THIRD DIVISION
September 19, 2018

No. 1-15-1784

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 13584
	)	
ROBERT RHAMES,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: Defendant's conviction and sentence for being an armed habitual criminal affirmed. Trial court's consideration of defendant's criminal history, including two prior offenses that served as qualifying offenses for current charge, was not improper double enhancement.

¶ 2 Defendant Robert Rhames was convicted after a bench trial of being an armed habitual criminal (AHC) and sentenced to 90 months (7 ½ years) in prison. 720 ILCS 5/24-1.7(a) (West 2012). Defendant contends that his sentence includes an improper "double enhancement," because the trial court considered the two qualifying felonies for the AHC charge as factors in aggravation.

¶ 3 On July 20, 2014, defendant went out drinking at the Funky Buddha Lounge. Around 3:00 a.m, he got into an argument outside the club with Franklin Bosley and some other security

guards, who were trying to disperse the large crowd of people and traffic leaving the club at closing time. Bosley testified that defendant seemed drunk.

¶ 4 Off-duty Chicago police officer Robert Markvart was still inside the club when he heard people saying that "someone outside has a gun." He went outside and saw defendant arguing with club security guards. Officer Markvart approached defendant and identified himself. Bosley backed off in deference to the officer.

¶ 5 At that point, Officer Markvart and Bosley both noticed that defendant was holding a gun in his right hand and pointing it toward the ground. They testified, in sum, that Officer Markvart drew his own gun and told defendant to "jock his weapon" (meaning, to put it in his pants). Defendant did—and then took off running. With Officer Markvart in pursuit, defendant jumped into the back of a pickup truck and said, "go, go," but nobody was in the driver's seat. Officer Markvart told defendant to get out of the truck. Defendant jumped out and fell down. Officer Markvart pinned defendant down and recovered the gun from his waistband.

¶ 6 Officer Markvart gave the gun to Officer Sara Lombardi, who soon responded to the scene with her partner. Officer Lombardi inventoried the gun and its magazine. Officer Markvart and Bosley both identified the gun at trial as the gun they saw defendant holding.

¶ 7 The State introduced certified copies of the two prior convictions, both for manufacture or delivery of cannabis, that were alleged in the information as qualifying offenses for the AHC charge. One was a class 2 felony from 2003 (see 720 ILCS 550/5(e)); the other was a class 3 felony from 2004 (see 720 ILCS 550/5(d)).

¶ 8 The trial court found Officer Markvart and Bosley credible, found defendant guilty of all charged offenses, and merged several lesser gun-possession charges into the AHC count.

¶ 9 The presentence investigation report (PSI) showed that defendant, age 41, had seven prior felony convictions, all for drug offenses. His most recent conviction, a 2010 case, was a Class 4 possession of a controlled substance, for which he was sentenced to one year in prison. Defendant had three convictions for manufacture or delivery of cannabis—the 2004 and 2003 qualifying offenses, and another in 2002—and was sentenced to 24 months' probation each time. His remaining convictions were for possession of a controlled substance with intent to deliver, and delivery of a controlled substance, Class 1 offenses from 1991 and 1990, respectively, for which he received concurrent 4-year prison sentences.

¶ 10 At defendant's sentencing hearing, the State's argument in aggravation was brief: "Your Honor, you see the background in front of you. You heard the facts of this case." After briefly summarizing the key evidence, the State continued, "Based on the defendant's background, he is armed habitual criminal. He has the qualifying felony offenses. That would be my aggravation, your Honor."

¶ 11 Defense counsel argued in mitigation that none of defendant's drug convictions involved violence. He was gainfully employed in his own photography business. He had an 11-year-old daughter, and was in a stable, long-term relationship with her mother, who had recently been diagnosed with cancer. And he had struggled with alcohol abuse, a problem he hoped to address during his time in prison.

¶ 12 Defendant spoke briefly in allocution. Despite his long history of selling drugs, defendant stressed, he has never been a violent person, and in recent years he had become "a family man." He was at the club working, taking pictures for a birthday party, and he described his behavior that night as an aberrant "outburst."

¶ 13 Before pronouncing sentence, the trial judge said, "Well, this is a possessory offense, but you have several prior convictions which makes this an armed habitual criminal case. A gun was possessed and not used." Neither the facts of the case nor defendant's criminal history, the judge concluded, warranted a sentence near the 30-year maximum. Instead, the judge "tr[ied] to be more moderate" and sentenced defendant to 90 months in prison—1½ years above the 6-year minimum. See 720 ILCS 5/24-1.7(b) (West 2010) (AHC is class X felony); 730 ILCS 5/5-4.5-25 (West 2012) (sentencing range for class X felony is 6-30 years).

