

No. 1-14-3528

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	13 CR 15221
)	
JAMES MITCHELL,)	Honorable
)	Thaddeus L. Wilson,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's sentence was not doubly enhanced. His conviction for aggravated unlawful use of a weapon was merged into his conviction for armed habitual criminal. Defendant's fines and fees were corrected.

¶ 2 Following a jury trial defendant, James Mitchell, was convicted of armed habitual criminal (AHC) (720 ILCS 5/24-1.7(b) (West 2012)), and aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(1),(3)(C) (West 2012)). The trial court merged the AUUW conviction into the AHC conviction and sentenced defendant to 13 years' imprisonment.

Defendant now appeals and argues: (1) the trial court engaged in double enhancement when during sentencing it relied on two prior felony convictions that served as elements of the offense of AHC; (2) he was denied his right to confrontation; and (3) certain fines and fees were

improperly imposed. For the reasons that follow, we affirm the judgment of the circuit court but correct the mittimus to reflect the correct fines and fees.

¶ 3

BACKGROUND

¶ 4 On the evening of July 16, 2013, Chicago Police Officers Mieszala and Fava were driving along the 8800 block of South Justine. The officers saw defendant James Mitchell standing on the sidewalk with five or six other men. Officer Mieszala exited his vehicle and announced his office. Defendant grabbed his waistband and fled southbound. None of the other men standing on the sidewalk fled.

¶ 5 The officers pursued defendant. When defendant got several houses away, he tripped and fell. Defendant tried to brace himself on the ground with his hand when he fell, but dropped a nickel-plated handgun from his left hand. It was getting dark at the time but Officer Mieszala was within 10 feet of defendant when the gun fell from defendant's hand. Officer Mieszala drew his weapon while defendant abandoned the handgun and continued to flee. Officer Mieszala continued his pursuit of defendant and apprehended defendant a few moments later. Officer Fava recovered defendant's gun while Officer Mieszala detained defendant.

¶ 6 At trial, over defense counsel's earlier objection, the trial court allowed the State to introduce a certification from the Illinois State Police that defendant had never been issued a FOID card. The parties also stipulated that defendant had been convicted of two prior qualifying felony offenses as defined by the armed habitual criminal statute. Outside the presence of the jury, the trial court allowed the State to admit into evidence certified statements of conviction for unlawful use of a weapon by a felon in case number 11 CR 595301 and residential burglary in case number 10 CR 0099104.

¶ 7 The jury found defendant guilty of being an armed habitual criminal and AUUW. The trial court merged the AUUW conviction into the AHC conviction and sentenced defendant to 13 years in prison.

¶ 8 ANALYSIS

¶ 9 Defendant argues that the trial court improperly doubly enhanced his sentence where the court expressly stated that it relied on his 2010 residential burglary conviction and his 2011 AUUW by a felon conviction in aggravation, both of which were elements of the offense of ACH for which he was convicted.

¶ 10 “Double enhancement occurs when 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.” *People v. Phelps*, 211 Ill. 2d 1, 12 (2004). Because this rule is statutory, there is no error if the legislature intended double enhancement. *People v. Rissley*, 165 Ill. 2d 364,

¶ 11 The trial court has broad discretionary power in imposing sentence and its sentencing decision is entitled to great deference. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000) (citing *People v. Fern*, 189 Ill. 2d 48, 53 (1999), *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977)). In addition, we presume the court employed proper reasoning when fashioning a sentence. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶¶ 8, 9. However, a trial court generally may not consider a factor implicit in the offense itself as an aggravating factor during sentencing for that offense. *People v. Ferguson*, 132 Ill. 2d 86, 96 (1989). The prohibition against double enhancement is based upon the assumption that the legislature considered the factors inherent in the offense when designating the appropriate range of punishment for the offense. *Rissley*, 165 Ill.2d at 390. We review *de novo* the legal question of whether a trial court relied on an improper

factor during sentencing. *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8. Defendant bears the burden of establishing his sentence was based upon improper factors. *Id.*

¶ 12 In imposing sentence, a court must consider a defendant's prior criminal history, among other factors such the "nature and circumstances of the crime, the defendant's conduct in commission of the crime, and the defendant's personal history, including his age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education" in imposing sentence. *People v. Thomas*, 171 Ill. 2d 207, 227-28 (1996); *People v. Maldonado*, 240 Ill. App. 3d 470, 485-86 (1992). Here, in imposing sentence, the court generally cited five instances of "illegal conduct, that just won't stop. 2005, 2010, 2011, 2013, and then again 2013." The court then stated "At some point before this case you were supposed to get it and learn that it needed to stop and you didn't."

¶ 13 Our supreme court in *Thomas*, 171 Ill. 2d 207, found the trial court's use of prior convictions to impose a Class X sentence did not preclude the court from considering the same prior convictions a second time as an aggravating factor in sentencing. *Thomas*, 171 Ill. 2d at 229. The court explained:

"Although the legislature considered the prior convictions of certain defendants in establishing their identity for Class X sentencing, the legislature did not intend to impede a sentencing court's discretion in fashioning an appropriate sentence, within the Class X range, by precluding consideration of their criminal history as an aggravating factor. Rather, while the *fact* of a defendant's prior convictions determines his eligibility for a Class X sentence, it is the nature and circumstances of these prior convictions which, along with other factors in aggravation and mitigation, determine the exact length of that sentence." (Emphasis in original). *Id.* at 227-28.

The *Thomas* court concluded that the trial court's consideration of an aggravating factor within the applicable sentencing range “does not constitute an enhancement, because the discretionary act of a sentencing court in fashioning a particular sentence * * * within the available parameters, is a requisite part of every individualized sentencing determination. [Citation.] The judicial exercise of this discretion * * * is not properly understood as an ‘enhancement.’” *Id.* at 224-25. Although *Thomas* concerned the mandatory Class X sentencing statute rather than the Class X AHC offense as in this case, we find the court's reasoning is nevertheless applicable here.

