2017 IL App (1st) 150094-U

FIRST DIVISION
July 31, 2017

No. 1-15-0094

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. 14 CR 1663
	)	
DOUGLAS JOHNSON,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Connors and Justice Simon concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's sentence is affirmed; the trial court correctly concluded that defendant's prior convictions qualified him for mandatory Class X sentencing

¶ 2 Following a bench trial, defendant Douglas Johnson was found guilty of unlawful use or possession of a weapon by a felon (UUWF), a Class 2 felony. Because Mr. Johnson had two prior convictions for offenses that, at the time he committed the UUWF, were also classified as Class 2 felonies, the trial court sentenced him as a Class X offender. 730 ILCS 5/5-4.5-95(b) (West 2012). On appeal, Mr. Johnson argues that the State failed to demonstrate by a preponderance of the evidence that one of those prior convictions, for defacing a firearm, was a

qualifying offense under the statute. He contends that legislative amendments following that conviction divided the offense into two separate offenses and that the State failed to establish whether his prior conviction was for the qualifying Class 2 offense of defacing a firearm or for the new Class 3 offense of merely possessing a defaced firearm. For the reasons that follow, we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 The evidence presented at Mr. Johnson's bench trial was that, on December 17, 2013, police officers executing a search warrant detained Mr. Johnson and, upon conducting a protective pat-down, recovered 27 rounds of ammunition from his pants pocket. The trial court found Mr. Johnson guilty of UUWF. Because he had a prior conviction for UUWF in case number 10 CR 22046, the UUWF in this case was a Class 2 felony rather than a Class 3 felony. 720 ILCS 5/24-1.1(e) (West 2012).

¶ 5 At his sentencing hearing, the State sought to have Mr. Johnson sentenced as a Class X offender pursuant to section 5-4.5-95 of the Unified Code of Corrections (Code of Corrections), which provided:

> "(b) When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, after having 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, that defendant shall be sentenced as a Class X offender. This subsection does not apply unless:
>
> (1) the first felony was committed after February 1, 1978 ***;

(2) the second felony was committed after conviction on the first; and

(3) the third felony was committed after conviction on the second." 730 ILCS 5/5-4.5-95(b) (West 2012).

¶ 6 The State initially represented to the trial court that Mr. Johnson had three qualifying prior Class 2 felony convictions. According to the prosecutor's statements to the trial judge, these included convictions for UUWF in 2010, for possession of a controlled substance with intent to deliver in 2009, and for "possession of a defaced firearm" in 2003. Defense counsel pointed out that the 2010 UUWF charge could not be used to establish Class X treatment because it had already been used to elevate the UUWF charge in this case to a Class 2 felony. Defense counsel agreed that the 2009 charge for possession with intent to deliver was a qualifying Class 2 offense. The parties and the court discussed whether the 2003 "defaced firearm" charge was a Class 2 offense. The prosecutor stated that she thought it was, defense counsel was unsure, and the trial judge stated that he believed it was not. According to the transcript of the sentencing hearing, the matter was resolved by using the clerk's computer to look up "720 ILCS 5/24-5A1," the provision of the Criminal Code of 1961 (Criminal Code) referenced in Mr. Johnson's Chicago police department criminal history report regarding this charge. The trial court then concluded "[d]efacing, yeah, it's a Class 2," and defense counsel conceded: "Okay. Then he's eligible—he's mandatory Class X by background."

¶ 7 As a Class X offender, Mr. Johnson faced a sentencing range of 6 to 30 years of imprisonment and 3 years of MSR (730 ILCS 5/5-4.5-25(a) (West 2012)), compared to the range of 3 to 14 years of imprisonment and 2 years of MSR he could have received for a second Class 2 conviction for UUWF (720 ILCS 5/24-1.1 (e) (West 2012)). The trial court sentenced Mr. Johnson to seven years of imprisonment and three years of MSR.

¶ 8 JURISDICTION

¶ 9 Mr. Johnson was sentenced on December 5, 2014, and timely filed a notice of appeal on December 10, 2014. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case (Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 2013)).

