2018 IL App (1st) 151440-U

No. 1-15-1440

Order filed February 22, 2018

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 7030
	)	
JARON WASHINGTON,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Burke and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: Affirmed in part, vacated in part, and remanded. Conviction for possession of a stolen motor vehicle affirmed, as record does not affirmatively show that trial court considered evidence other than what was properly admitted at trial, and over defendant's challenge to the sufficiency of the evidence to sustain his conviction for possession of a stolen motor vehicle. Cause remanded for resentencing, as trial court relied on two void gun convictions in aggravation.

¶ 2 Following a bench trial, defendant Jaron Washington was found guilty of the possession of a stolen motor vehicle and sentenced to five years in prison. On appeal, he contends that the

trial court improperly relied on its own "perception of car rental prices and practices" to discredit defense counsel's arguments and deprive defendant of a fair trial. He further contends that he was not proven guilty beyond a reasonable doubt because the State failed to prove that he knew that the vehicle at issue was stolen. Defendant finally contends that he was denied a fair sentencing hearing when the trial court considered in aggravation two convictions that were "based on statutes later found to be unconstitutional." We affirm the conviction, vacate the sentence, and remand for resentencing.

¶ 3 At trial, Officer Kovarsky testified that on April 4, 2014, he and his partner were in a marked squad car when he observed defendant, who was driving a maroon minivan, fail to stop at a stop sign. The officers curbed the minivan, and asked defendant for his driver's license. When defendant failed to provide his license, he was taken into custody. Defendant was placed in the back of the squad car and "*Mirandized*." A computer search revealed that defendant's driver's license was suspended. Kovarsky asked defendant where "he got the vehicle from." Defendant responded that he had rented it from a "hype" for $30. Kovarsky explained that "[a] hype is a narcotics user." He then "ran" the minivan's Florida license plate. It "came back to a different vehicle." The minivan's VIN, which ended in 6019, indicated that it belonged to Hertz Rental Company (Hertz). Defendant was then transported to a police station.

¶ 4 At the police station, Kovarsky contacted Hertz through a phone number that was tied to the minivan's VIN number. He spoke to a member of the company's "loss prevention" department who stated that the minivan was "supposed" to be on a Hertz lot and had not been rented since February 6, 2014. Defendant was then charged with possession of a stolen motor

vehicle. During cross-examination, Kovarsky testified that defendant did not attempt to flee and was cooperative. To his knowledge, Hertz did not know that the minivan was not on the lot.

¶ 5 The parties stipulated that Hertz loss prevention agent James Kuzynowski would testify, if called, that a 2012 minivan with a VIN of the vehicle in question was owned by Hertz, that Hertz records indicated that the vehicle was not rented as of February 6, 2014, and that Hertz did not have a rental agreement with defendant or give defendant authorization to be in possession of or drive the vehicle.

¶ 6 During closing argument, the defense argued that although the minivan may have been stolen, there was no way for defendant to know; rather, he rented a vehicle from someone on the street. The State responded that defendant had "several indications" that the minivan was stolen. Specifically, defendant, who did not have a driver's license, rented a "pretty nice minivan" for $30 from a drug user, and the "hype" did not provide a contract or ask for proof of insurance.

¶ 7 In finding defendant guilty, the court first noted defendant's statement that he rented the minivan from a "hype," and the stipulation that Hertz had not authorized defendant to drive the vehicle. Therefore, the issue before the court was defendant's knowledge. The court determined that knowledge that the minivan was stolen could be imputed to defendant through the Florida license plate, and the fact that the car was a recent "vintage" and rented for $30. The court characterized defendant's statement that he rented the minivan from a "hype" as "a misleading statement to the police, which to the Court cries out the defendant's state of mind at that time." Therefore, the court concluded, based upon the circumstances of the case, that defendant had "enough knowledge" and found defendant guilty of the possession of a stolen motor vehicle.

