SECOND DIVISION
March 28, 2017

No. 1-14-2610

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. 13 CR 12090
	)	
SONNY GARNER,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Justice Pierce concurred in the judgment.
Presiding Justice Hyman specially concurred.

O R D E R

¶ 1 *Held*: Defendant cannot establish plain error or that he was denied the effective assistance of counsel because he cannot show, based upon the record before this court, that one of the prior convictions rendering him subject to a Class X sentence was not a Class 2 or higher offense.

¶ 2 Following a simultaneous, but severed, bench trial with codefendant George Green, defendant Sonny Garner was found guilty of burglary.[1] He was sentenced, because of his

[1] Green is not a party to this appeal.

criminal background, to a Class X sentence of seven years in prison. On appeal, Garner contends that he was improperly subjected to a Class X sentence because he did not have the requisite number of prior qualifying convictions, and requests that this cause be remanded for resentencing. Garner also contends that his mittimus must be corrected to reflect the 415 days he spent in custody prior to sentencing. We affirm and correct the mittimus.

¶ 3 At trial, Douglas Hayes testified that his company was hired to manage and sell a vacant building at 4848 West Madison in Chicago. He was contacted by police officers on June 11, 2013, and visited the building on the following day. Hayes observed openings cut through a vent to gain access to the building, as well as "vandalism" and the "removal of material from inside related to the infrastructure for electrical and piping and things of that nature." He did not know Garner and had not given Garner permission to enter the building or take items from the building.

¶ 4 Officer Thomas Murphy testified that he saw Garner standing next to an open vent in the alley behind 4848 West Madison. Garner was holding a hammer in his left hand and a shopping cart was "[r]ight next" to him. The shopping cart was full of copper piping and shelving. Murphy exited his vehicle and recovered the hammer from Garner.

¶ 5 Officer Costanzo, Murphy's partner, testified that the vent "looked like it was disassembled so someone can make their way through it." He observed Garner near the vent. Costanza testified consistently with Murphy that Garner was holding a hammer and standing next to a shopping cart containing electrical conduit and shelving. Garner told Costanzo that someone else was in the building. At the same time, Costanzo heard someone inside the building. Costanzo and two other officers entered the building through the vent. Green was located inside and taken into custody. Later, at a police station, Garner stated that he was walking down the

alley when he observed a copper pipe come out of the vent, so he picked it up and put it in a shopping cart. Garner also picked up other miscellaneous items and put them in the shopping cart.

¶ 6 The trial court found Garner guilty of burglary. A presentence investigation report (PSI) was then prepared. At sentencing, the State argued that Garner was subject to a Class X sentence based upon his criminal background, which included a Class X conviction in case number 98 CR 30917. The State also noted that Garner had a "1987 Class 2 offense," in case number 87 CR 15533 for which he received probation and periodic imprisonment. The court replied, "okay, that could have happened." The trial court then sentenced Garner, due to his criminal background, to a Class X sentence of seven years in prison.

¶ 7 On appeal, Garner contends that he was improperly subjected to a Class X sentence because his conviction in case number 87 CR 15533 was for a Class 4, rather than a Class 2 offense. He contends that this cause must be remanded for resentencing because he was not subject to a Class X sentence. Garner acknowledges he failed to preserve this error for review. However, he asks this court to review it pursuant to the plain error rule because he was denied his fundamental right to a fair sentencing hearing by the trial court's belief that he was subject to a Class X sentence.