¶ 10 ANALYSIS

¶ 11 Mr. Johnson argues that his sentence must be reduced or the case remanded for resentencing because the State failed to prove by a preponderance of the evidence that he had the two qualifying prior convictions necessary for him to be sentenced as a Class X offender. Specifically, Mr. Johnson argues that it is unclear whether his prior conviction for defacing a firearm was a qualifying offense under section 5-4.5-95(b) of the Code of Corrections. According to Mr. Johnson, between the time of that conviction and December 17, 2013—when he committed the UUWF that is the subject of this case—the legislature divided defacing a firearm into two separate offenses—one for knowingly and intentionally defacing a firearm, which remained a Class 2 felony, and one for merely possessing a defaced firearm, which was reduced to a Class 3 felony. Mr. Johnson insists that it was impossible for the trial court to tell from the bare fact of his conviction which of these two offenses he committed. Although Mr. Johnson acknowledges that this issue was not preserved in a post-sentencing motion, he invites us to consider it as plain error. He alternatively argues that his trial counsel was ineffective for failing to raise the issue in a post-sentencing motion. Because we do not find the trial court's reliance on this conviction to be error, we do not need to decide whether it was plain error or whether the failure to raise the issue was ineffective assistance by Mr. Johnson's counsel.

¶ 12 Although the imposition of a sentence within a statutory sentencing range is a matter within the trial court's discretion (*People v. Jones*, 168 Ill. 2d 367, 373 (1995)), the initial determination of what sentencing range should apply required the court in this case to construe the statutory provisions governing both eligibility for Class X sentencing and the substantive elements of the offense of defacing a firearm, both in 2003 and in 2013. Statutory construction involves questions of law that we review *de novo*. *People v. Gutman*, 2011 IL 110338, ¶ 12. Our primary goal is "to ascertain and give effect to the legislature's intent," the "best indication of [which] is the statutory language, given its plain and ordinary meaning." *People v. Ramirez*, 214 Ill. 2d 176, 179 (2005).

¶ 13 For purposes of establishing a defendant's eligibility for enhanced sentencing, the State must prove the defendant's prior convictions by a preponderance of the evidence. *People v. Robinson*, 167 Ill. 2d 53, 71-73 (1995). Formal proof is not required; a presentence investigation report (PSI) is sufficient. *People v. Williams*, 149 Ill. 2d 467, 491 (1992). Section 5-4.5-95(b) of the Code of Corrections requires that each of the two qualifying convictions is 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," making clear that it is an offense's classification on the date the later felony—and not the prior felony—was committed that determines whether a prior conviction is a qualifying conviction for purposes of Class X treatment. 730 ILCS 5/5-4.5-95(b) (West 2012). The language is unambiguous in this regard. To the extent that the State suggests that the court should look instead to the classification of the prior offense at the time of the conviction for that offense, we disagree.

¶ 14 Here, the PSI provided to the trial court listed Mr. Johnson's prior convictions, including his conviction and three-year sentence for "Deface Firearm ID Marking" in case number 03 CR

149632. The criminal history report attached to the PSI indicated that this conviction was under "720 ILCS 5.0/24-5A-1." There is no statutory provision with this exact citation, but the transcript from Mr. Johnson's sentencing hearing indicates that, by entering this citation into the clerk's computer, the trial court was directed to section 5/24-5(a) (720 ILCS 5/24-5(a) West 2012)), defining the crime called "Defacing identification marks of firearms," which was a Class 2 felony both in 2003 when Mr. Johnson was charged with this crime and on December 17, 2013, when he committed the UUWF that is before us now.

¶ 15 Mr. Johnson argues that the offense of defacing a firearm "has changed in classification since the date of the original conviction." More specifically, Mr. Johnson argues that legislative amendments have divided the offense into two separate offenses, only one of which is a Class 2 felony, and that the State failed to prove which of these offenses he was convicted of committing in 2003. We disagree. It is clear to us that the only crime that Mr. Johnson could have been convicted of on the 2003 charge was defacing a firearm, which was and still is a Class 2 felony.

¶ 16 The version of section 24-5 of the Criminal Code Mr. Johnson was convicted under on the 2003 charge provided:

> "(a) Any person who shall knowingly or intentionally change, alter, remove or obliterate the name of the maker, model, manufacturer's number or other mark of identification of any firearm commits a Class 2 felony.
>
> (b) Possession of any firearm upon which any such mark shall have been changed, altered, removed or obliterated shall be prima facie evidence that the possessor has changed, altered, removed or obliterated the same." 720 ILCS 5/24-5 (West 2002).