¶ 8 In denying defendant's motion for a new trial, the court noted that as the trier of fact it found defendant's statement that he rented the vehicle from a hype "made up to mask the knowledge" that the court believed that defendant had. The court further stated:

> "It doesn't have to be true—that statement. The fact that he made it is absurd. And the strength of that statement is in its limitations. Anybody who will rent a $30.00 vehicle when he—and the type of vehicle it was that was two years old, it's an absurd statement to make. That proves to me that he knew. He thought he'd put it over on the cops by saying he got it from a hype. The fact that he made such a statement, to me, cries out knowledge that it was converted. That's my ruling then; that's my ruling now. The strength of that statement's in its limitations, Counsel.
>
> * * *
>
> It cries out knowledge. Whether it was true or whether it was a lie, it cries out knowledge. Any paperwork done as far as we know? The hype just gives it for 30 bucks and hopes somebody returns it, right. It's absurd."

¶ 9 The court then sentenced defendant to five years in prison. We will recount the sentencing hearing later, when we consider an issue relevant to sentencing.

¶ 10 On appeal, defendant first contends that he was denied a fair trial because the trial court relied on its own "perception of car rental prices and practices" to unfairly discredit defendant's counsel's arguments. Defendant argues that the trial court's conclusion that he knew the minivan was stolen was improperly based upon facts not in evidence, that is, the court's determinations that a minivan of the make and model at issue would not rent for $30, and that vehicle rentals have written agreements.

¶ 11 Defendant acknowledges that he failed to preserve this issue for appeal, but asks this court to review it pursuant to the plain-error doctrine. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (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"). The first step in plain error analysis is to determine whether a clear or obvious error occurred. *In re M.W.*, 232 Ill. 2d 408, 431 (2008).

¶ 12 In a bench trial, the trial court is limited to the record developed during the course of the trial before the court. *People v. Wallenberg*, 24 Ill. 2d 350, 354 (1962). Although the court is "free to accept or reject as much or as little as it pleases of a witness' testimony" (*People v. Nelson*, 246 Ill. App. 3d 824, 830 (1993)), "[a] determination made by the trial [court] based upon a private investigation by the court or based upon private knowledge of the court, untested by cross-examination, or any of the rules of evidence constitutes a denial of due process of law" (*Wallenberg*, 24 Ill. 2d at 354). The trial court will be accorded every presumption that it considered only admissible evidence in its deliberations. *People v. Jenk*, 2016 IL App (1st) 143177, ¶ 53. "This assumption will be overcome only if the record affirmatively demonstrates the contrary, as where it is established the court's finding rests on a private investigation of the evidence, or on other private knowledge about the facts in the case." *People v. Tye*, 141 Ill. 2d 1, 26 (1990)). Critically, however, "[a] trial judge does not operate in a bubble; she may take into account her own life and experiences in ruling on the evidence." *People v. Thomas*, 377 Ill. App.

3d 950, 963 (2007). We review *de novo* whether a defendant's due process rights were violated. *People v. Williams*, 2013 IL App (1st) 111116, ¶ 75.

¶ 13 In the case at bar, we are not persuaded by defendant's argument that the trial court "applied its purported knowledge of traditional rental car rental practices to the circumstances of this case, even though conventional rental agreements do not apply." Defendant argues that because the trial court did not have experience with the "hype" car rental market, the court was not in a position to discount defendant's "reasonable" explanation as to how he, a man without a valid driver's license, was able to rent the minivan.

¶ 14 But the trial court's comments do not reflect improper personal knowledge and were not based upon the trial court's private investigation or private knowledge. Rather, they flowed from information that is within the province of "common knowledge" See *People v. White*, 183 Ill. App. 3d 838, 841 (1989). In other words, it is common knowledge that legitimate vehicle rentals usually have paperwork.

¶ 15 To the extent that defendant argues that the trial court's lack of knowledge regarding "hype" rental practices caused it to conclude that all drug users rent stolen cars, we disagree. The court's comments, considered within the context of the court's guilty finding, indicate that the court's analysis of defendant's statement led the court to conclude either that the circumstances of the rental should have alerted defendant to the possibility that the minivan was stolen, or that there was in fact no "hype" and defendant's explanation for his possession of the minivan was a lie. Regardless of the reasoning behind the trial court's conclusion, it was for the trier of fact, in this case the court, to weigh the evidence and draw reasonable inferences from the facts. See *People v. Bradford*, 2016 IL 118674, ¶ 12. Here, the trial court did not find defendant's

statement to the police credible, as evidenced by its guilty finding. Ultimately, defendant's claim must fail because the record does not affirmatively demonstrate (*Tye*, 141 Ill. 2d at 26) that the trial court relied upon inadmissible evidence in its analysis (*Jenk*, 2016 IL App (1st) 143177, ¶ 53). Instead, the court relied on common knowledge regarding the logistics of a legitimate car rental. Consequently, defendant's due process rights were not violated. We must therefore honor defendant's procedural default. See *People v. Williams*, 193 Ill. 2d 306, 349 (2000) (absent reversible error, there can be no plain error).

