

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).

2012 IL App (4th) 110730-U

Filed 7/20/12

NO. 4-11-0730

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
ROBERT A. HARTMAN,	)	No. 07CF1258
Defendant-Appellant.	)	
	)	Honorable
	)	John W. Belz,
	)	Judge Presiding.

---

JUSTICE KNECHT delivered the judgment of the court.  
Presiding Justice Turner and Justice McCullough concurred in the judgment.

### ORDER

- ¶ 1 *Held:* (1) The extended-term portion of defendant's sentence for attempt (aggravated vehicular hijacking) is void and vacated. The trial court may have relied on two grounds for imposing the extended-term sentence: the victim's age and defendant's criminal history. Neither supports the extended-term sentence. Using the victim's age to elevate the class of the offense and as a factor to extend the sentence results in an improper double enhancement. Using the defendant's criminal history is improper, because he had no prior conviction for a felony of the same or greater class.
- (2) The extended-term portion of defendant's sentence for attempt (robbery) is void and vacated. An extended term for this offense is improper because it was not the highest class of offense for which defendant was convicted.
- (3) The trial court improperly admonished defendant, who entered a negotiated plea, as if the plea were an open plea.
- (4) This court need not rule on defendant's argument the certificate pursuant to Illinois Supreme Court Rule 604(d) (eff. Jul. 1, 2006) was insufficient, because defense counsel will file a new certificate if defendant pursues a challenge to his sentences and plea after proper admonishments are given.

(5) Defendant is not entitled to one additional day of sentencing credit.

¶ 2 In March 2010, defendant, Robert Hartman, pleaded guilty to two counts of aggravated battery (720 ILCS 5/12-4(a) (West 2006)), one count of attempt (aggravated vehicular hijacking) (720 ILCS 5/8-4(a), 18-4(a)(1) (West 2006)), and one count of attempt (robbery) (720 ILCS 5/8-4(a), 18-1(a) (West 2006)). The trial court sentenced defendant to concurrent terms of 5 years' imprisonment on both aggravated-battery counts and to extended terms of imprisonment of 25 years for attempt (aggravated vehicular hijacking), and 10 years for attempt (robbery), with time-served credit of 668 days.

¶ 3 Defendant appeals his sentences, arguing (1) the trial court's extended-term sentences for attempt (aggravated vehicular hijacking) and attempt (robbery) are void, because the court used the age of the victim, over 60 years old, as the basis for imposing extended-term sentences when the age of the victim had been used to raise the class of both offenses; (2) because his plea was negotiated, the court improperly admonished him under Illinois Supreme Court Rule 605(b) (eff. Oct. 1, 2001), when he should have been admonished under Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001); (3) the record does not contain a Rule 604(d) certificate and the cause should be remanded for its filing; and (4) he is entitled to one additional day of sentencing credit. The State concedes the extended-term sentences are void, but for different reasons than those provided by defendant. The State also concedes defendant was improperly admonished. We vacate the extended-term portions of defendant's sentences, affirm the presentence credit awarded, and remand for further proceedings.

¶ 4

## I. BACKGROUND

¶ 5 According to the factual basis for his guilty pleas, defendant, on October 20, 2007, entered a gas station holding two knives. He stabbed a gas-station employee, Nathan Yousif, in the left shoulder and in the lower back, causing Yousif great bodily harm. Defendant fled. A short time later, defendant entered the residence of Robert Alewelt, a 76-year-old man. Defendant was bleeding and asked for a ride. While in Alewelt's vehicle, defendant demanded Alewelt's wallet and car and attempted to take those items by force. Defendant kicked and punched Alewelt in his face and side and caused him great bodily harm. Alewelt lost control of his vehicle and crashed into a light pole. Defendant ran from the scene.

