

factor.

¶ 3 Initially, on direct appeal, we reversed the trial court's judgment and remanded for a new trial on the Rule 431(b) issue, finding the court had failed to strictly comply with the rule's requirements. In particular, this court found the trial court had erred by failing to advise the venire that defendant's decision not to testify could not be held against him. We held this error was so substantial that it affected the fundamental fairness of the trial and required a new trial. *People v. Blanton*, 396 Ill. App. 3d 230, 232 (Nov. 10, 2010).

¶ 4 In January 2011, the supreme court issued a supervisory order (*People v. Blanton*, 239 Ill. 2d 558 (Jan. 26, 2011) (nonprecedential supervisory order on denial of petition for leave to appeal) (No. 109586)) directing this court to vacate our judgment and to reconsider in light of *People v. Thompson*, 238 Ill. 2d 598 (2010). In accordance with the supreme court's directions, we vacated our prior judgment and reconsidered in light of *Thompson*. Thereafter, we affirmed defendant's conviction on the Rule 431(b) issue, and considered defendant's other contentions of error for the first time. After such consideration, we vacated defendant's sentence and remanded for a new sentencing hearing based on a violation of the proportionate-penalties clause. *People v. Blanton*, 2011 IL App (4th) 080120, ¶ 31.

¶ 5 On remand, the trial court sentenced defendant to 20 years in prison. Defendant claims the court should have sentenced him to no more than 10 years in prison after removing the 15-year enhancement. We affirm.

¶ 6 I. BACKGROUND

¶ 7 In April 2007, the State charged defendant by indictment with armed robbery (720 ILCS 5/18-2(a)(2) (West 2006)) and aggravated robbery (720 ILCS 5/18-5(a) (West 2006)). Each

count included the element that defendant was armed with a firearm during the commission of the offense. The charges stemmed from the following facts. The victim, a University of Illinois student, was approached from behind by two males as she stood at her apartment door trying to enter. One man held a gun to her head and both demanded her money. She described both as wearing baggy pants with white shoes, hoods, and shirts covering their faces up to their eyes. One of the suspects wore light blue shoe laces in his shoes. They took her keys and two cellular telephones and fled. A witness approaching the same apartment complex saw two men running away from the building. She described the men's clothing as the victim had. Defendant was arrested a few blocks away from the scene, wearing white shoes with light blue shoe laces.

¶ 8 The jury found defendant guilty of aggravated robbery and armed robbery while armed with a firearm. As stated above, in January 2008, the trial court vacated the aggravated-robbery conviction under the one-act, one-crime rule and sentenced defendant to 25 years' imprisonment for armed robbery. At sentencing, both counsel noted that 15 years was required to be added to defendant's sentence under the mandatory enhancement statute related to the use of firearms. See 720 ILCS 5/18-2(b) (West 2006).

¶ 9 After the subsequent appeals as described above, defendant's sentence, including the 15-year firearm enhancement, which was determined to be unconstitutional and was vacated and the cause was remanded for a new sentencing hearing. *Blanton*, 2011 IL App (4th) 080120, ¶ 31. In October 2011, on remand, the trial court conducted the new sentencing hearing. The State presented no evidence in aggravation. Defendant asked the court to take judicial notice of the testimony presented in mitigation at the last sentencing hearing. The court did so and indicated it would consider "additional documents tendered on behalf of the defendant this date as evidence in

mitigation." The prosecutor reminded the court defendant was convicted of a Class X felony subject to, now without the enhancements, a sentencing range of 6 to 30 years. He recommended a sentence of 28 years. Defendant's counsel made the following argument:

"Your Honor, [the prosecutor] is asking for more time than the court had originally sentenced him to, which is their right to ask for, but the only thing the court has on the record now that's different than what the court had back then when the court sentenced him to 25 years is positive things that he has been doing. ***

*** It's our position, Judge, and the court may disagree, but it's our position that when the court was looking at the sentencing range—we're trying to get into the mind of the court obviously which we can't—but you gave slightly more than the minimum, and so we are not suggesting necessarily you give him 6 years now but if the enhancement is what was the unconstitutional problem here, which was 15 years, it would not be inappropriate to reduce the sentence by the 15-year enhancement, which would put him to 10 years. It's not the minimum but it's something over the minimum but it takes into account the problem with the enhancement. Certainly this court does not have to do that, but we certainly think that something in the range of 6 to 10, perhaps 12 years would be appropriate."