¶ 16 Defendant further contends that his conviction should be reversed because the State failed to prove beyond a reasonable doubt that he knew that the minivan was stolen.

¶ 17 When reviewing a challenge to the sufficiency of the evidence, the relevant question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. It is the responsibility of the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts. *Bradford,* 2016 IL 118674, ¶ 12. Accordingly, a reviewing court will not substitute its judgment for that of the fact finder on questions involving the weight of the evidence or the credibility of the witnesses. *Id*. This court reverses a defendant's conviction only where the evidence is so unreasonable, improbable or unsatisfactory that a reasonable doubt of his guilt remains. *Id*.

¶ 18 To obtain a conviction for the possession of a motor vehicle, the State must prove that the defendant possessed the vehicle, that the vehicle defendant possessed was stolen and that the defendant knew that the vehicle was stolen. See 625 ILCS 5/4-103(a)(1) (West 2014). Factual questions, such as knowledge, are resolved by the trier of fact. *People v. Fernandez,* 204 Ill.

App. 3d 105, 108 (1990). A defendant's knowledge that the property was stolen does not require direct proof. *People v. Frazier*, 2016 IL App (1st) 140911, ¶ 23. If the surrounding facts and circumstances would lead a reasonable person to believe that the property was stolen, however, the trier of fact may infer that the defendant knew that it was stolen. *Id.*

¶ 19 Although defendant's statement to the police indicated that he rented the minivan, a reasonable trier of fact could conclude that defendant knew that the minivan was stolen—either because (1) there was no "rental," and defendant stole it himself and gave a false story to the police, or (2) even if his story had some semblance of truth, it would have been obvious to defendant that the car was stolen when he "rented" it. Under either possibility, the trial court found defendant's explanation for his possession of the minivan "absurd," as the circumstances—an out-of-state license plate and the $30 rental fee for a relatively new vehicle—would lead a reasonable person to believe that the minivan was stolen. Therefore, the trial court imputed to defendant the knowledge that the minivan was stolen. See *id.* ¶ 23 (trier of fact may infer that defendant knew that vehicle was stolen when surrounding facts and circumstances would lead reasonable person to believe property was stolen). A trier of fact is not required to disregard inferences which flow normally from the evidence or search out all possible explanations consistent with a defendant's innocence and elevate them to reasonable doubt. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. Accordingly, we are not persuaded by defendant's argument.

¶ 20 Finally, defendant contends that the trial court erred at sentencing when it considered, in aggravation, convictions that had no legal effect. Specifically, defendant contends that his 2001 conviction for AUUW pursuant to section 24-1.6(a)(1), (a)(3)(a) of the Criminal Code of 1961

(the Code) (see 720 ILCS 5/24-1.6(a)(1), (a)(3)(a) (West 2000)), and his 1998 conviction for UUW pursuant to section 24-1(a)(4) of the Code (720 ILCS 5/24-1(a)(4) (West 1998)), are void *ab initio* because those statutes were found unconstitutional. See *People v. Burns*, 2015 IL 117387; *Moore v. Madigan*, 702 F. 3d 933 (2012); *People v. Aguilar*, 2013 IL 112116.

¶ 21 A brief summary of the sentencing hearing is in order. At sentencing, the State noted, in aggravation, that defendant had three felony convictions and multiple misdemeanors. The felonies included a 1998 conviction for unlawful use of a weapon (UUW), a class 4 offense for which defendant received probation; a 2001 conviction for possession of a controlled substance (PCS), a class 4 offense for which defendant received probation; and a 2001 conviction for aggravated unlawful use of a weapon (AUUW), a class 2 offense, for which defendant received 3 years' imprisonment.

