

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
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 14772
)	
JULIAN NOBLE,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Harris and Justice Simon concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Judgment entered on defendant's conviction of armed habitual criminal affirmed over defendant's contention that the trial court improperly considered two prior convictions, which were inherent in the offense, in sentencing him.
- ¶ 2 Following a bench trial, defendant Julian Noble was found guilty of armed habitual criminal and sentenced to nine years' imprisonment. On appeal, defendant solely contends that the cause must be remanded for resentencing because the trial court improperly considered a factor inherent in the offense of armed habitual criminal in sentencing him.

1-12-2200

¶ 3 Defendant has not challenged the sufficiency of the evidence to sustain his armed habitual criminal conviction. We therefore recite only those facts necessary to address his sentencing claim. *People v. Gomez*, 402 Ill. App. 3d 945, 947 (2010).

¶ 4 The common law record shows that defendant was arrested on August 29, 2011, and charged by information with one count of armed habitual criminal, two counts of unlawful use of a weapon by a felon, and two counts of aggravated unlawful use of a weapon. At trial, the State presented evidence of defendant's prior qualifying convictions for delivery of a controlled substance (case number 00CR0823001) and vehicular hijacking (case number 05CR1400801), and the testimony of the two Chicago police officers who observed defendant fleeing from gunfire while holding a handgun, which he discarded upon seeing them. The trial court found defendant guilty on all counts and merged the convictions into the single count of armed habitual criminal.

¶ 5 At sentencing, the State argued for a significant sentence, noting defendant's "lifetime of criminal activity" that spanned from 1996 to 2005. Referencing the presentence investigation report (PSI) and the Chicago police criminal history report attached to it, the State mentioned defendant's prior felony drug convictions under case numbers 96CR1664701, 00CR082301, and 05CR684301, and his prior vehicular hijacking conviction under case number 05CR1400801. Although not specifically mentioned by the State, the PSI included defendant's misdemeanor drug conviction under case number 1122765101, and his misdemeanor convictions for driving on a suspended license and with no insurance under respective case numbers TG299700 and TG2997101. Additionally, the attached criminal history report chronicled defendant's six felony arrests, eight misdemeanor arrests, and, ultimately, five convictions, representing his "lifetime of

criminal activity" that spanned from 1996 to 2005. Based on the foregoing, the State asserted that defendant was a threat to society and that he had shown a consistent pattern of being unable to live in, or adhere to the laws of, our society.

¶ 6 In mitigation, defense counsel pointed out that defendant is 36 years of age and has a GED, and that prior to the incident at bar, he was employed as a barber and was providing support for his four children. Defense counsel also submitted a letter written by defendant, asking for leniency.

¶ 7 The trial court sentenced defendant to a single term of nine years' imprisonment on the armed habitual criminal count. In doing so, the court stated, "[t]he facts of the case it's a drop case in a manner of speaking with a gun. He's got a record indicating he shouldn't have had a gun." Defendant filed a motion to reconsider his sentence asserting, *inter alia*, that the court improperly considered in aggravation matters that are implicit in the offense. The trial court denied defendant's motion, noting that it had tried to be moderate with him.

¶ 8 On appeal, defendant contends that the trial court improperly considered his two prior qualifying convictions, namely, delivery of a controlled substance and vehicular hijacking, in imposing his sentence because they had already been considered in his conviction for the offense of armed habitual criminal. Defendant thus argues that he was subject to an improper double enhancement when the trial court, "without acknowledging that these convictions were an inherent factor in [his] armed habitual criminal conviction, emphasized that '[h]e's got a record indicating he shouldn't have had a gun' and imposed a nine year sentence."

¶ 9 A "double enhancement" occurs when either 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, or the same factor is used twice to elevate the severity of the offense itself. *People v. Phelps*, 211 Ill. 2d 1, 11-13 (2004), cited in *People v. Guevara*, 216 Ill. 2d 533, 545 (2005).

There is a strong presumption that the trial court based its sentencing determination on proper legal reasoning and we review the sentencing decision with deference. *People v. Bowman*, 357 Ill.App.3d 290, 303–04 (2005). It is the defendant's burden to affirmatively establish that the sentence was based on improper considerations. *People v. Conley*, 118 Ill.App.3d 122, 133 (1983). The question of whether the court made a double enhancement error is a question of law, which we review *de novo*. *People v. Shanklin*, 2014 IL App (1st) 120084, ¶ 91; *People v. Chaney*, 379 Ill. App. 3d 524, 527 (2008).

¶ 10 The armed habitual criminal statute prohibits the receipt, sale, possession, or transfer of a firearm by a person with at least two prior convictions for certain qualifying offenses including, in pertinent part, vehicular hijacking and any violation of the Illinois Controlled Substances Act or the Cannabis Control Act, that is punishable as a Class 3 felony or higher. 720 ILCS 5/24-1.7(a)(2), (3) (West 2010). The offense of armed habitual criminal is a Class X felony, which carries a sentencing range of between 6 and 30 years' imprisonment. 720 ILCS 5/24-1.7(b) (West 2010); 730 ILCS 5/5-4.5-25 (West 2010).

