2016 IL App (1st) 141828-U

SIXTH DIVISION
DECEMBER 16, 2016

No. 1-14-1828

**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).

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 13 CR 22023 |
| | ) | |
| PERRY LEE, | ) | Honorable |
| | ) | Mary Margaret Brosnahan, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

**ORDER**

¶ 1 *Held*: Where defendant's contention of error was raised for the first time in his reply brief in this court, it is forfeited for appellate review.

¶ 2 Following a jury trial, defendant Perry Lee was found guilty of the Class 2 felony of unlawful use of a weapon (UUW) by a felon. He was sentenced to eight years' imprisonment to be followed by two years of mandatory supervised release. On appeal, defendant contended in his opening brief that the enhancement of his offense to a Class 2 felony could not be sustained based on his prior conviction for robbery or his prior conviction for UUW by a felon, and he requested that we remand this case for resentencing under the Class 3 felony sentencing range.

The State filed its response brief, addressing the issues raised by defendant in his opening brief. Defendant thereafter filed a reply brief in which he (1) conceded the correctness of the State's positions; (2) abandoned his original claims; and (3) argued for the first time that the trial court improperly considered his prior convictions for UUW by a felon and aggravated unlawful use of a weapon (AUUW) in aggravation at sentencing.

¶ 3 Because defendant's only remaining contention on appeal was raised for the first time in his reply brief, it is forfeited. Accordingly, as explained below, we affirm the judgment of the circuit court.

¶ 4 Defendant was charged by indictment with five violations of article 24 of the Criminal Code of 1961 (720 ILCS 5/24 *et seq.* (West 2012)), which arose from his conduct on October 24, 2013: (1) UUW by a felon under section 24-1.1(a) in that he knowingly possessed a firearm after having been convicted of the felony offense of robbery under case number 09 CR 1513001; (2) UUW by a felon under section 24-1.1(a) in that he knowingly possessed firearm ammunition after having been convicted of the felony offense of robbery under case number 09 CR 1513001; (3) AUUW under section 24-1.6(a)(1), (3)(c) in that he knowingly carried a firearm and had not been issued a firearm owner's identification (FOID) card; (4) AUUW under section 24-1.6(a)(2), (3)(c) in that he knowingly carried a firearm on a public street and had not been issued a FOID card; and (5) defacing identifications marks of a firearm under section 24-5(b). The State proceeded on count 1 and *nolle-prossed* the remaining counts.

¶ 5 During admonitions prior to trial, the court explained that the predicate felony was defendant's prior Class 2 felony conviction for robbery under case number 09 CR 1513001 and that defendant was eligible for a sentence of 3 to 14 years' imprisonment. After jury selection and

outside its presence, defense counsel noted that ordinarily UUW by a felon is a Class 3 felony, and that a prior conviction for a forcible felony, such as the robbery in this case, could enhance the felony to a Class 2 offense. He then argued that use of defendant's prior robbery conviction both as the predicate felony and to enhance his offense to a Class 2 felony constituted a double enhancement because the robbery was being used twice. The court stated:

> "I think it's properly charged as a Class 2.
>
> For purposes of the jury and proceeding forward, I would note that this would really be a sentencing issue for the Court. The class of the offense or the nature of the offense is not going to ever be before the jury, since the Defense has requested that they only be read the word qualifying felony."

¶ 6 At trial, Chicago police officer Derrick Patterson testified that, on the evening of October 24, 2013, at about 9:15 p.m., he and his partner, Officer Mackowiak, were on patrol when they observed a man, later identified as defendant, exit a gangway and walk toward Bishop Street. Defendant "looked in [the officers'] direction, tossed a black object behind him, walked out, and began to walk southbound in a hurried pace." Officer Patterson believed that the six or eight-inch object was a handgun based on "[t]he way that [defendant] turned quickly and dropped it and the manner in which he walked away in a hurried pace." No other people were in the gangway when defendant dropped the object.

¶ 7 Officer Patterson then detained defendant while Officer Mackowiak went to the area where the defendant had tossed the item. With a hand gesture, Officer Mackowiak signaled to Officer Patterson to place defendant in custody. After Officer Patterson arrested defendant,

Officer Mackowiak showed him the black .22 semi-automatic handgun that he recovered. It was consistent with the object Officer Patterson saw defendant drop.

