

2017 IL App (1st) 151382-U

No. 1-15-1382

Order filed December 7, 2017

Fourth Division

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 13 CR 12548
)	
RAPHEAL JOHNSON,)	Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge, presiding.

JUSTICE MCBRIDE delivered the judgment of the court.
Justices Gordon and Ellis concurred in the judgment.

ORDER

¶ 1 *Held:* This case is remanded for resentencing where the trial court relied, in aggravation of defendant's sentence, on two prior weapons-related convictions that were constitutionally invalid.

¶ 2 Following a bench trial, defendant Rapheal Johnson was convicted of the aggravated criminal sexual assault of a victim under 9 years of age while defendant was under 17 years of age (720 ILCS 5/12-14(b)(i) (West 2006)). Defendant was sentenced to 18 years in prison. On appeal, defendant contends his case should be remanded for resentencing because in aggravation

of his sentence, the trial court considered two 2010 weapons-related felony convictions that had been rendered constitutionally invalid by *People v. Burns*, 2015 IL 117387, and *People v. Aguilar*, 2013 IL 112116.¹

¶ 3 In 2013, defendant was charged with six counts of predatory criminal sexual assault of a child and three counts of aggravated criminal sexual assault based on a series of incidents from May 2007 to August 2011 involving defendant's cousin, J.P. Three counts were nol-prossed during the trial.

¶ 4 Before trial, the court heard arguments on the State's motion to admit evidence of other sexual crimes committed by defendant. The court ruled it would allow testimony about defendant's sexual contact in 2011 with G.L., an 11-year-old relative.

¶ 5 At trial, Jewanna Brooks, J.P.'s mother, testified she and J.P.'s father, Marshall P., divorced in 2007. From 2007 to 2011, Marshall's sister, Karmeya Johnson, babysat J.P. and her siblings while Brooks worked, and they would sleep at Johnson's house between three and five nights each week. Defendant, who is Johnson's son, also lived in the house, along with Johnson's four other children. In November 2012, J.P. had a conversation with Brooks about defendant. Brooks spoke to the police the next day and took J.P. to a hospital.

¶ 6 J.P. testified she was born on August 18, 1998. J.P. spent nights at Johnson's house between 2007 and 2011. One night in May 2007 when she was eight years old, J.P. was asleep in a bedroom where two of her cousins were also sleeping. Defendant woke J.P. and told her to get

¹ Although defendant and the State refer to the convictions in question as "void," a judgment is "void" only if it was entered by a court that lacked jurisdiction. See *People v. Castleberry*, 2015 IL 116916, ¶ 13; *People v. Smith*, 2016 IL App (2d) 130997, ¶ 19 n.1 (concluding that the issue in *Smith*, as here, is whether the trial court could consider in aggravation a conviction that has been deemed unconstitutional).

up. Defendant led J.P. by the hand to the living room, where he held the back of her head, put his penis in her mouth and forced her to perform oral sex. J.P. was sitting on the couch and defendant was standing.

¶ 7 Defendant then told J.P. to lean across the couch, and defendant put his penis in her vagina for more than a minute. J.P. then went back upstairs. J.P. did not tell anyone what happened because she was close friends with a young female cousin and did not want to stop going to her aunt's house where she would see that cousin. J.P. testified defendant forced her to perform oral sex on another date later in 2007.

¶ 8 J.P. further testified that in 2010, Johnson moved to a different apartment, where defendant assaulted J.P. five or more times. J.P. recalled two incidents similar to the May 2007 occurrence. In 2012, J.P. told her cousin Kya Rankin about the sexual assaults, and Kya told J.P. to tell Brooks. Brooks took J.P. to the police station upon learning what had happened. Kya testified J.P. told her in September 2012 about defendant's assaults.

¶ 9 Marshall P. testified he is J.P.'s father and defendant, who is his nephew, was like a brother or a son to him. He offered testimony about J.P.'s living arrangement consistent with other State witnesses.

¶ 10 Marshall testified that in November 2012, he received a phone call from defendant, who was in the Cook County jail. Defendant said he knew Marshall would not want to speak to him because he had "f---ed his little cousin up." Although defendant did not specify the name of his victim, Marshall testified that he "knew exactly what [defendant] was talking about." Marshall testified about several additional phone calls, and a recording of those phone calls was played.