¶ 17 In *People v. Quinones*, 362 Ill. App. 3d 385, 394 (2005), we held that subsection (b) of section 24-5 "created an impermissible mandatory rebuttable presumption" that shifted the

evidentiary burden to the defendant to prove that he did not knowingly deface a firearm and "was therefore unconstitutional." In response, the legislature amended section 24-5 in 2004, omitting the presumption and creating the new Class 3 offense of possessing a defaced firearm. The amended version of that section, which was in effect on December 17, 2013, provides as follows:

> "(a) Any person who shall knowingly or intentionally change, alter, remove or obliterate the name of the importer's or manufacturer's serial number of any firearm commits a Class 2 felony.
>
> (b) A person who possesses any firearm upon which any such importer's or manufacturer's serial number has been changed, altered, removed or obliterated commits a Class 3 felony." 720 ILCS 5/24-5 (West 2012).

¶ 18 Although Mr. Johnson acknowledges that "[i]n 2003, there was only one offense involving defacing a firearm's identification markings," he insists that, in this case, it was the State's burden at sentencing to offer evidence beyond the mere fact of his conviction for that offense to demonstrate "whether [he], in 2003, actually committed the offense of defacing the weapon, or merely possessed a defaced weapon." This argument, however, ignores the fact that possession of a defaced weapon simply was not a crime he could have been charged with on the 2003 charge.

¶ 19 To the extent that Mr. Johnson is suggesting that the *evidence* that was used to convict him on the 2003 charge might have been nothing more than his possession of a defaced firearm, his argument is misplaced. Section 5-4.5-95(b) of the Code of Corrections sets forth specific conditions that, if met, make Class X sentencing mandatory. *People v. Thomas*, 171 Ill. 2d 207, 222 (1996). It directs courts to consider the *fact* of a prior conviction, the statutory elements of the prior offense, the legal classification of an offense with those same elements on the date the

new offense was committed, and the timing of the prior conviction in relation to other convictions. 730 ILCS 5/5-4.5-95(b) (West 2012). The statute does not instruct the court to review the sufficiency of the evidence or in any other manner consider the specific facts underlying the prior conviction.

¶ 20 For this reason, *Shepard v. United States*, 544 U.S. 13 (2005), which Mr. Johnson relies on for the proposition that "any fact beyond the mere fact of [a] prior conviction must be proven by a judicial record of conclusive significance," simply does not apply. In *Shepard*, a criminal defendant was sentenced under the Armed Career Criminal Act (18 U.S.C. § 924(e) (2000)), which established a minimum sentence for anyone possessing a firearm after receiving three prior convictions for violent felonies or serious drug offenses. *Id.* at 15-16. Under the Act, burglary was considered a violent felony only if it was committed in a building or enclosed space, but the defendant in *Shepard* had on four prior occasions pled guilty to burglary under Massachusetts law, which defined burglary more broadly to include unlawful entries into boats and cars. *Id.* at 16-17. The Supreme Court held that, to determine what *type* of burglary a defendant had pled guilty to, the trial court could look only to the charging document, the terms of the plea agreement, or a hearing transcript in which the basis for the plea was confirmed by the defendant, and not, as the government in that case urged, to police reports submitted as the basis for issuing the complaint. *Id.* 21, 26. Unlike the burglary statute at issue in *Shepard*, in 2003 section 24-5 of the Criminal Code did not encompass more than one *type* of defacing a firearm.

¶ 21 To the extent that Mr. Johnson is arguing, under *Quinones*, that he had a basis for vacating his conviction because his guilty plea may have been influenced by the availability of an unconstitutional evidentiary presumption stemming from his mere possession of a defaced

firearm, it was incumbent upon him to pursue such a challenge. *Cf. People v. McFadden*, 2016 IL 117424, ¶ 29 (holding that where an element of the offense of UUWF was the defendant's status as a felon, "it [wa]s immaterial whether th[at] predicate conviction ultimately might turn out to be invalid for any reason" because "a conviction is treated as valid until the judicial process has declared otherwise by direct appeal or collateral attack").

¶ 22 For Class X treatment to apply in this case, it was not the State's burden to prove anything beyond the timing and existence of Mr. Johnson's prior convictions and their classifications on December 17, 2013. Neither the removal from the Criminal Code of an evidentiary presumption nor the addition of a new criminal offense in any way altered the elements of the offense Mr. Johnson was convicted of—defacing a firearm—and that offense has at all relevant times been a Class 2 felony. The trial court therefore did not err by sentencing Mr. Johnson as a Class X offender based, in part, on his prior conviction for defacing a firearm. "Having found no error, there can be no plain error" and no basis for a meritorious objection necessary to establish the ineffective assistance of defense counsel. *People v. Bannister*, 232 Ill. 2d 52, 79 (2009).

¶ 23 CONCLUSION

¶ 24 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 25 Affirmed.