

No. 1-12-1743

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
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
)	Cook County
Plaintiff-Appellee,)	
)	
v.)	No. 11 CR 14503
)	
WILLIAM CRUZ,)	
)	Honorable
Defendant-Appellant.)	Kenneth J. Wadas,
)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant was found guilty of aggravated battery of a peace officer and driving with a revoked driver's license. The circuit court erred in imposing an extended-term sentence on the less serious offense without finding that the defendant's two convictions arose from unrelated courses of conduct. The appellate court remanded the case for resentencing.

¶ 2 Following a bench trial in the circuit court of Cook County, defendant William Cruz was found guilty of aggravated battery of a peace officer (720 ILCS 5/12-3.05(d)(4) (West 2010))

and driving with a revoked driver's license (625 ILCS 5/6-303(a) (West 2010)), and was sentenced, based on his background, to a 6-year Class X sentence for the Class 2 offense of aggravated battery of a peace officer, and a concurrent 6-year extended-term sentence for the Class 4 offense of driving with a revoked license. On appeal, defendant contends that the trial court erroneously imposed an extended-term sentence on the less serious of his two convictions. For the following reasons, we vacate defendant's sentence on the conviction for driving with a revoked license and remand the matter for resentencing.

¶ 3 BACKGROUND

¶ 4 The record on appeal discloses the following facts. On September 9, 2011, the State charged defendant by indictment with: one count of aggravated battery of a peace officer; five counts of aggravated driving under the influence of alcohol (DUI); and six counts of felony driving while his driver's license, permit or privilege was suspended or revoked. On April 24, 2012, immediately prior to trial, defense counsel tendered a signed jury waiver. The trial judge inquired whether defendant sought to waive his right to a trial by jury and defendant responded in the affirmative.

¶ 5 At trial, Chicago police officer Maria Guzman testified that at approximately 11:50 p.m. on August 6, 2011, she and her partner, Officer Cho,¹ responded to a radio call of a man beating a woman inside a vehicle at 4024 South California Avenue in Chicago. The officers arrived at the scene and approached a vehicle parked at a bus stop. A man and a woman were seated in the front of the vehicle and a child was seated in the rear of the vehicle. Officer Guzman approached the woman seated on the passenger side of the vehicle, later identified as Sonia Vellarde (Vellarde). Officer Cho approached the man in the driver's seat, whom Officer Guzman

¹ Officer Cho's first name does not appear of record.

identified as defendant. Officer Guzman also testified the keys to the vehicle were in the ignition, but the engine was not running.

¶ 6 According to Officer Guzman, Vellarde had scratches on her forehead, swollen lips and cheeks. Defendant's lip was lacerated and swollen.

¶ 7 The police officers directed defendant to exit the vehicle. Officer Cho handcuffed defendant and escorted him to the rear of the vehicle. Officer Guzman further testified that defendant had bloodshot eyes, slurred his words and had a strong odor of alcohol on his breath. Defendant was uncooperative and insulting. Defendant refused a field sobriety test, stating, "F*** you, b***. F*** you, b***. I ain't doing s***." Officer Guzman informed defendant he was under arrest for DUI.

¶ 8 Officer Guzman additionally testified that at this juncture, Chicago police officers Felix Tomalis and Tim Tantillo arrived at the scene to provide assistance. Officers Tomalis and Tantillo attempted to lead defendant to their police vehicle, but defendant swore at the officers and refused to walk. The officers were required to pull and drag defendant toward their vehicle. When defendant was outside the door of the police vehicle, Officer Guzman observed defendant lean forward and spit on Officer Tomalis.

¶ 9 Officer Tomalis also testified regarding defendant's arrest, which required him to pull and drag defendant toward his police vehicle. According to Officer Tomalis, defendant spat mostly blood, which landed on the officer's arm and shoe. Officer Tomalis acknowledged he responded with an open-handed slap to defendant's head. Officer Tomalis further testified that defendant then calmed down, at which point the police placed defendant in the police vehicle. Officers Guzman and Tomalis both opined that defendant was intoxicated at the scene of the arrest.