¶ 8 Chicago police officer Matthew Mackowiak testified that he observed defendant drop a dark object behind him in the gangway. He recovered the "blue steel .22 caliber semiautomatic handgun" from the same area where he saw defendant drop the dark object. He continued searching after he recovered the weapon, but did not see anything else in the gangway area. Officer Mackowiak identified People's exhibit 5 as the weapon he recovered and described it as a "Walther Model P22, .22 caliber handgun with a three and a half inch barrel *** loaded once with one round in the chamber and eight additional rounds in the magazine." After recovering the handgun, Officer Mackowiak showed it to his partner and later inventoried it at under inventory number 13032359.

¶ 9 Chicago police officer Pamela Schaffrath testified that she was assigned to the firearms lab as a firearms examiner when she examined a gun that was inventoried as number 13032359. Officer Schaffrath identified People's exhibit 5 as the firearm, and described it as a "Carl Walther Model P22, .22 caliber handgun." She stated that the gun was functioning and test-fired properly.

¶ 10 It was stipulated that defendant "has a prior qualifying felony conviction under Case No. 09 CR 1513001, to sustain the charge of unlawful use of a weapon by a felon."

¶ 11 The State rested. Defendant moved for a directed verdict, which the court denied.

¶ 12 Porsha Pore testified that she had known defendant for about three years. At around 9:15 p.m. on the night in question, she observed defendant on a porch and the police driving down the street in a regular blue and white police car. When the police pulled up to the house where defendant was standing, he walked toward them. Her view was unobstructed and she did not

observe a black object in defendant's hand or see him throw anything into the gangway. After walking toward the gangway, the officers returned with a black object then put defendant in handcuffs and drove off. Pore never saw defendant in the gangway.

¶ 13 The jury found defendant guilty of UUW by a felon. Defendant filed a motion for a new trial, which the court denied.

¶ 14 At sentencing, the court indicated that it would consider defendant's criminal history as it appeared on page three of the presentence investigation report (PSI). Page three reflects that in June of 2008, defendant was convicted of the Class 4 felony of AUUW and sentenced to 24 months' probation in case number 08 CR 0991901.[1] Later in 2008, that probation was terminated unsatisfactorily. In December of 2008, defendant was sentenced to two "concurrent" years' imprisonment for the Class 3 felony of UUW by a felon in case number 08 CR 2030201. In 2010, defendant was convicted of robbery and sentenced to four years' imprisonment in case number 09 CR 1513001. Defendant was sentenced to 30 days for possession of cannabis in December of 2011.

¶ 15 In aggravation, the State stressed that defendant armed himself with a fully-loaded 22-caliber semiautomatic weapon while on city streets at around 9 o'clock at night, and although he was a young man, he had three prior felonies. The State requested a sentence in the higher end of the sentencing range.

¶ 16 In mitigation, defense counsel argued that defendant was 23 years old and could still have bright future, and pointed out that defendant had obtained some college education after

[1] The record reflects that defendant was convicted under section 24-1.6(a)(1), (a)(3)(A) of the Criminal Code (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2008)).

graduating from high school and that he had held two significant prior employment positions. Defendant had a loving family, which counsel argued could would facilitate his rehabilitation. Defense counsel asked the court not to "consider the UUWs from '08" in light of "the recent case law" in Illinois regarding "UUW charges" and contended that the predicate felony for his prior UUW by a felon offense was obtained pursuant to a statute that has been declared void *ab initio*. Requesting a sentence in the lower end of the range, counsel expressed his belief that defendant was capable of doing good and that an extended sentence was not necessary.

¶ 17 Regarding defendant's prior convictions, the court said:

> "I'm not going to simply disregard them. They do stand in his background as prior felony convictions from 2008, both of them where he got an original sentence of — the first one was probation.
>
> And it was apparently a violation of that probation. And he picked up a second case. And then on to the 2009 case."

¶ 18 In allocution, defendant explained that he believed he could be a law abiding citizen and requested mercy from the court so that he could get back to his family and his children and "continue to try to be a law abiding citizen."

¶ 19 The court first considered the statutory factors in mitigation. 730 ILCS 5/5-5-3.1(a)(1)-(16) (West 2014). Regarding the second factor, whether defendant did not contemplate that his criminal conduct would cause or threaten serious bodily harm, the court stated, "certainly when you have [a] loaded gun in your possession, as I said, a recipe for upcoming disaster." Addressing the eighth factor, whether the defendant's conduct was the result of circumstances

unlikely to reoccur, the court noted defendant's past behavior was as an indicator of future behavior. The court stated, "defendant has in his short time amassed three prior felony convictions; two of them are weapons related." The court then explained that his 2010 robbery was the conviction it "weighed most significantly."

¶ 20 Regarding the ninth factor, whether or not the character and attitude of the defendant indicate he is unlikely to commit another crime, the court stated, "I believe that the defendant as he sits here is speaking from the heart. But I can't say based on his background that I feel comfortable saying he's unlikely to commit another crime." With the exception of factor 11, whether imprisonment would entail excessive hardship to defendant's dependents, the remaining factors did not apply.