¶ 22 Because the current conviction for possession of a stolen vehicle was a class 2 felony, the court inquired whether defendant's criminal background rendered him subject to a mandatory class X sentence. It was clear that the 2001 AUUW was a class 2 felony. But it was not immediately clear to the court whether either of the other prior felony convictions—the 2001 PCS or the 1998 UUW—were class 2 felonies that would mandate a class X sentence. See 730 ILCS 5/5-4.5-95 (West 2014) (defendant shall be sentenced as Class X offender if convicted of class 2 felony after having been twice convicted previously of class 2 or greater felonies).

¶ 23 The court asked about the 1998 UUW conviction, and the prosecutor said she needed to confirm which class of felony it was. In the interim, defense counsel raised the viability of the 1998 UUW conviction in light of *Aguilar*:

"COUNSEL: Judge, I believe the '98—and I raised this before—is void under *Aguilar*.

THE COURT: Don't know that until it's unvoided [*sic*].

COUNSEL: I think the case law says that they're all void. There was a case—

THE COURT: I don't know what that case involves. You may know more than I on that. I don't know if you pulled that file. I don't know if you represented him. It's obviously 13 months probation. I don't know if that's Class II or not. The fact that it was only 13 months probation, which is one more month than the minimum amount of probation on a felony, I don't know what that is. Let's see how—first of all, it would be irrelevant if [the 2001 PCS conviction] was, in fact, a class II or greater. The '98 conviction is irrelevant. If, in fact, the [2001 PCS conviction] was not a class II, then I'll enter and continue the sentencing hearing so that you can make your [plea] for the void sentence of 1998.

¶ 24 The prosecutor then confirmed that the 2001 PCS conviction was a class 4 felony, as was the 1998 UUW conviction. Finding only one prior class 2 felony in defendant's background, the court ruled that defendant "was not Class X mandatory by any account."

¶ 25 The court then elicited any further argument from the State and defendant. The State argued for the maximum sentence of 7 years.

¶ 26 The defense then argued in mitigation that all of defendant's criminal history was from 2001 and before, and that defendant had not been in trouble in "many, many years." At the time of his arrest, defendant was working and supporting his family. The defense therefore requested probation or the minimum sentence of 3 years.

¶ 27 In sentencing defendant to five years in prison, the trial court stated that it had considered, among other things, the presentence investigation, the financial impact of incarceration, the evidence in mitigation and aggravation, and the arguments of counsel. It concluded: "The Court having heard the following evidence in this case, the Court considered the judgment based on defendant's criminal history, the facts of this case. Five years in the Illinois Department of Corrections."

¶ 28 Defendant claims that the trial court erred in considering his 1998 UUW conviction and his 2001 AUUW conviction in imposing sentences, as each of those convictions are void *ab initio* under *Burns*, 2015 IL 117387, *Moore*, 702 F. 3d 933, and *Aguilar*, 2013 IL 112116. The parties do not dispute that these two prior felony convictions resulted from violations of unconstitutional statutes.

¶ 29 Defendant argues that the cause must be remanded for resentencing, because the trial court's reliance on these unconstitutional convictions at sentencing "likely impacted" the length of his sentence. Defendant asks this court to take judicial notice of the fact that on November 17, 2015, an order was entered in the trial court vacating defendant's UUW conviction in case number 98 CR 0197. See *People v. Hill*, 2014 IL App (3d) 120472, ¶ 18 (reviewing court may take judicial notice of public records).

¶ 30 It has long been true that a sentencing court may not consider, as a factor in aggravation, a prior conviction that was based on a statute later determined to be unconstitutional. *People v. Alejos*, 97 Ill. 2d 502, 511 (1983) (remand for resentencing when trial considered improper armed-violence conviction in imposing sentence for voluntary manslaughter); *People v. Fischer*, 100 Ill. App. 3d 195, 200 (1981) (remand for resentencing on armed-robbery conviction when

court considered in aggravation defendant's prior conviction for marijuana, based on statute declared unconstitutional). Since *Aguilar*, *Madigan*, and *Burns*, this court has twice found reversible error, requiring a remand for re-sentencing, when a trial court considered in aggravation one or more gun convictions based on these invalid statutes. See *People v. Smith*, 2016 IL App (2d) 130997, ¶ 11; *People v. Billups*, 2016 IL App (1st) 134006, ¶ 15.