¶ 10 The State submitted certified abstracts from the office of the Illinois Secretary of State

indicating defendant's driver's license was revoked on August 6 and 7, 2011, then rested its case.

¶ 11 Vellarde, defendant's fiancée, testified that on the evening of August 6, 2011, she, defendant, and their one-year-old son attended a party at 38th Street and California Avenue. Vellarde observed defendant consume a single serving of beer at the party. According to Vellarde, at approximately 10:30 p.m., a woman pushed her son. Vellarde confronted the woman, who punched Vellarde and threw a bottle at her forehead. Defendant indicated to Vellarde that it was time for them to leave the party, but someone struck defendant before they exited.

¶ 12 Vellarde also testified she, defendant, and their son left the area in a gray sports utility vehicle and drove to a bus stop at the corner of California and Archer Avenues. Defendant and Vellarde commenced an argument and they exited the vehicle. According to Vellarde, defendant was upset because Vellarde did not timely inform him of the events at the party. Vellarde further testified that she took possession of the vehicle's keys and stored them in her handbag. Defendant then reentered the vehicle, at which point the police arrived. Vellarde was speaking to police officers when the commotion between defendant and the other police officers occurred. Vellarde opined that defendant was upset during the incident, but not intoxicated. The defense then rested its case.

¶ 13 The trial judge found defendant guilty on count 1 of the indictment, charging aggravated battery by spitting on the police officer. Defendant was acquitted on counts 2 through 6 of the indictment, charging aggravated DUI. The trial judge found defendant guilty on counts 7 through 12 of the indictment, finding defendant was in actual physical control of the vehicle while his license was revoked.

¶ 14 On May 29, 2012, defendant filed a posttrial motion for new trial. The trial court denied

the posttrial motion for a new trial on the same date, and immediately proceeded to a sentencing hearing. The parties presented evidence in aggravation and mitigation of the offense, including defendant's numerous prior felony and misdemeanor convictions. The trial judge sentenced defendant as a Class X offender to six years in prison on count 1 of the indictment, the offense of aggravated battery. The trial judge also imposed a concurrent six-year, extended-term sentence on count 7 of the indictment, the offense of driving with a revoked license, with the remaining convictions merging into the conviction on count 7. Later on May 29, 2012, defendant filed a timely notice of appeal to this court.

¶ 15

ANALYSIS

¶ 16 The sole issue on appeal is whether the trial judge erred in imposing an extended-term sentence on defendant's conviction for driving with a revoked license. It is well settled that, to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required. See 730 ILCS 5/5-4.5-50(d) (West 2010); *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). In this case, defendant failed to object to his sentence contemporaneously and file a postsentencing motion. Defendant, however, argues the extended-term sentence for driving with a revoked license is void. An extended-term sentence not authorized by statute is void and may be challenged for the first time on appeal. See *People v. Thompson*, 209 Ill. 2d 19, 27 (2004); *People v. Peacock*, 359 Ill. App. 3d 326, 337 (2005). Accordingly, we turn to consider defendant's challenge to his extended-term sentence for driving with a revoked license.

¶ 17 Section 5-8-2 of the Unified Code of Corrections (Code) states in part:

"A judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by Article 4.5 of Chapter V for an

offense or offenses within the class of the most serious offense of which the offender was convicted unless the factors in aggravation set forth in Section 5-5-3.2 or clause (a)(1)(b) of Section 5-8-1 were found to be present." 730 ILCS 5/5-8-2(a) (West 2010).

