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2016 IL App (3d) 140428-U

Order filed August 30, 2016

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-14-0428
DETRICK D. BAINES,	)	Circuit No. 11-CF-175
Defendant-Appellant.	)	Honorable Clark Erickson, Judge, Presiding.

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JUSTICE SCHMIDT delivered the judgment of the court.  
Justices Holdridge and Wright concurred in the judgment.

**ORDER**

*Held:* Defendant is deprived of his constitutional right to effective assistance where counsel requests a minimum sentence under the incorrect sentencing range (Class X as opposed to Class 2). Prejudice is established when, as here, defendant's sentence included a three-year MSR as opposed to the two-year MSR applicable to Class 2 felonies.

¶ 1 Defendant, Deitrick D. Baines, appeals his concurrent 6½-year prison sentences imposed for his two convictions for unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)). Defendant contends that he was deprived of effective assistance when defense

counsel failed to object to the trial court imposing a double enhanced sentence. We vacate defendant's sentence and remand for resentencing.

¶ 2

## FACTS

¶ 3

As the result of a search warrant executed on defendant's residence, the State charged defendant with two counts of unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(c)(2), (d)(i) (West 2010)) and two counts of unlawful possession of a weapon by a felon with a previous conviction for a forcible felony, residential burglary (720 ILCS 5/24-1.1(a) (West 2010)).

¶ 4

Following a trial, the jury found defendant guilty of both counts of unlawful possession of a weapon by a felon. The jury found defendant not guilty of one count of the unlawful possession of a controlled substance with intent to deliver and the court declared a mistrial on the other count of unlawful possession of a controlled substance with intent to deliver.

¶ 5

At the sentencing hearing, the State recommended a sentence of nine years' imprisonment. The State argued that Class X sentencing applied because defendant's current convictions were Class 2 felonies and defendant had two previous Class 2 or greater felony convictions. The State noted that defendant's previous convictions for aggravated criminal sexual abuse and removal of a gravestone to resell (Class 1 and Class 2 felonies, respectively) only counted as one of the two required convictions for purposes of Class X sentencing because those convictions were sentenced at the same time. The State added, however, that defendant's prior residential burglary conviction acted as the second required conviction for Class X sentencing. The defense requested the minimum sentence for a Class 2 felony. In response, the trial court told defense counsel that it could not impose a Class 2 felony sentence because defendant's present conviction was his third Class 2 or greater conviction, making the minimum

prison term six years under the Class X sentencing range. The defense did not object. Instead, upon conclusion of the trial court's comments, the defense requested the minimum Class X prison term of six years.

¶ 6 Ultimately, the trial court sentenced defendant under the Class X range to concurrent 6½-year terms' imprisonment for each conviction of unlawful possession of a weapon by a felon. The trial court granted defendant 184 days of presentence credit and imposed 3 years' of mandatory supervised release (MSR). The defense did not file a motion to reconsider defendant's sentence.

¶ 7 ANALYSIS

¶ 8 At the outset, the State concedes that a double enhancement sentencing error took place and defendant should have been sentenced under the lesser Class 2 range rather than Class X. Before turning to defendant's ineffective assistance claim, we briefly review the details of the double enhancement error.

¶ 9 Generally, unlawful possession of a weapon by a felon is a Class 3 felony. 720 ILCS 5/24-1.1(e) (West 2010). The penalty for unlawful possession of a weapon by a felon may be elevated to a Class 2 felony if a defendant has certain previous forcible felony convictions, including residential burglary. *Id.* The penalty for unlawful possession of a weapon by a felon may be further enhanced to a Class X felony if a defendant has "twice been convicted in any state or federal court of an offense that contains the same elements as an offense now (the date the Class 1 or Class 2 felony was committed) classified in Illinois as a Class 2 or greater Class felony and those charges are separately brought and tried and arise out of different series of acts." 730 ILCS 5/5-4.5-95(b) (West 2010).

¶ 10 In the present case, defendant’s prior residential burglary conviction served as the predicate forcible felony to elevate the penalty of defendant’s current unlawful possession of a weapon by a felon charges from Class 3 to Class 2 felonies. However, the same residential burglary conviction also served as one of the two predicate convictions to further enhance the penalty for defendant’s current convictions to Class X felonies. This was an improper double enhancement because the same factor (defendant’s prior residential burglary conviction) was used twice to elevate the seriousness of the offense itself. See *People v. Phelps*, 211 Ill. 2d 1, 12-13 (2004). While defendant’s prior residential burglary conviction could properly elevate the punishment for defendant’s current unlawful possession of a weapon by a felon convictions from Class 3 to Class 2, defendant’s prior residential burglary conviction could not then enhance the penalty further from Class 2 to Class X. We therefore accept the State’s double enhancement concession.