¶ 21 Turning to the statutory factors in aggravation (730 ILCS 5/5-5-3.2 (West 2014)), the court found that defendant's history of prior delinquency was "significant." The court pointed out that defendant received four years for his robbery conviction in 2010 and that the instant case occurred in 2013. "So not much time at all has gone by. That obviously is concerning to the Court."

¶ 22 In announcing sentence, the court stated, "I think that based on the prior background, how recent the background is. And the fact that 2009 was a robbery obviously evidencing escalation here. And here he still has — is found with a weapon on him." The court sentenced defendant to eight years in the Illinois Department of Corrections on a Class 2 extended term sentence, to be followed by two years of mandatory supervised release.

¶ 23 Defendant filed a motion to reconsider his sentence, which the court denied.

¶ 24 On appeal, defendant contended in his opening brief that the enhancement of his crime to a Class 2 felony could not be sustained based on his prior convictions for robbery or UUW by a felon, and requested that we remand this case for resentencing under the Class 3 felony sentencing range. Defendant argued that use of his 2009 robbery conviction as the predicate felony and the basis for the Class 2 enhancement was improper because it constituted a double enhancement. He further argued that his 2008 UUW by a felon conviction could not sustain the Class 2 enhancement because its predicate offense was a 2008 AUUW conviction, which he argued was void *ab initio* under *People v. Aguilar*, 2013 IL 112116. The State filed a response brief, asserting that the offense was properly enhanced to a Class 2 felony by the robbery, not the UUW by a felon conviction. In his reply brief, defendant conceded the double enhancement issue in light of *People v. Easley*, 2004 IL 1155814, and acknowledged that the predicate forcible felony of robbery could sustain the Class 2 enhancement. After abandoning his original claims, defendant then argued for the first time in his reply brief that in light of *Aguilar*, the trial court improperly considered both of his 2008 convictions in aggravation at sentencing.

¶ 25 Under Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013), points not argued in the appellant's brief "are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." *Vancura v. Katris*, 238 Ill. 2d 352, 369 (2010); see also *People v. Polk*, 2014 IL App (1st) 122017, ¶ 49. As such, Rule 341(h)(7) requires arguments in the reply brief to be strictly confined to replying to arguments presented in the brief of the appellee. *People v. Taylor*, 2015 IL 117267, ¶ 32. "A contrary practice would permit appellants to argue questions in their reply briefs as to which counsel for appellees would have no opportunity to reply." *People v. English*, 2011 IL App (3d) 100764, ¶ 22.

¶ 26 As explained above, defendant's contentions of error in his opening brief were limited to challenging the enhancement of his current offense from a Class 3 to a Class 2 felony and were devoid of any mention of the trial court's consideration of his 2008 convictions as factors in aggravation at sentencing. Thus, the State devoted its entire response brief to arguing that the offense was properly enhanced to a Class 2 felony based on defendant's prior robbery conviction. Because defendant did not raise his sentencing issue in his opening brief, the State was deprived of an opportunity to respond to that claim. The absence of the State's position on the issue raised in defendant's reply brief substantially hinders appellate review. See *English*, 2011 IL App (3d) 100764, ¶ 22. Accordingly, defendant's contention of error is forfeited. *Id.*; *People v. Polk*, 2014 IL App (1st) 122017, ¶ 49.

¶ 27 We are mindful that issues raised for the first time in a reply brief may be addressed if a just result dictates their consideration. See *People v. Brownell*, 123 Ill. App. 3d 307, 319 (1984). However, this is not such a case. The sentencing issue defendant raised in his reply brief implicates our supreme court's recent ruling in *People v. McFadden*, 2016 IL 117424 (*reh'g denied* Sept. 26, 2016). In *McFadden*, our supreme court held that where a defendant's prior AUUW conviction may be void *ab initio* under *Aguilar*, unless and until that prior conviction is vacated, it is treated as valid and may properly serve as the predicate felony for a subsequent conviction of UUW by a felon. *Id.* ¶¶ 21, 31-33, 37. Although *McFadden* was decided more than two months before defendant filed his reply brief, he did not cite the case much less argue against extending its holding to the sentencing context. Here, neither party has addressed whether *McFadden*'s holding, that void-but-unvacated prior convictions may serve as predicate offenses, also means that those void convictions may be considered in aggravation at sentencing

in this case. As neither party has provided input on the topic, we decline to excuse defendant's forfeiture of the issue.

¶ 28 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 29 Affirmed.