Aggravated battery of a peace officer is a Class 2 felony (720 ILCS 5/12-3.05(d)(4)(i), 5/12-3.05(h) (West 2010)), with a normal sentencing range of not less than 3 years and not more than 7 years and an extended-term sentencing range of not less than 7 years and not more than 14 years (730 ILCS 5/5-4.5-35(a) (West 2010)). Driving with a revoked driver's license is a Class 4 felony (625 ILCS 5/6-303(a), 5/6-303(d-3) (West 2010)), with a normal sentencing range of not less than 1 year and not more than 3 years, and an extended-term sentencing range of not less than 3 years and not more than 6 years (730 ILCS 5/5-4.5-45(a) (West 2010)). Accordingly, defendant contends the trial judge lacked authority under section 5-8-2(a) of the Code to impose an extended-term sentence on the less serious conviction of driving with a revoked driver's license.

¶ 18 The Illinois Supreme Court, construing a prior, substantially similar version of section 5-8-2(a) of the Code, held that "when a defendant has been convicted of multiple offenses of differing classes, an extended-term sentence may only be imposed for the conviction within the most serious class ***." *People v. Jordan*, 103 Ill. 2d 192, 206 (1984). Our supreme court, however, also interpreted the prior version of section 5-8-2(a) of the Code "to allow for the imposition of extended terms on separately charged, differing class offenses that arise from unrelated courses of conduct regardless of whether the cases are separately prosecuted or consolidated." *People v. Coleman*, 166 Ill. 2d 247, 257 (1995). "[I]n determining whether a defendant's multiple offenses are part of an 'unrelated course of conduct' for the purpose of his

eligibility for an extended-term sentence under section 5-8-2(a), courts must consider whether there was a substantial change in the nature of the defendant's criminal objective." *People v. Bell*, 196 Ill. 2d 343, 354 (2001). The State relies on this exception to argue the extended-term sentence for driving with a revoked driver's license was proper, claiming the two offenses in this case arose from unrelated courses of conduct.

¶ 19 Defendant replies that the *Coleman* exception does not apply in this case because the trial judge did not find the two offenses arose from unrelated courses of conduct. This court has held "[t]he determination of whether a defendant's actions constituted a single course of conduct is a question of fact for the trial court to determine." *People v. Sergeant*, 326 Ill. App. 3d 974, 988 (2001) (citing *People v. Edwards*, 259 Ill. App. 3d 151, 156 (1994)). This court has also held the determination of whether there was a substantial change in the nature of the criminal objective from one offense to another "cannot initially be made by this court." See *Edwards*, 259 Ill. App. 3d at 156 (interpreting section 5-8-4(a) of the Code). Rather, the issue is "best suited for the trial court in its role as fact finder." *Id.* Where the court has not made a finding that the two offenses arose from unrelated courses of conduct, this court has vacated the unauthorized sentence and remanded the matter to the trial court for resentencing. See *id.* (and cases cited therein).

¶ 20 Defendant further argues, however, that the sentencing judge is no longer permitted to find that different offenses arose from unrelated courses of conduct, based upon section 111-3(c-5) of the Code of Criminal Procedure of 1963 (725 ILCS 5/111-3(c-5) (West 2012)). Initially, we note defendant raised this final argument for the first time in his reply brief. Points not argued in the appellant's opening brief are forfeited and shall not be raised in the reply brief. See Ill. S. Ct. R. 612(i) (eff. Feb. 6, 2013) (incorporating Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013)); *People v. Polk*, 2014 IL App (1st) 122017, ¶ 49. Moreover, insofar as we have

vacated the sentence at issue, we need not consider relaxing the rule of forfeiture in this appeal.

¶ 21

CONCLUSION

¶ 22 In sum, the trial court erred in imposing an extended-term sentence on the conviction for driving with a revoked license without finding that defendant's two convictions arose from unrelated courses of conduct. In this case, however, the matter may be remanded to the circuit court for a determination of whether the convictions arose from unrelated courses of conduct. Defendant's remaining arguments are forfeited. Accordingly, for all of the aforementioned reasons, defendant's sentence on the charge of driving with a revoked driver's license is vacated and this case is remanded for resentencing.

¶ 23 Sentence vacated; cause remanded for resentencing.