¶ 10 The trial court sentenced defendant to 20 years in prison, noting this sentence was "consistent with the crime committed by" defendant and would serve as a deterrent to others. The

court further found as follows:

"The court believes that, first of all, this is a very serious offense. The fact that the court is not and will emphasize that it is not invoking the enhancement provision that was ruled unconstitutional, that as noted by the appellate court, still believes that it can and must take into account the fact that this offense was committed with a handgun, which not only placed the victim in jeopardy for her life and safety but anyone else who might happen to have been in the vicinity. I don't believe that the court can be certain that the person holding the gun would necessarily have hit his target if he had to shoot, which then would have put in danger anybody else who was within the range of the weapon at the time, so these are very serious matters. And anything short of essentially a mid-range sentence I believe is inconsistent with the offense committed.

*** I think anything short of a mid-range sentence is simply inconsistent with the offense committed, the defendant's past record of criminal conduct, his failure to the point of the offense to take advantage of opportunities he had to rehabilitate himself, and the lasting effect that this event will have on the victim."

¶ 11 Defendant filed a motion to reconsider, which, after a hearing, the trial court denied.

This appeal followed.

¶ 12

II. ANALYSIS

¶ 13 Defendant makes one claim on appeal, asserting the trial court erred by increasing his sentence after it was determined the enhancement originally imposed was unconstitutional. To reiterate, defendant was found guilty of armed robbery. Because defendant was armed with a firearm, a mandatory sentencing enhancement of 15 years was added to the sentence imposed by the court, for a total of 25 years. See 720 ILCS 5/18-2(b) (West 2006). Our supreme court determined the 15-year enhancement for armed robbery with a firearm was unconstitutional. *People v. Hauschild*, 226 Ill. 2d 63, 86-87 (2007). (Our supreme court recently affirmed the viability of *Hauschild* in *People v. Clemons*, 2012 IL 107821, ¶ 19). Defendant contends the trial court did not have any grounds to resentence him to anything greater than the base 10-year sentence originally imposed.

¶ 14 Before addressing the merits of this appeal, we address the State's claim that defendant has forfeited his argument because it "is completely contrary to [the] position he took in the trial court." In the trial court, defendant acknowledged the court was not *required* to simply subtract the 15-year enhancement upon resentencing. Rather, he argued the court *should* simply subtract. The State contends defendant now argues on appeal that the court had no discretion and was *required* to vacate the enhancement and leave the remainder of the sentence unaltered. We do not agree with the State's assessment of defendant's argument and we decline to find it forfeited. We find defendant does not contend, in this appeal, that the court was bound to resentence him to 10 years. Acknowledging that the trial court maintains some discretion, defendant claims here the court should at least *begin* its analysis with a 10-year sentence and adjust the sentence according to the new evidence presented. Because we find defendant's argument on appeal is not "completely

contrary" to the position he argued in the trial court, we decline to find his argument forfeited. *Cf. People v. Catron*, 285 Ill. App. 3d 36, 38 (1996) (failure to pose an argument in the trial court made on appeal results in forfeiture of that issue).

¶ 15 On the merits, defendant contends the "State presented no new evidence at the second sentencing hearing, much less any new evidence in aggravation." Therefore, he claims, the court "had no grounds upon which to sentence [him] to more than 10 years." In fact, the only new evidence presented was evidence in mitigation, which would presumably have lowered the sentence to less than 10 years.

¶ 16 On the other hand, the State claims, when originally sentencing defendant, the trial court inherently considered the required 15-year enhancement when it determined what sentence to impose so that the sentence would accurately reflect the seriousness of the offense and defendant's rehabilitative potential without being too harsh, knowing that 15 years had to be added. Thus, the State claims, upon resentencing, after the 15-year enhancement was removed, the court was authorized to fashion what it believed to be an appropriate sentence that would reflect the unchanged characteristic of the seriousness of the crime.