¶ 6 In November 2007, defendant was charged by information with the following offenses: three counts of attempt (first degree murder) (720 ILCS 5/8-4(a), 9-1(a)(1), (a)(2) (West 2006)) (counts I to III), one count of aggravated battery of Yousif (720 ILCS 5/12-4(a) (West 2006)) (count IV), one count of attempt (aggravated vehicular hijacking) (720 ILCS 5/8-4(a), 18-4(a)(1) (West 2006)) (count V), one count attempt (robbery) from Alewelt (720 ILCS 5/8-4(a), 18-1(a) (West 2006)) (count VI), and one count aggravated battery of Alewelt (720 ILCS 5/12-4(a) (West 2006)) (count VII).

¶ 7 In March 2010, defendant pleaded guilty to counts IV, V, VI, and VII, and the State agreed to dismiss counts I to III. The State further agreed the sentences shall run concurrently and defendant would be eligible for day-for-day sentence credit. Before the trial court accepted defendant's plea, the court admonished defendant. The court informed defendant he was eligible for extended-term sentences because Alewelt was over the age of 60.

¶ 8 In August 2009, defendant was sentenced. Pursuant to the negotiated plea, all sentences were concurrent. For counts IV and VII, the aggravated-battery counts, the trial court

sentenced defendant to five years' imprisonment. The court sentenced defendant to 10 years' imprisonment on count VI, attempt (robbery), and to 25 years' imprisonment on count V, the attempt (aggravated vehicular hijacking) conviction.

¶ 9 After sentencing, a motion to reconsider sentence was filed and denied. On appeal, this court, in June 2010, remanded and ordered defense counsel to file a certificate in compliance with Illinois Supreme Court Rule 604(d) (eff. Jul. 1, 2006). *People v. Hartman*, No. 4-10-0142 (June 16, 2010) (unpublished under Supreme Court Rule 23). On remand, defense counsel filed a certificate purported to be in compliance with Rule 604(d). On appeal following another denied motion to reconsider sentence, this court again remanded the case for compliance with Rule 604(d). *People v. Hartman*, No. 4-10-0861 (Apr. 5, 2011) (unpublished under Supreme Court Rule 23).

¶ 10 In July 2011, a hearing was held on defendant's motion to reconsider sentence. Defense counsel did not file a new motion but instead relied upon the two previously filed motions. Defense counsel, at the hearing, stated he filed a new Rule 604(d) certificate that day. The trial court denied defendant's motion.

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 A. Extended-Term Sentences

¶ 14 Defendant first argues his extended-term sentences for attempt (aggravated vehicular hijacking) and attempt (robbery) are void and must be stricken. Defendant maintains the age of the victim, Alewelt, was used twice, resulting in an erroneous double enhancement of his sentence. Defendant further argues the attempt (robbery) extended-term sentence violates

section 5-8-2(a) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-2(a) (West 2006)), because the attempt (robbery) offense was not in the same class of the most serious offense for which he was convicted. Defendant concludes the cause must be remanded for resentencing.

¶ 15 The State disagrees with parts of defendant's argument but concedes both of these sentences are void and the cause should be remanded.

¶ 16 "A double enhancement occurs when \*\*\* 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." *People v. Guevara*, 216 Ill. 2d 533, 545, 837 N.E.2d 901, 908 (2005). The bar against double enhancements is "premised on the assumption that the legislature considered the factors inherent in the offense in fashioning the appropriate range of punishment for that offense." *Guevara*, 216 Ill. 2d at 545, 837 N.E.2d at 908. Unless it is found the legislature clearly intends a double enhancement to occur, trial courts are barred for using one factor as an element of an offense and as the basis of imposing a harsher sentence. *Guevara*, 216 Ill. 2d at 545-46, 837 N.E.2d at 908. We review the issue of whether an impermissible double enhancement occurred *de novo*. See *Guevara*, 216 Ill. 2d at 546, 837 N.E.2d at 908.