¶ 11 Here, two of defendant's four felony convictions were used to satisfy an element of the armed habitual criminal offense: vehicular hijacking and one delivery of a controlled substance. Defendant was sentenced to a Class X term of nine years' imprisonment. As such, there was no double enhancement. See, e.g., *People v. Easley*, 2014 IL 115581, ¶ 28 (prior unlawful use of a weapon by a felon conviction was used only once, as an element of the offense, and not also to enhance the offense).

¶ 12 Defendant argues, however, that he was subject to an improper double enhancement based on the trial court's statement, "He's got a record indicating he shouldn't have had a gun." We initially note that in determining whether the trial court improperly imposed a sentence, we consider the record as a whole and will not focus on isolated statements. *People v. Walker*, 2012 IL App (1st) 083655, ¶ 30.

¶ 13 The record shows that the sentencing hearing was brief, and the court's comments perfunctory. In announcing its sentencing decision, the court gave a one-sentence synopsis of the case, and then commented that defendant's "got a record that indicates he shouldn't have had a gun", and imposed a term of nine years' imprisonment. The statutory requirement that the trial court specify on the record the factors that led to its sentencing determination was not meant to be a trap for the sentencing court, and we are not persuaded by defendant's assertion that the court imposed a harsher sentence than might otherwise been imposed based on its reference to his criminal background. *People v. Barney*, 111 Ill. App. 3d 669, 679 (1982); see also *People v. Gramo*, 251 Ill. App. 3d 958, 971 (1993) ("The court was merely describing the nature of the offenses defendant committed and the seriousness with which the legislature, the courts, and society view them.")

¶ 14 Although defendant's prior qualifying convictions are elements of the offense (*People v. Davis*, 405 Ill. App. 3d 585, 591 (2010)), and therefore cannot be used to impose a harsher sentence (*People v. Conover*, 84 Ill. 2d 400, 404-05 (1981)), defendant's history of prior criminal activity is a statutory aggravating factor that may be considered by the court as a reason to impose a longer prison term. 730 ILCS 5/5-5-3.2(a)(3) (West 2010); *People v. Thomas*, 171 Ill. 2d 207, 224-25 (1996). Moreover, there is no requirement that the minimum sentence be

1-12-2200

imposed in the absence of aggravating factors (*Barney*, 111 Ill. App. 3d at 679) and, in this case, we do not find that the trial court's observation, after reviewing defendant's criminal history, that "he's got a record that indicates he shouldn't have had a gun" demonstrates, or reasonably indicates, that an impermissible sentencing factor added three years to the statutory Class X minimum sentence for the offense. *People v. Martin*, 112 Ill. App. 3d 486, 503-04 (1983). We find that, in context, the nature of the conviction, possession of a weapon by a twice convicted felon, and the defendant's more than ten year criminal history which included two felony convictions that were not used as elements of the charged offense plus misdemeanor convictions, the instant record does not warrant a conclusion that the court impermissibly enhanced defendant's sentence based on the two felony convictions that were proven elements of the offense. Given the requirement that a sentencing judge consider relevant statutory factors when imposing a sentence and the reality that sentences vary depending on the facts of the case, the nature of the offense and the defendant's background, the trial court must be afforded significant discretion when imposing a sentence. *People v. Hunter*, 101 Ill.App.3d 692, 695 (1981) ("Occasionally, certain conduct may warrant a harsher penalty than other conduct, even though both are technically punishable under the same statute. We believe, therefore, that the best approach is to continue to afford the trial judge a significant measure of discretion in sentencing matters.")

¶ 15 In reaching our decision, we are unpersuaded by defendant's reliance on *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 10, an aggravated arson case, where we found there was explicit reliance on a factor implicit in the offense used as an aggravating factor in sentencing where the trial court stated, "The factors in aggravation that I do find apply in this case are,

Number 1, that the Defendant's conduct caused or threatened serious harm. No question, this Defendant's conduct in this offense caused the greatest harm there could be, that is the *death* of another person." (Emphasis added.) In contrast, in *People v. Kibayasi*, 2013 IL App (1st) 112291, ¶¶ 53, 58, a first degree murder case, we found the trial court's statement that "the results of [defendant's] actions caused the death of Dylan" focused on the manner and circumstances of the offense, as opposed to our finding in *People v. Dowding*, 388 Ill. App. 3d 936, 941 (2009), where the trial court improperly focused on the result of defendant's conduct, the victim's death, as a factor in aggravation based on the court's statements "that the [d]efendant's conduct caused or threatened serious harm" and "Defendant's conduct in this offense caused the greatest harm there could be, that is the death of another person." We reach a similar conclusion here, where the trial court's limited comments during the brief sentencing hearing do not show that it relied on defendant's prior qualifying convictions to impose a harsher sentence, and find *Abdelhadi*, which relied greatly on *Dowding*, distinguishable from the case at bar.

¶ 16 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 17 Affirmed.