¶ 11 Defendant argues on appeal that defense counsel provided ineffective assistance in failing to object to the trial court’s double enhancement error. Instead, counsel endorsed the error by requesting the minimum Class X prison sentence after the trial court incorrectly explained that Class X sentencing was required. Defendant also notes that counsel did not file a motion to reconsider defendant’s sentence. Because defendant establishes counsel’s conduct was deficient and he suffered prejudice as a result, we hold that defendant is entitled to resentencing.

¶ 12 To succeed on a claim of ineffective assistance of counsel, a defendant must show that: (1) counsel’s performance was objectively unreasonable; and (2) defendant suffered prejudice as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶ 13 Before examining the first *Strickland* prong, we must first look to the substantive law relevant to the penalties authorized by the Class 2 and Class X sentencing ranges. At the time of

the offenses, the Class 2 felony sentencing range allowed for a term of imprisonment between 3 and 14 years. 730 ILCS 5/5-4.5-35(a) (West 2010). The sentencing range for a Class X felony was a term of 6 to 30 years' imprisonment. 730 ILCS 5/5-4.5-25(a) (West 2010).

¶ 14 Turning to the first *Strickland* prong (deficient performance), we reemphasize that the State has already conceded the double enhancement error. Sentencing is a critical stage of criminal proceedings. *People v. Stanley*, 246 Ill. App. 3d 393, 403 (1993). The applicable statute is clear and its application is straightforward. The terms of imprisonment and MSR provided by the Class X sentencing range are greater in length than Class 2. Compare 730 ILCS 5/5-4.5-35(a) (West 2010), with 730 ILCS 5/5-4.5-25(a) (West 2010). There is no reasonable explanation why defense counsel would endorse, rather than object to, the trial court's incorrect statement that Class X sentencing was required. Counsel's failure to do so was objectively unreasonable.

¶ 15 We now turn to the second *Strickland* prong (prejudice). To satisfy this prong, a defendant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *People v. Evans*, 186 Ill. 2d 83, 93 (1999). Initially, defendant contends he has shown prejudice because his 6½-year prison sentence falls at the lower end of the Class X range (6 to 30 years). According to defendant, it follows that the trial court would have sentenced him to the lower end of the Class 2 range (3 to 14 years). We need not reach this issue, however, in light of the fact that the trial court erroneously imposed a three-year MSR term.

¶ 16 A criminal sentence consists of two separate parts: a period of imprisonment and a period of MSR. *People v. Lee*, 2012 IL App (4th) 110403, ¶ 31. Stated differently, "[d]efendant's prison term and MSR are a part of the same sentence, not two different sentences." *Id.*; see *People ex rel. Scott v. Israel*, 66 Ill. 2d 190, 194 (1977).

¶ 17 Here, the trial court imposed the three-year MSR term *required* by the Class X sentencing statute. 730 ILCS 5/5-4.5-25(1) (West 2010). However, because defendant was subject to Class 2 sentencing, as opposed to Class X, the trial court was *required* to impose a two-year MSR term in accordance with the Class 2 sentencing statute. 730 ILCS 5/5-4.5-35(1) (West 2010). Had defense counsel made the trial court aware of defendant’s Class 2 eligibility, the trial court would have been *required* to impose a two-year MSR term. 730 ILCS 5/5-8-1(d) (West 2010) (MSR is mandated by statute and is a required component of defendant’s sentence). Moreover, the prejudice to defendant is clear: defendant received an additional year of MSR, during which he remains in legal custody of the Department of Corrections and is subject to conditions curtailing his liberty. See *Lee*, 2012 IL App (4th) 110403, ¶ 36.

¶ 18 Accordingly, we find that it is more than arguable that the result of the sentencing hearing would have been different had defense counsel raised the issue of defendant’s Class X eligibility. Because defendant is entitled to be sentenced in accordance with the Class 2 statutory guideline, the proper remedy is remand for a new sentencing hearing on defendant’s entire sentence. See *People v. Hall*, 2014 IL App (1st) 122868, ¶ 15 (deciding under the plain-error doctrine that remand for resentencing is appropriate remedy for double enhancement error even though the term of imprisonment fell within the correct sentencing range).

¶ 19 CONCLUSION

¶ 20 For the foregoing reasons, we vacate in part the judgment of the circuit court of Kankakee County and remand for resentencing.

¶ 21 Vacated in part.

¶ 22 Cause remanded with directions.