¶ 17 Our supreme court, in *People v. Phelps*, 211 Ill. 2d 1, 12, 809 N.E.2d 1214, 1221 (2004), expressly cited *People v. White*, 114 Ill. 2d 61, 66, 499 N.E.2d 467, 469 (1986), as a "textbook example" of impermissible double enhancement. The *Phelps* court explained, in *White*, the court held the victim's age could not be the basis for an extended-term sentence when the accused was convicted of aggravated battery of a child. The aggravated-battery-of-a-child offense was a greater class of felony than aggravated battery, meaning the victim's age was the basis for an enhanced penalty. *Phelps*, 211 Ill. 2d at 12, 809 N.E.2d at 1221 (citing *White*, 114

Ill. 2d at 66, 499 N.E.2d at 469). The trial court erred by using the victim's age again to impose an extended-term sentence. *Phelps*, 211 Ill. 2d at 12, 809 N.E.2d at 1221 (citing *White*, 114 Ill. 2d at 66, 499 N.E.2d at 469).

¶ 18 According to defendant's interpretation of the record, this case resembles the "textbook example." Defendant was charged with attempt (aggravated vehicular hijacking) against Alewelt, who was over 60 years old. The vehicular-hijacking offense, a Class 1 felony (720 ILCS 5/18-3(c) (West 2006)), is elevated to aggravated vehicular hijacking, a Class X felony, when "the person from whose immediate presence the motor vehicle is taken is \*\*\* a person 60 years of age or over" (720 ILCS 5/18-4(a)(1), (b) (West 2006)). Defendant was convicted of attempt (aggravated vehicular hijacking). The sentence for attempt (aggravated vehicular hijacking) is the sentence for a Class 1 felony. 720 ILCS 5/8-4(c)(2) (West 2006). The nonextended sentencing range for defendant's attempt conviction, a Class 1 felony, is 4 to 15 years' imprisonment. 730 ILCS 5/5-8-1(a)(4) (West 2006). The extended-term sentencing range for a Class 1 felony is 15 to 30 years' imprisonment. 730 ILCS 5/5-8-2(a)(3) (West 2006). If the age of the victim is 60 years or older, a trial court may apply an extended-term sentence (730 ILCS 5/5-5-3.2(b)(4)(ii) (West 2006)). In this case, the trial court admonished defendant, in the plea proceedings, he faced an enhanced sentence because of the age of the victim. The court sentenced defendant to 25 years, which is outside the nonextended range for a Class 1 felony but inside the extended-term range for a Class 1 felony.

¶ 19 Defendant makes a similar double-enhancement argument regarding his sentence for attempt (robbery). Robbery is generally a Class 2 felony. See 720 ILCS 5/18-1(b) (West 2006). If, however, the victim is 60 years of age or older, the offense is elevated to a Class 1

felony. 720 ILCS 5/18-1(b) (West 2006). Defendant was convicted of attempt (robbery), making him eligible to be sentenced for a Class 2 felony. 720 ILCS 5/8-4(c)(3) (West 2006). Defendant's attempt (robbery) conviction was punishable by a nonextended term of imprisonment of three to seven years' imprisonment. 730 ILCS 5-8-1(a)(5) (West 2006). Under section 5-8-2 of the Code, the permissible extended-term sentence for a Class 2 felony is 7 to 14 years. 730 ILCS 5/5-8-2(a)(4) (West 2006). The trial court, after earlier admonishing defendant he was eligible for enhanced sentencing due to the victim's age in the plea proceedings, sentenced defendant to 10 years' imprisonment for attempt (robbery).

¶ 20 Defendant's argument is persuasive. The State maintains the trial court's extended-term sentencing was not an improper double enhancement. The State contends the trial court relied upon defendant's criminal history when imposing the extended-term sentences. The State emphasizes the trial court's comments about the victim's age serving as a sentencing enhancement occurred during the guilty-plea proceedings, not at sentencing. The State maintains the court, at sentencing, only discussed defendant's criminal history, which includes a prior conviction for a Class 2 felony, robbery.