The parties stipulated the recording was a true and accurate copy of recordings of several jail phone calls between November 13, 2012, and February 5, 2013.

¶ 11 Chicago police detective Moreen Hanrahan testified that on December 6, 2011, she questioned defendant regarding the sexual abuse of G.L. After being advised of his *Miranda* rights, defendant confessed he had touched G.L. and placed her hand on his penis. An assistant State's attorney memorialized defendant's statement that was consistent with his statement to the detective, and that statement was read into the record.

¶ 12 For the defense, Johnson testified that after learning of the incident involving defendant and G.L. in 2011, she asked J.P. if defendant had ever touched her. J.P. responded that defendant had not touched her and if he did, she would tell her parents and Johnson. At the close of evidence, the trial court found defendant guilty of aggravated criminal sexual assault as charged in count 8 of the indictment, which alleged contact between defendant's penis and J.P.'s mouth while the victim was under 9 years of age and defendant was under 17 years of age.

¶ 13 At defendant's sentencing hearing, which was held in 2015, the State indicated its intent, as alleged in count 8, to seek an extended-term sentence. The prosecutor argued, in part:

“So normally this would be sentence-able between 6 and 30 years, but because [of] the victim's age, she was under 18 and actually in this count the victim was actually 8 years old, we are asking for extended sentencing, 6 to 60.”

¶ 14 The State indicated it would seek an extended-term sentence based on defendant's criminal history, which could be considered pursuant to section 5-5-3.2(a)(3) of the Unified Code of Corrections (730 ILCS 5/5-5-3.2(a)(3) (West 2006)). Defendant's criminal history

included 2010 convictions for aggravated unlawful use of a weapon (AUUW) and unlawful possession of a weapon on a public way.

¶ 15 Defense counsel objected to the court's consideration of defendant's criminal history, stating "he had no criminal history at the time of the alleged offense." The court responded that it could consider "the criminal history for sentencing purposes."

¶ 16 The State noted defendant was on probation for the sexual abuse of G.L. In aggravation of defendant's sentence, the State further argued:

"Your Honor, the defendant knows right from wrong and the defendant knows his actions were wrong when he first assaulted the victim in this case and then went on to do it three years later, showing his recidivism. In addition, he has further criminal history. He's not only a sex offender, he also possessed a dangerous weapon, a gun, in the city streets of Chicago, and he did this within three months. He was first arrested in the beginning of 2010 for an aggravated unlawful use of a weapon. And then, your Honor, he was arrested and I just want to make sure I have it right, and that was a Class 4 felony. And then he was arrested just three months later for possession of a firearm, which is a Class 3 felony, and that was in mid-2010. Your Honor, the defendant was given a break on those gun cases, the Class 4 and the Class 3. He was actually sentenced at the same time and given the opportunity to do Cook County Boot Camp. Your Honor, based on the defendant's criminal history, based on the ages of the victims, his recidivism, we ask that you not only sentence him to the maximum of 30 years, that you also sentence him to the extended term sentencing closer somewhere between 30 and 60 years based on his

background and the fact that he has acknowledged that he knows his actions were wrong.”

¶ 17 In mitigation, defense counsel argued that defendant was a teenager when the crimes occurred and that defendant felt remorse for his acts, and counsel emphasized defendant’s family ties to his mother, grandmother and two children. Counsel argued this case did not “warrant the maximum or an extended-term sentence.” Defendant addressed the court, stating he understood the pain he had caused his family.

¶ 18 In imposing sentence, the court stated it had reviewed the pre-sentence investigation report, as well as victim impact statements read into the record, and had heard arguments from both parties in aggravation and mitigation. The court stated it also considered “the pertinent factors that are set forth in the statute with regard to aggravation and mitigation” and defendant’s statement in allocution.

¶ 19 The court then addressed defendant, noting he was “25, or about to be 25 years old and has four felony convictions.” The court further stated:

“To be honest with you, Mr. Johnson, in looking at this case, although I found that the evidence for certain counts, predatory criminal sexual assault, to not find you guilty beyond a reasonable doubt, that does not mean that I don’t think that you are a predator, because I do believe you are.