¶ 14 We note that a sentencing court is not required to refrain from any mention of the factors that are elements of an offense and a mere reference to these factors is not reversible error. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 50. In our view, the court was merely remarking on the extent of defendant's criminal history. The court here properly considered the entirety of defendant's criminal history and recidivism, among the other factors required in imposing sentence. *Id.* at 227-28. The court never expressly stated the nature of defendant's illegal conduct. There is no indication whatsoever that the court placed any added emphasis on the two convictions, 10 CR 00991-04 and 11 CR 05953-01, that formed the essential elements of AHC giving rise to the sentence imposed. Furthermore, defendant's sentence is on the lower range of permissible sentences. AHC is a Class X felony, punishable by six to thirty years in prison. (720 ILCS 5/24-1.7(b) (West 2014)). The trial court sentenced defendant to a 13-year sentence, which is within the appropriate sentencing range.

¶ 15 We find defendant's reliance on *People v. Conover*, 84 Ill. 2d 400 (1981), *People v. Saldivar*, 113 Ill. 2d 256 (1986) and *People v. Abdelhadi*, 2012 IL App (2d) 111053, to be misplaced. In all of these cases there were specific remarks by the trial court which indicated

reliance on factors in aggravation which were also elements of the offenses charged which led to an improper double enhancement. *People v. Conover*, 84 Ill. 2d 400, 402 (1981) (factor of receiving compensation for commission of an offense may only be considered a factor in aggravation when the crime is one that does not involve proceeds); *People v. Saldivar*, 113 Ill. 2d 256, 264 (1986) (the court considered the “terrible harm that was caused to the victim”). *People v. Abdelhadi*, 2012 IL App (2d) 111053 (reliance of the trial court on the “threat” or “harm to others”). No such double enhancement occurred here.

¶ 16 Defendant next alleges that his conviction for AUUW should be reversed and remanded for a new trial because his constitutional right of confrontation was violated because the affidavit that alleged he lacked a FOID card was testimonial hearsay. Defendant argues that he was not given the opportunity to cross-examine the affiant either in-court or prior to trial.

¶ 17 The State responds that this issue is moot because the trial court vacated defendant’s AUUW conviction by merging it with the AHC conviction. The State further argues that even if the trial court had not merged this count, it would have vacated this count under the one-act, one-crime rule as defendant only possessed one handgun.

¶ 18 A conviction requires both a finding of guilt and a sentence. 730 ILCS 5/5-1-12 (West 2010) (“ ‘Judgment’ means an adjudication by the court that the defendant is guilty or not guilty, and if the adjudication is that the defendant is guilty, it includes the sentence pronounced by the court”); see also *People v. Holmes*, 405 Ill. App.3d 179, 186, (2010) (holding that even if one viewed the defendant's guilty plea as an adjudication by the court that he was guilty, that adjudication did not meet the statutory definition of a “judgment” until a sentence was pronounced by the trial court). Here, at the sentencing hearing, the trial court expressly merged

the AUUW conviction into the AHC conviction and sentenced defendant for only the AHC conviction.

¶ 19 Defendant asks this court to make determinations regarding the constitutionality of the admission of evidence on the AUUW count which was merged into the AHC count. Defendant was only charged with possessing one gun in this case. Therefore, he could have only been convicted for the most serious offense charged with respect to his possession of the gun. Where a defendant is charged with multiple crimes that are derived from the same act, a defendant may only be convicted for the most serious offense. *People v. King*, 66 Ill. 2d 551, 566 (1977). As the trial court properly merged its findings, and so indicated on the record, defendant's conviction was based only on the more serious charge, AHC, and therefore the constitutionality of the admission of evidence related to the AUUW count is not properly before this court.

¶ 20 Defendant argues that his fines and fees should be corrected to show the proper amount of fines and fees. Defendant first contends that the \$100 Trauma Fund Fine was improperly imposed. The State agrees that "the trauma fund fine applies only to specified firearm offenses that do not include the armed habitual criminal statute." *People v. Williams*, 394 Ill. App. 3d 480, 483 (2009) (citing 730 ILCS 5/5-9-1.10 (West 2006)). Therefore, we vacate this fine.

¶ 21 Defendant also argues that the \$5 Electronic Citation Fee should be vacated because it does not apply to felonies and he was convicted of a felony offense. The State agrees that this fee is statutorily permitted in any traffic, misdemeanor, municipal ordinance, or conservation case, and because defendant was convicted of a felony, the fee was improperly imposed here. 705 ILCS 105/27.3e (West 2012). Accordingly, we vacate the \$5 Electronic Citation Fee imposed.

¶ 22 Defendant next contends that he is entitled to presentence custody credit toward the \$15 State Police Operations Fee because it is a fine and not a fee since it does not reimburse the State for his prosecution. The State agrees. We order that the \$15 State Police Operations Fee imposed in this case to be offset by defendant's 450 days *per diem* presentence incarceration credit as required by statute. 725 ILCS10-14(a) (West 2012).

¶ 23 CONCLUSION

¶ 24 For the reasons stated, we affirm defendant's conviction. Pursuant to our authority under Illinois Supreme Court Rule 615(b), we instruct the Clerk of the Circuit Court to correct defendant's mittimus to reflect the vacatur of the \$100 Trauma Fund Fine and the \$5 Electronic Citation Fee and to apply defendant's presentence incarceration as a credit towards his \$15 State Police Operations Fee.

¶ 25 Affirmed; mittimus to be corrected.