¶ 21 The State, however, concedes error still occurred and concludes the extended-term sentences are void. As for the attempt (aggravated vehicular hijacking) offense, the State argues, defendant's prior history cannot serve as the basis for the extended-term sentence. The attempt (aggravated vehicular hijacking) offense is a Class 1 felony, while the highest class of felony in defendant's criminal history is a Class 2 felony. Section 5-5-3.2(b)(1) of the Code permits an extended-term sentence on an offense only when the offender was previously convicted of the same or greater class felony. 730 ILCS 5/5-5-3.2(b)(1) (West 2006).

¶ 22 As for the attempt (robbery) conviction, the State maintains although section 5-5-3.2(b)(1) would permit an extended-term sentence, section 5-8-2(a) of the Code (730 ILCS 5/5-8-2(a) (West 2006)) prohibits it. We note this is an argument the defendant also made regarding the attempt (robbery) sentence. Under section 5-8-2(a), if a defendant is convicted of multiple offenses of differing classes, the trial court may only impose an extended-term sentence on the offense in the most serious class. *People v. Peacock*, 359 Ill. App. 3d 326, 337, 833 N.E.2d 396, 405 (2005) (citing 730 ILCS 5/5-8-2(a) (West 2002)). The State concludes because attempt (robbery) was not the highest class of offense for which defendant was convicted, an extended-term sentence could not be imposed. The State maintains the one exception to section 5-8-2(a), when the offenses arise from unrelated courses of conduct (*Peacock*, 359 Ill. App. 3d at 337, 833 N.E.2d at 405), does not apply here.

¶ 23 We note an extended-term sentence not authorized by statute is void and may be attacked at any time. *Peacock*, 359 Ill. App. 3d at 336-37, 833 N.E.2d at 405 (citing *People v. Thompson*, 209 Ill. 2d 19, 27, 805 N.E.2d 1200, 1204-05 (2004)). There is no issue of waiver in this case.

¶ 24 Both parties concede defendant's extended-term sentences are void, but they cannot agree on the reason and the record does not resolve the issue. This is problematic given case law mandates a trial court, when imposing extended-term sentences, "must enumerate its consideration of the requisite aggravating factors supporting" the extended-term sentence. *People v. Brown*, 327 Ill. App. 3d 816, 826, 764 N.E.2d 562, 572 (2002). The trial court did not clearly do this. Defendant relies on language from the *plea proceedings* to support his conclusion the trial court, at *sentencing*, used Alewelt's age in imposing the extended terms, while the

State cites vague references at sentencing to defendant's criminal history as the court's basis. The court's reasoning is unclear, but what is clear is the extended-term portions of these sentences are void.

¶ 25 Defendant's extended-term sentence for attempt (aggravated vehicular hijacking) is void. The parties identify two possible bases for the extended term for this offense: Alewelt's age (730 ILCS 5/5-5-3.2(b)(3)(ii) (West 2006)) and defendant's criminal history. The first basis fails because, as in the textbook example of *White*, this would be an impermissible double enhancement. The second basis (730 ILCS 5/5-5-3.2(b)(1) (West 2006)) fails, as the State concedes, because defendant's criminal history did not include an offense of the same or greater class felony.

¶ 26 The extended-term portion of defendant's sentence for attempt (robbery) is also void. As for the attempt (aggravated vehicular hijacking) offense, the case presents two possible bases for the extended term for this offense: Alewelt's age and defendant's criminal history. As we have found, Alewelt's age cannot be used, because an impermissible double enhancement results. While defendant may have been sentenced to an extended term because of his criminal history (730 ILCS 5/5-5-3.2(b)(1) (West 2006)), section 5-8-2(a) of the Code (730 ILCS 5/5-8-2(a) (West 2006)) prohibits the extended term because the trial court was only authorized to impose such term on the offense in the most serious class (see *Peacock*, 359 Ill. App. 3d at 337, 833 N.E.2d at 405), which was the attempt (aggravated vehicular hijacking) offense.