I do believe that the appropriate sentence based on all the factors I set forth is not the maximum or not extended term, certainly not the minimum. But the appropriate sentence is 18 years in the Illinois Department of Corrections.”

¶ 20 On appeal, defendant contends this case must be remanded for resentencing because the trial court improperly considered his two prior weapons-related convictions in imposing a term of 18 years in prison. He asserts those convictions are constitutionally invalid because the AUUW statute and the UPW statute on which they relied were held unconstitutional in *People v. Burns*, 2015 IL 117387, and *People v. Aguilar*, 2013 IL 112116. Defendant contends that those two felony convictions likely had an effect on the length of his sentence.

¶ 21 Defendant notes that his trial counsel neither raised this issue in the motion to reconsider sentence nor objected to the trial court's consideration of the convictions. He nevertheless contends this issue can be addressed either under the second prong of the plain-error doctrine, which allows consideration of forfeited claims that affect substantial rights, or as a claim of the ineffective assistance of counsel.

¶ 22 As defendant points out, this court has reviewed the trial court's consideration of an improper sentencing factor under the second prong of the plain-error doctrine. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 7. The plain-error doctrine allows review of an unpreserved error where a clear or obvious error occurred and either (1) the evidence was 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) that the error was so serious that it affected the fairness of the proceedings, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 23 The first step of a plain-error analysis is determining whether error occurred. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). We find that the trial court erred in considering defendant's weapons-related convictions as part of his criminal record at sentencing. Defendant's AUUW

conviction in 2010 was based on section 24-1.6(a)(1) of the AUUW statute (720 ILCS 5/24-1.6(a)(1) (West 2010)). That statute was found unconstitutional in *Burns* and *Aguilar* because a ban on the possession of weapons in an individual's home or vehicle violated the second amendment's right to bear arms for self-defense. *Burns*, 2015 IL 117387, ¶ 21 (citing *Aguilar*). Defendant's conviction of unlawful possession of a weapon on a public way was based on section 24-1(a)(10) of the UUW statute (720 ILCS 5/24-1(a)(10) (West 2010)), which was found unconstitutional in *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012). Therefore, those convictions should not have been considered in his sentencing. See *Smith*, 2016 IL App (2d) 130997, ¶ 19.

¶ 24 The State concedes that *Burns* and *Aguilar* rendered defendant's two convictions constitutionally invalid and that defendant's weapons-related convictions should not have been considered by the trial court at sentencing in this case. Still, the State contends defendant cannot establish second-prong plain error or deficient representation by trial counsel and that this case need not be remanded for resentencing because the court did not lend significant weight to those convictions in imposing defendant's 18-year sentence, which was within the applicable statutory range. The State points out that in sentencing defendant, the trial court noted his assault of another young relative, and the State contends the sentence reflected the court's belief that defendant was a sexual predator.

¶ 25 Defendant was convicted of aggravated criminal sexual assault pursuant to section 12-14(b)(i) of the Criminal Code of 1961 (720 ILCS 5/12-14(b)(i) (West 2006)). That offense is a Class X felony punishable by a term of between 6 and 30 years in prison. 720 ILCS 5/12-14(d)(1) (West 2006); 730 ILCS 5/5-8-1(a)(3) (West 2006). At sentencing, the State indicated it

would seek an extended-term sentence based on defendant's criminal history, noting the two 2010 convictions. The prosecutor argued that defendant "possessed a dangerous weapon, a gun, in the city streets of Chicago" twice in a three-month period, detailing defendant's two weapons-related convictions.

¶ 26 A defendant's criminal history is relevant to the trial court's determination of a sentence. 730 ILCS 5/5-5-3.2(a)(3) (West 2006); *People v. Flanery*, 243 Ill. App. 3d 759, 761 (1993). However, in imposing a sentence, the trial court must not consider in aggravation of that sentence a conviction for the violation of an unconstitutional statute. *People v. Smith*, 2016 IL App (2d) 130997, ¶¶ 15-16 (relying on *People v. Fischer*, 100 Ill. App. 3d 195, 200 (1981)); see also *People v. Billups*, 2016 IL App (1st) 134006, ¶ 15.