¶ 31 The State contends that defendant's sentence was proper because there is "no evidence" that the trial court "substantially relied" upon those convictions when imposing a sentence that was within the statutory range. Rather, the State argues that the court properly relied on defendant's criminal history, which included a prior conviction for possession of a controlled substance and certain misdemeanor offenses, as well as the facts of this case in imposing a sentence in the middle of the applicable statutory range.

¶ 32 Defendant acknowledges that he failed to preserve this issue for appeal and asks this court to review it pursuant to the plain error doctrine or, in the alternative, as a matter of ineffective assistance of counsel.

¶ 33 A defendant's claim of ineffective assistance of counsel is evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Henderson*, 2013 IL 114040, ¶ 11. With respect to the first prong, the defendant must overcome the "strong presumption" that counsel's action or inaction was the result of sound trial strategy rather than incompetence. *People v. Clendenin*, 238 Ill. 2d 302, 317

(2010); see also *People v. Billups*, 2016 IL App (1st) 134006, ¶ 15 (counsel's failure to object to the use at sentencing of two convictions in aggravation that were based upon violations of a statute that was determined to be unconstitutional "cannot have served any strategic purpose").

¶ 34 We note that in *People v. McFadden*, 2016 IL 117424, ¶¶ 39-40, our supreme court was not persuaded by the defendant's argument that the cause should be remanded for resentencing of his armed robbery convictions, because the trial court was not aware that a prior conviction for AUUW was unconstitutional, and absent that conviction, he had only one prior felony conviction in his background. The court first noted that "the constitutional invalidity" of the defendant's prior conviction was not "confirmed" by the record, and, in any event, the record "adequately" demonstrated that the weight placed upon that conviction was not significant and did not warrant a new sentencing hearing. *Id.* ¶ 41. The court then detailed the defendant's "extensive" criminal history, including a juvenile disposition for aggravated battery and convictions for battery, resisting arrest, aggravated assault, criminal trespass to a vehicle, assault, theft, driving while under the influence, and possession of a controlled substance with intent to deliver. *Id.* ¶ 44. The court further noted that the defendant's presentence investigation report (PSI) indicated that the defendant was a high-ranking member of the Conservative Vice Lords gang, which he joined when he was 11 years old, and that the defendant had, in the case before the court, committed three armed robberies within a 24-hour period. *Id.* ¶ 44-45. The court therefore concluded that a remand for resentencing was not warranted when the defendant was sentenced to three concurrent terms of 14 years in prison, when armed robbery is a Class X offense with an applicable sentencing range of between 6 and 30 years in prison. *Id.* ¶ 46 (citing 730 ILCS 5/5-4.5-25(a) (West 2008)).

¶ 35 The record in this case, however, does not demonstrate what weight the trial court put on the two convictions at issue; rather, the trial court stated that it considered defendant's criminal history in imposing sentence. Moreover, although the parties and the trial court discussed the possibility that one of defendant's convictions was void when discussing his criminal background, defense counsel did not raise that argument in mitigation at sentencing.

¶ 36 *People v. Billups*, 2016 IL App (1st) 134006, is instructive. In that case, the defendant was found guilty of two counts of the delivery of heroin. The defendant's PSI listed, *inter alia*, a 1995 conviction for misdemeanor possession of a firearm, a 1995 conviction for felony possession of a firearm, and a 1998 conviction for unlawful possession of a firearm by a felon. Defense counsel did not object to the PSI or ask for any amendments. In sentencing the defendant, the trial court noted that defendant had not been in prison for a " 'long time,' " but that he had " 'been in the penitentiary for narcotics cases and gun cases.' " *Id.* ¶ 9. The trial court therefore sentenced defendant to two concurrent six-year prison terms.

¶ 37 On appeal, the defendant challenged the use of the 1995 gun convictions in aggravation at sentencing because they both resulted from violations of unconstitutional statutes. *Id.* ¶ 11. He acknowledged that defense counsel failed to object before the trial court as to the consideration of the unconstitutional convictions and asked the court to review the issue as plain error or a matter of ineffective assistance of counsel. *Id.* ¶ 13.