¶ 8 The plain error doctrine permits "a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007), citing *People v.*

Herron, 215 Ill. 2d 167, 186-87 (2005). In the context of sentencing, this court may consider a forfeited error where the evidence is closely balanced or the error is so fundamental that it may have deprived the defendant of a fair sentencing hearing. *People v. Thomas*, 178 Ill. 2d 215, 251 (1997). Pursuant to the plain error doctrine, a "defendant has the burden of persuasion and, if he fails to meet his burden, his procedural default will be honored." *People v. Johnson*, 2015 IL App (1st) 133663, ¶ 12, citing *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). "The first step of plain-error review is determining whether any error occurred." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 9 Section 5-4.5-95 of the Unified Code of Corrections mandates enhanced Class X penalties for recidivist offenders. 730 ILCS 5/5-4.5-95 (West 2012). Therefore, any adult defendant convicted of a Class 1 or Class 2 felony must be sentenced as a Class X offender "after having twice been convicted * * * of an offense that * * * [is] now classified * * * as a Class 2 or greater Class felony" as long as the relevant offenses were "separately brought and tried and arise out of a different series of acts." 730 ILCS 5/5-4.5-95(b) (West 2012). A Class X sentence is between 6 and 30 years in prison. See 730 ILCS 5/5-4.5-25 (West 2012).

¶ 10 The parties have supplemented the record on appeal with the indictment and sentencing order in case number 87 CR 15533. The supplemental common law record reveals that in case number 87 CR 15533, Garner was charged, under count 1, with possession of a controlled substance with intent to deliver in that he knowingly and unlawfully possessed more than 1 but less than 15 grams of a substance containing cocaine. See Ill. Rev. Stat. 1987, ch. 56.5, par. 1401, § 401(b)(2). A violation of this provision was a Class 1 felony. *Id.* Garner was sentenced to periodic imprisonment and one year of felony probation in case number 87 CR 15533. The

hand-written portion of the sentencing order lists the offense as "PCS," and the violation as one of "Chapt. 56 ½ Sec. 1401 B(2)."

¶ 11 Initially, we note that it was Garner's responsibility to bring to the trial court's attention any errors or discrepancies in the PSI and that by failing to raise any objections to the content of the report, Garner conceded the PSI's accuracy with respect to his prior convictions. See *People v. Matthews*, 362 Ill. App. 3d 953, 967-68 (2005). See also *People v. Jones*, 2016 IL 119391,¶ 37 (Oct. 20, 2016) ("a PSI is generally a reliable source for the purpose of inquiring into a defendant's criminal history").

¶ 12 To the extent that Garner relies on the plain error doctrine to overcome his failure to challenge the PSI or the characterization of his conviction in case number 87 CR 15533 as the second conviction required to make Garner eligible for a Class X sentence, his argument fails because he has failed to demonstrate error.

¶ 13 Garner relies on the sentencing order's classification of the offense as "PCS" and the accompanying sentence of periodic imprisonment and probation to argue that this conviction was actually for the lesser-included Class 4 offense of possession of cocaine. He notes that a Chicago Police Department Criminal History Report for Garner, attached to the PSI, listed the offense as "Possess Controlled Substance" and classified it as a "4."

¶ 14 Garner has not established that his conviction in number 87 CR 15533 was not a Class 2 or greater Class felony. The supplemental record on appeal reveals that in case 87 CR 15533, Garner was charged with a Class 1 felony (see Ill. Rev. Stat. 1987, ch. 56.5, par. 1401, § 401(b)(2)), and the sentencing order in that case indicates that his conviction was for a violation of "Chapt. 56 ½ Sec. 1401 B(2)." Garner's position that he was actually convicted of the Class 4 offense of possession of cocaine because he was sentenced to periodic imprisonment and

probation is speculative because periodic imprisonment and probation were proper dispositions for a violation of section 401(b)(2) involving five or fewer grams of cocaine. See Ill. Rev. Stat. 1987, ch. 38, par. 1005, §5-5-3(c)(2)(D). Ultimately, this court is not persuaded, based upon the record before us, that the mere fact that the sentencing order lists the offense as "PCS" means that Garner was actually convicted of possession of cocaine rather than possession of cocaine with intent to deliver. Because Garner has failed to establish that an actual error occurred, he cannot establish plain error. See *Thompson*, 238 Ill. 2d at 613 ("The first step of plain-error review is determining whether any error occurred.").

¶ 15 In the alternative, Garner contends that his trial counsel was ineffective for failing to "inquire into" whether he was actually subject to sentencing as a Class X offender.