¶ 27 When a trial court considers an improper factor in aggravation of a sentence, the case must be remanded unless it appears from the record that the weight placed upon the improper factor was so insignificant that it did not lead to a greater sentence. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 18. In determining if the court gave significant weight to an improper factor so as to require remand, this court has considered: (1) whether the trial court made any dismissive or emphatic comments in reciting its consideration of the improper factor; and (2) whether the sentence received was substantially less than the maximum sentence permissible by statute. *Id.*

¶ 28 In sentencing defendant, although the court did not remark on defendant's criminal history in detail, the court noted that defendant had "four felony convictions." Defendant's term of 18 years was 12 years less than the maximum sentence but represented the midpoint of the 6- to 30-year Class X sentencing range. Although the court declined to impose a maximum or

extended-term sentence, the court expressly indicated it did not find a minimum sentence to be appropriate. Given the State's emphasis on defendant's weapons-related crimes, we cannot say that the argument regarding those convictions did not weigh in the court's determination of a sentence in this case. Therefore, this case is remanded to the trial court for resentencing.

¶ 29 In arguing that defendant has not established plain error and that remandment for resentencing is not necessary, the State relies on *People v. McFadden*, 2016 IL 117424, and *People v. Ware*, 2014 IL App (1st) 120485. In *McFadden*, 2016 IL 117424, ¶ 31, our supreme court upheld the defendant's conviction for UUW by a felon even though the defendant's prior AUUW conviction, which served as an element of the main offense, was invalid pursuant to *Aguilar*. Rejecting the defendant's contention that based on the prior conviction's invalidity, the State did not prove each element of UUW by a felon, the supreme court held in *McFadden* noted that the defendant did not seek to vacate his AUUW conviction but instead sought reversal of his more recent conviction. *Id.* ¶ 21. The supreme court held the defendant could seek to vacate his AUUW conviction but its invalidity did not negate the fact that defendant had been convicted of a felony when he committed the main offense. *Id.* ¶ 31.

¶ 30 The defendant in *McFadden* asserted that his case should be remanded for resentencing because "without his prior AUUW conviction he had only one prior felony conviction in his background" and the court would have likely sentenced him to a shorter prison term. *Id.* ¶ 39. Holding that remandment for resentencing was not required, the supreme court noted that the defendant had a lengthy criminal history but that the sentencing court did not focus on one offense in particular. *Id.* ¶ 44.

¶ 31 In *Ware*, the defendant was convicted of six counts of armed robbery with a firearm and his criminal history included two prior AUUW convictions, among other felonies. *Id.* ¶¶ 8-9. After the trial court erroneously sentenced the defendant to an extended term based on the mistaken belief that he had a prior Class X conviction, this court reduced the defendant’s term to the maximum non-extended term sentence. *Id.* ¶¶ 29-32. However, this court declined to remand the case for resentencing even though the defendant’s criminal history included two prior AUUW convictions. *Id.* ¶ 34 (noting its jurisdiction did not extend to a review of the defendant’s prior convictions). This court noted that the AUUW convictions were not elements of the charged offenses and were not used as a basis for a statutory enhancement or extended-term sentence; moreover, the court found that the trial court did not place great weight on the defendant’s prior AUUW convictions and “was most concerned with the circumstances” of the instant crimes. *Id.* ¶¶ 35-36.

¶ 32 This court is required to remand unless the record indicates the weight placed on the improper factor was so insignificant that it did not lead to a greater sentence. *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 18. Here, unlike in *McFadden* and *Ware*, the State argued that defendant was “not only a sex offender” but that he “also possessed a dangerous weapon, a gun, in the city streets of Chicago,” and that defendant followed that incident with another felony offense for possessing a firearm. Before sentencing defendant, the court noted that defendant had four felony convictions. In contrast to the authority cited by the State, we cannot say the emphasis placed on what were presented as defendant’s four prior felony convictions did not lead the court to impose a greater sentence. The sentencing court will decide what weight, if any, it gave to the two felony convictions.

¶ 33 In conclusion, plain error occurred when the trial court considered in aggravation of defendant's sentence his weapons-related convictions that were based on unconstitutional statutes. Given that result, we need not reach defendant's ineffective assistance of counsel claim.

¶ 34 Accordingly, defendant's convictions are affirmed. However, his 18-year sentence is vacated and this case is remanded for resentencing.

¶ 35 Convictions affirmed, sentence vacated and case remanded.