¶ 27 We find the extended terms were unauthorized and void, but we disagree with the parties' contention remand for resentencing is necessary. In a similar circumstance, when this court found the extended-term portion of a sentence void, we vacated the extended-term portion

of that sentence and reduced the sentence to the maximum nonextended prison term. See *Peacock*, 359 Ill. App. 3d at 338, 833 N.E.2d at 406; see also *Thompson*, 209 Ill. 2d at 29, 805 N.E.2d at 1206 (vacating "the extended-term portion of defendant's sentence for violation of an order of protection, and reduc[ing] his sentence to the maximum nonextended term"). Following *Peacock* and *Thompson*, we vacate the extended-term portions of defendant's sentences for attempt (aggravated vehicular hijacking) and attempt (robbery). We reduce the sentence for attempt (aggravated vehicular hijacking) to the maximum prison term of 15 years and the concurrent sentence for attempt (robbery) to the maximum prison term of 7 years.

¶ 28 B. Postsentencing Admonishments

¶ 29 Defendant argues the trial court improperly admonished him according to Illinois Supreme Court Rule 605(b) (eff. Oct. 1, 2001), which applies to open pleas of guilty. Defendant maintains his plea was a negotiated plea and he, therefore, should have been admonished according to Rule 605(c). The State concedes the error.

¶ 30 We find this concession warranted. In exchange for his plea of guilty to counts IV, V, VI, and VII, the State agreed to dismiss counts I, II, and III, *i.e.*, the attempt (first degree murder) counts. The State also agreed it would not seek consecutive sentences. This is a negotiated guilty plea. See Ill. S. Ct. Rule 605(c) (eff. Oct. 1, 2001) ("For the purposes of this rule, a negotiated plea is one in which the prosecution has bound itself to recommend a specific sentence, or a specific range of sentence, or where the prosecution has made concessions relating to the sentence to be imposed and not merely to the charge or charges then pending.").

¶ 31 Because this case involves a negotiated plea, defendant should have been admonished pursuant to Rule 605(c). The record shows the trial court admonished defendant

pursuant to Rule 605(b). We remand the cause to permit compliance with Rule 605(c).

¶ 32 C. Rule 604(d) Certificate

¶ 33 Defendant argues the cause must again be remanded for defense counsel to comply with the certificate requirements of Illinois Supreme Court Rule 604(d) (eff. Jul. 1, 2006).

¶ 34 Our decision mandating remand for compliance with Rule 605(c) renders this issue moot. On remand, after defendant is admonished pursuant to Rule 605(c), he will decide whether to move to withdraw his guilty plea and challenge his sentence. If defendant does not pursue this route, a Rule 604(d) certificate is unnecessary. If defendant chooses to mount such a challenge, defense counsel will comply strictly with the requirements of Rule 604(d).

¶ 35 D. Sentencing Credit

¶ 36 Last, the parties dispute whether defendant is entitled to an additional day of sentencing credit. Defendant maintains he should receive presentence credit for the day of sentencing if he was not committed to the Department of Corrections (DOC) on that day. Defendant maintains the record does not show whether he was committed to the DOC and the case should be remanded for a hearing on the issue.

¶ 37 Our supreme court, in *People v. Williams*, 239 Ill. 2d 503, 509, 942 N.E.2d 1257, 1261 (2011), held the date summary judgment is entered is the date the sentence begins and prisoners are not entitled to presentence custody credit for that day. Whether defendant was physically transported to a DOC facility on that date is irrelevant. The record shows judgment was issued on August 18, 2009. The trial court's calculation correctly did not include that day.

¶ 38 Defendant cites *People v. Hill*, 409 Ill. App. 3d 451, 457, 949 N.E.2d 1180, 1185

(2011), to support his argument for remand. We find *Hill* distinguishable. In *Hill*, the issue did not involve whether the date of sentencing must be considered, but whether credit should be given for time the defendant spent in custody following the date he posted bond and the date of sentencing.

¶ 39

### III. CONCLUSION

¶ 40 We vacate the extended-term portions of the sentences for attempt (aggravated vehicular hijacking) and attempt (robbery). We remand the case for the purpose of allowing the trial court to admonish defendant pursuant to Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001). We affirm the judgment regarding presentence credit. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 41 Affirmed in part and vacated in part; cause remanded with directions.