¶ 16 To establish ineffective assistance of counsel, a defendant bears the burden to show that his attorney's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for the complained of errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate prejudice under *Strickland*, the defendant must show that there is a reasonable probability that the outcome of the trial would have been different, that is, counsel's deficient performance made the result of the proceeding unreliable or fundamentally unfair. *People v. Evans*, 209 Ill. 2d 194, 220 (2004).

¶ 17 Garner must establish prejudice under *Strickland*, and that factual determination depends on the class of felony to which he pled guilty. This is precisely the type of ineffective assistance claim that cannot be resolved on direct appeal because it depends on matters outside the record. Such a claim may prevail in a postconviction proceeding if Garner can prove the charge to which

he pled guilty (perhaps by obtaining the transcript of his guilty plea). But until Garner can support his claim with such evidence, it is premature and we decline to rule on it.

¶ 18 Garner finally contends that the mittimus must be corrected to reflect 415 days of presentence custody credit. The State agrees that Garner is entitled to 415 days of presentence custody credit when he was arrested on June 11, 2013, and sentenced on July 31, 2014. Therefore, pursuant to our power to correct a mittimus without remand (*People v. Rivera*, 378 Ill. App. 3d 896, 900 (2008)), we direct the clerk of the circuit court to correct the mittimus to reflect 415 days of presentence custody credit.

¶ 19 Accordingly, pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court to correct Garner's mittimus to reflect 415 days of presentence custody credit. We affirm the judgment of the circuit court of Cook County in all other aspects.

¶ 20 Affirmed; mittimus corrected.

¶ 21 PRESIDING JUSTICE HYMAN, specially concurring:

¶ 22 Garner's eligibility for Class X sentencing depends on whether his 1987 conviction was for a Class 2 or higher felony. But it is not at all evident from the record whether Garner was convicted of possession with intent to deliver under section 1401(b) (2), or whether he pled guilty to the lesser crime of possession. I agree with the majority that, because of this ambiguity, we cannot yet rule on Garner's claim. I write separately to explain why the claim deserves attention in a future proceeding.

¶ 23 To establish an ineffective-assistance claim, Garner must show both that his attorney's representation fell below an objective standard of reasonableness, and that he was prejudiced by this — that there is a reasonable probability that, but for counsel's error, the results would have

been different. *People v. Burton*, 2015 IL App (1st) 131600, ¶ 22 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). Failure to make a showing of either prong defeats the claim. *People v. Flowers*, 2015 IL App (1st) 113259, ¶ 41. Trial counsel has a duty to consider the effect of prior convictions on a client's potential sentence. See *People v. Billups*, 2016 IL App (1st) 134006, ¶ 15.

¶ 24 The relevant question for an ineffective-assistance inquiry asks: What was Garner's attorney reasonably expected to know about his client's criminal history before sentencing? The parties have provided us with records supporting their respective positions. Garner's counsel received the presentence investigation report. It contains the "investigative" portion completed by the probation department, and criminal history reports from the Chicago police, the Illinois State Police, and the FBI. Garner's sentence (probation and periodic imprisonment) was always reported correctly, but the charge to which he pleaded guilty was not.

¶ 25 The probation officer listed Garner's past convictions, and included the 1987 conviction as "Man./Del. >10-30 Grms. Cocaine." The CPD criminal history report states that the "Arrest Charge" was "Possess Controlled Substance," and lists it as a Class 4 felony, but that the "Court Charge/Disposition" was "man/del > 10-30G COC," under section 1401(b)(2). The ISP report lists the arrest charge as "possession controlled sub" under section 1402, but the charge filed with the court was "man/dev 01-15 gm cocain/analog," under section 1401(b)(2). The FBI lists the 1987 arrest as being for "poss controlled substance."