¶ 38 In determining whether the defendant received ineffective assistance of counsel, the court noted that two of the defendant's three firearms convictions resulted from violations of unconstitutional statutes, and that our supreme court's decision in *Aguilar* predated the sentencing hearing in that case. *Id.* ¶ 15. Therefore, "[c]ompetent counsel should have known"

that *Aguilar* held a firearms statute unconstitutional on grounds that would apply to both of the defendant's 1995 convictions. *Id.* The court determined that "[t]he failure to object to the use of the two convictions in aggravation cannot have served any strategic purpose," and, consequently found that the defendant had shown that defense counsel's performance fell below an objective standard of reasonableness. *Id.*

¶ 39 The court was unpersuaded by the State's argument that the defendant suffered no prejudice from the error, as the trial court referred to the defendant's " 'gun crimes' " when imposing sentence. *Id.* ¶ 16. The court stated that to establish prejudice, the defendant needed only to show a reasonable probability that the trial court would have imposed a lesser sentence if his counsel had not erred. *Id.* The court noted that the defendant "had little criminal history in the 15 years" prior to the instant conviction and that at sentencing the trial court relied "more heavily" on the older convictions, *i.e.*, two felony conviction for possession, a misdemeanor for aggravated assault and the three gun convictions. *Id.* The court concluded that there was a reasonable probability that the trial court would have imposed a lesser sentence "if defense counsel had alerted the court to the unconstitutionality of the statutes" that the defendant had violated in two of the three gun convictions. *Id.* Therefore, the court remanded to the trial court for resentencing. *Id.* ¶ 18.

¶ 40 The court declined the defendant's request to reduce his sentence because "[i]n light of the information" before the trial court at sentencing, including the list of prior convictions to which defense counsel did not object, the court could not say that the trial court abused its discretion when it sentenced the defendant. *Id*.

¶ 41 Similarly, here, defendant's criminal history was from 2001 and before, approximately, 13 years before the instant conviction, and our supreme court's decision in *Aguilar* predated the sentencing hearing in this case. Although the record reveals that the parties discussed whether *Aguilar* applied to defendant's 1998 conviction in the context of whether defendant's criminal background rendered him eligible for Class X sentencing, there is no indication that defendant's counsel challenged the use of the 1998 and 2001 convictions in aggravation at sentencing or argued that absent those two convictions, defendant's criminal background consisted of just one felony. The failure to argue against the use of these convictions in aggravation at sentencing cannot have served any strategic purpose. See *Billups*, 2016 IL App (1st) 134006, ¶¶ 8, 15 (when counsel failed "to object to the use of the two [firearms] convictions in aggravation" that were listed in the presentence report, despite the fact that our supreme court had held a firearms statute unconstitutional on grounds that would apply to both convictions, the defendant had "sufficiently shown that his counsel's performance fell below an objective standard of reasonableness").

¶ 42 To the extent that the State responds that that defendant cannot establish prejudice because the trial court properly considered all factors in aggravation and mitigation, including defendant's criminal history, when sentencing defendant to a sentence within the applicable sentencing range, we disagree. At sentencing, the trial court stated that it considered all evidence in mitigation and aggravation including defendant's criminal history. But absent the two prior felonies that were based upon statutes that were later declared unconstitutional, the aggravating factor of defendant's "criminal background" is significantly diminished, from three felonies to one. To establish prejudice, defendant only needs to show a "reasonable probability" that the trial court judge would have imposed a lesser sentence if defense counsel had not erred. See *Id.* ¶ 16.

There is a reasonable probability that the trial court would have imposed a lesser sentence if defense counsel had argued that two of defendant's three prior felonies were for violations of statutes determined to be unconstitutional. *Id.* Therefore, as in *Billups*, this cause must be remanded to the trial court for resentencing. *Id.* ¶ 18.

¶ 43 For the foregoing reasons, we affirm defendant's conviction for possession of a motor vehicle but vacate his sentence and remand the cause for resentencing.

¶ 44 Affirmed in part and vacated in part; cause remanded.