¶ 17 We note defendant's argument was implicitly rejected by our supreme court in *Hauschild*. In that case, after finding the mandatory enhancement was unconstitutional, the supreme court remanded the matter to the trial court with explicit instructions to resentence the defendant within the applicable sentencing range and without consideration of the improper mandatory sentencing enhancement. *Hauschild*, 226 Ill. 2d at 89. It is only reasonable to conclude there would be no basis to remand if the trial court was only permitted to impose the original sentence, merely subtracting the 15-year enhancement.

¶ 18 Similar arguments have been rejected by the appellate court, including this court. See *People v. Ridley*, 345 Ill. App. 3d 1091, 1093-94 (2004) (this court found that a remand for resentencing is a viable option upon vacating the unconstitutional sentencing enhancement); *People v. Barnes*, 364 Ill. App. 3d 888, 897 (2006) (the First District held that a sentence increased by a mandatory enhancement is one single sentence, not "distinct, independent prison terms"); *People v. Gibson*, 403 Ill. App. 3d 942, 955 (2010) (the Second District determined the proper remedy was to follow *Hauschild* and remand to the trial court for resentencing in accordance with the statute as it existed prior to the amendment); *People v. Herron*, 2012 IL App (1st) 090663, ¶ 29 (the First District rejected the defendant's request to vacate the enhancement and amend the sentencing judgment without remand).

¶ 19 On direct appeal, when this court determined the 15-year sentencing enhancement was unconstitutional, we vacated the 25-year sentence and remanded "for resentencing with directions to the trial court to resentence defendant in accordance with the sentencing scheme in effect prior to the enactment of the 15-year sentence enhancement." *Blanton*, 2011 IL App (4th) 080120 at ¶ 31. Upon remand, the trial court was not bound to sentence defendant to the unenhanced portion of the original sentence only. See *Hauschild*, 226 Ill. 2d at 89 (the trial court should remand for the trial court to resentence the defendant "within the range for armed robbery as it existed prior to being amended by Public Act 91-404, eff. January 1, 2000"). The purpose of remand is "to allow the trial court to reevaluate defendant's sentence in light of his cumulative sentence and to then resentence him" within the proper range. *Hauschild*, 226 Ill. 2d at 89. Thus, the sentencing court had the range of potential punishment between 6 and 30 years at its discretion for resentencing defendant on his Class X felony. See 730 ILCS 5/5-8-1(a)(3) (West 2006).

¶ 20 There is no dispute defendant's 20-year sentence falls within the applicable statutory range. Defendant offers no authority to support his position that the constitutional portion of his original sentence (10 years) must stand and bind the trial court upon resentencing to that term. When imposing the original 25-year sentence, the trial court did not indicate it was bifurcating the sentence into two separate sentences, a discretionary 10-year sentence and the mandatory 15-year enhancement. Instead, the court, without comment, sentenced defendant to "a term of incarceration in the Illinois Department of Corrections of 25 years." See *Gibson*, 403 Ill. App. 3d at 955 (noting there is a distinction between a court sentencing a defendant to a term of years without a comment regarding the possible invalidity of an enhancement and doing so while commenting on the effect of the sentence should the enhancement be declared invalid).

¶ 21 This court's prior holding, that the original 25-year sentence in its entirety was void, mandated a new sentencing hearing. *Hauschild*, 226 Ill. 2d at 80-81. As stated above, we suggested the trial court impose a sentence within the range of 6 to 30 years. The 20 years imposed was less than the 25-year sentence originally imposed and clearly fell within the sentencing range. In the absence of authority to the contrary, we conclude the term imposed upon resentencing was lawful, was within the court's authority, and was an appropriate use of the court's discretion.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we affirm the trial court's judgment sentencing defendant to 20 years in prison. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal.

¶ 24 Affirmed.