¶ 26 Obvious discrepancies occur between the arrest charge (for the lesser offense of possession of a controlled substance) and the more serious charge to which Garner is listed as pleading guilty. But the PSI records are not even consistent about the actual conviction; it lists Garner as both pleading guilty to the manufacture or delivery of between 10 and 30 grams of

cocaine, or for between one and fifteen grams of cocaine. Both crimes are listed as stemming from section 1401(b)(2), but section 1401(b)(2) does not include "ten to thirty grams of cocaine." That section covers possession of one to fifteen grams of cocaine. (In fact, "ten to thirty grams of cocaine" does not appear anywhere in section 1401.) Given that charging instruments and criminal documents tend to follow the language of the statutes, this is baffling. There is an error somewhere in the paperwork, which hardly instills confidence in its accuracy. (Some of the documents in the PSI likely repeat mistakes found in earlier documents.)

¶ 27 The error's second problem is that the charge as listed does not match the sentence Garner received. The majority correctly observes that had Garner been convicted of possession with intent to deliver between one and five grams of cocaine, he could have been sentenced to probation. See Ill. Rev. Stat. 1987, ch. 56.5, par. 1401, §401(b)(2); ch. 38, par. 1005-5-3, § 5-5-3(b). But if Garner pleaded guilty to possessing ten to thirty grams of cocaine, he would have been ineligible for probation. See Ill. Rev. Stat. 1987, ch. 38, par. 1005-5-3, § 5-5-3(c)(2)(D) (probation or periodic imprisonment shall not be imposed for violation of section 401(b)(2) relating to more than five grams of cocaine).

¶ 28 The record does not reveal whether Garner's counsel read the relevant statutory provisions. Had Garner's attorney read section 1401(b)(2), he or she would have found that "ten to thirty grams of cocaine" is not listed among the provisions; had his counsel read section 5-5-3(c), he or she would have found that probation was not an available sentence if Garner had been convicted of possessing ten to thirty grams of cocaine. Either statute would have alerted Garner's counsel to initiate an investigation regarding what Garner was actually convicted of. Counsel could have tried to correct any errors in the PSI (which the majority takes Garner to task for not doing) and contested Garner's eligibility for Class X sentencing. We do not know

whether Garner's counsel performed these necessary steps, so we cannot say whether the lawyer's performance fell below the standard of reasonableness. If Garner raises this claim in a future proceeding, that question may be answered.

¶ 29 The next question involves whether Garner can show a reasonable probability that his counsel could have shown that Garner's 1987 conviction did not render him eligible for Class X sentencing. At this point, we can examine the records newly submitted by the parties (which Garner's trial attorney did not have).

¶ 30 The information filed against Garner lists the charge as possession of a controlled substance with intent to deliver between one and fifteen grams of cocaine, under section 1401(b)(2). But the docket sheet for the 1987 conviction lists the charge under section 1401(b)(2) as "man/del >10-30G COC." Again, the ten-to-thirty gram charge does not actually exist under section 1401(b)(2).

¶ 31 But the sentencing order—the best indicator we have so far of what crime Garner pleaded guilty to—cites section 1401(b)(2), but twice lists the crime as "PCS" (possession of a controlled substance). Significantly, possession (without intent to deliver) is not charged under section 1401, but under section 1402. Somewhere on that piece of paper is a typographical error involving either the statute number, or the charge.

¶ 32 We should also consider that Garner apparently pled guilty to this drug charge. Given that criminal defendants often plead guilty in exchange for reduced charges, the strong possibility exists that while charged with possession with intent to deliver under section 1401, Garner pled guilty to straight possession under section 1402 (a much less serious charge). This explains why the mittimus states that Garner pled to "PCS" (straight possession) while citing

section 1401. It would also be consistent with the criminal history reports' statement that Garner was arrested for possession of a controlled substance.

¶ 33 Given the conflicting information in the paper record, and the logical possibility of a plea deal explaining the discrepancy, Garner may be able to show that his 1987 conviction was less than a Class 2 felony, and he is not eligible for a Class X sentence. The transcript of his plea proceedings from the 1987 conviction may clear up this confusion. If that transcript confirms what the other records imply, and if Garner can show that his attorney did not do the necessary inquiry into his prior charges, Garner would have a viable *Strickland* claim.