered by the court as reasons to impose an extended term sentence under Section 5-8-2 upon any offender:

(1) When a defendant is convicted of any felony, after having been previously convicted in Illinois or any other jurisdiction of the same or similar class felony or greater class felony, when such conviction has occurred within 10 years after the previous conviction, excluding time spent in custody, and such charges are separately brought and tried and arise out of different series of acts[.]” 730 ILCS 5/5-5-3.2(b)(1) (West 2010).

¶ 15 The conviction in case No. 07-CF-304 logically would be a Class 4 felony conviction—“Domestic Battery/Bodily Harm Prior”—and defendant receive a sentence available only for a felony—29 months’ probation. See 730 ILCS 5/5-4.5-55(d) (West 2010) (a proper sentence of probation for a Class A misdemeanor cannot exceed 2 years). Moreover, as the product of an “07” case, that is, a case filed in 2007, the conviction was plainly less than 10 years old. Defendant’s argument with respect to this is that the presentence report might be incorrect.

¶ 16 Nothing in the record suggests that either the court or the State intended to use the convictions in cases Nos. 09-CF-606 and 00-CF-2357 as a basis for imposition of the enhanced sentence. The comments by the court and State are not models of clarity. However, what they said was completely consistent with the intention that the older convictions be the basis for elevating the class of the offenses only. Further, had the State or the court intended to suggest that case Nos. 09-CF-606 and 00-CF-2357 were a basis for a section 5-5-3.2(b)(1) extended term, one or the other most likely would have mentioned that they counted as recent enough because of defendant’s time in custody. Neither made such a comment, suggesting an intention to rely on a newer conviction.

In the absence of an affirmative showing to the contrary, we presume that the court followed the law. *People v. Gaultney*, 174 Ill 2d 410, 420 (1996).

¶ 17 In any event, our concern is not whether the court relied on the same convictions for two purposes, but whether an extended term was legally available. This is a question that does not implicate the court's discretion; it is a matter of law and subject to *de novo* review. See *People v. Brooks*, 2012 IL App (4th) 100929, ¶ 14 (whether an extended term is available is a matter of law subject to *de novo* review). The existence of No. 07-CF-304 is sufficient, whatever the role it played in the court's reasoning.

¶ 18 Defendant argues that the presentence report is not a proper basis for finding predicate offenses. He is incorrect. The supreme court has held that, where a defendant does not dispute the applicability of a sentence, use of a presentencing report to establish such applicability is proper. *People v. Williams*, 149 Ill. 2d 467, 493 (1992). Defendant did not object here. Therefore, No. 07-CF-304 is sufficient to establish the availability of an extended term.

¶ 19 Defendant next argues that, under the one-act, one-crime doctrine, the court should have vacated defendant's conviction of the less serious offense, domestic battery (insulting or provoking contact). The State confesses error on that point, and we accept the confession. We therefore vacate that conviction.

¶ 20 III. CONCLUSION

¶ 21 For the reasons stated, we affirm defendant's conviction of, and sentence for, domestic battery (bodily harm), but vacate his conviction of domestic battery (insulting or provoking contact).

¶ 22 Affirmed in part and vacated in part.