¶ 14 Defense counsel filed a motion to reconsider sentence, alleging that defendant's sentence was excessive, and that the trial court had improperly considered factors implicit in the offense. The motion was denied, and defendant timely appealed.

¶ 15 Defendant's only argument on appeal is that his sentence includes an improper double enhancement. We review this legal question *de novo*. *People v. Phelps*, 211 Ill. 2d 1, 12 (2004).

¶ 16 As a preliminary matter, defendant argues that this issue is fully preserved because he raised it in his motion to reconsider sentence. A sentencing error usually must be raised in both a contemporaneous objection and a post-sentencing motion (*People v. Hillier*, 237 Ill. 2d 539, 544 (2010)), but defendant argues that under *People v. Saldivar*, 113 Ill. 2d 256, 265 (1986), that rule does not, or should not, apply here. Alternatively, he argues that the alleged double enhancement was plain error. We need not address these arguments, because we find that there was no double enhancement in the first place and thus no error, plain or otherwise.

¶ 17 The AHC statute prohibits the possession of a firearm by a person with at least two prior convictions for certain qualifying offenses, including any violation of the Cannabis Control Act that is punishable as a Class 3 felony or higher. 720 ILCS 5/24-1.7(a)(3) (West 2012). Two of defendant's seven prior felony convictions—both for manufacture or delivery of cannabis—were

used to satisfy the "qualifying offenses" requirement. Thus, these two prior convictions were elements of defendant's AHC offense.

¶ 18 An element of the defendant's offense generally may not be used as an aggravating factor in sentencing for that offense. *Phelps*, 211 Ill. 2d at 11-12. This rule against double enhancement prohibits a trial court from increasing a defendant's sentence based merely on consideration of a factor that is already inherent in the offense itself. See *id.* But our supreme court has held that consideration of a defendant's criminal history in fashioning a sentence within the applicable statutory range does not count as an "enhancement" in the sense prohibited by the rule. *People v. Thomas*, 171 Ill. 2d 207, 224-25 (1996).

¶ 19 In *Thomas*, the supreme court considered, and rejected, a double-enhancement challenge in the context of mandatory Class X sentencing, pursuant to the general-recidivism provisions of the Code of Corrections. Thomas was convicted of a Class 1 felony, but since he had two prior Class 2 felony convictions, he was subject to a mandatory Class X term, within the range of 6-30 years. *Id.* at 210; see 730 ILCS 5/5-5-3(c)(8) (West 1992) (now found at 730 ILCS 5/5-4.5-95(b) (West 2016)). In sentencing Thomas to the intermediate range of 15 years, the trial court expressly considered his criminal history—and only his criminal history—as a statutory aggravating factor. *Thomas*, 171 Ill. 2d at 210, 225; *People v. Thomas*, 266 Ill. App. 3d 870, 881 (1994) (qualifying offenses "were the only factors in aggravation" cited by trial court); see 730 ILCS 5/5-5-3.2(a)(3) (West 1992) (trial court may consider defendant's criminal history as a "reason[ ] to impose a more severe sentence").

¶ 20 Thomas made the same argument on appeal that defendant makes here—that his criminal history had already been used to enhance his offense from a Class 1 to a Class X, and thus to consider his criminal history *again* in sentencing him about the Class X minimum constituted a

double enhancement. The appellate court agreed with Thomas. See *Thomas*, 171 Ill. 2d at 223 ("The appellate court held that the trial court could not use defendant's two prior Class 2 felony convictions both to qualify defendant for a Class X term *** and as an aggravating factor in sentencing defendant beyond the minimum Class X term [citation].").

¶ 21 The supreme court disagreed and reversed this portion of the appellate court's holding. The supreme court held that considering defendant's criminal history as an aggravating factor did "not involve a double enhancement" (*id*. at 224) and, indeed, was "not properly understood as an enhancement" of any kind. *Id*. at 225. Rather, "the discretionary act of a sentencing court in fashioning a particular sentence tailored to the needs of society and the defendant, within the available parameters, is a requisite part of every individualized sentencing determination." *Id*. at 224-25.

¶ 22 The supreme court explained that a trial court has "a constitutionally mandated duty to assess defendant's rehabilitative potential," and to fashion a sentence "tailored to the needs of society and the defendant, within the available parameters." *Id.* at 224-25, 229. Because a sentencing judge must be allowed to consider a "defendant's *entire* criminal history" for this purpose, the trial court had properly " '*re*considered' [the] two prior convictions" that were used to qualify Thomas for a Class X sentence. (Emphases added). *Id.* at 229.

¶ 23 To be sure, those prior convictions could not be used to increase the *applicable range* a second time, for example, by subjecting Thomas to an extended-term sentence—*that* would be an improper double enhancement. See *id.* at 225 (distinguishing *People v. Hobbs*, 86 Ill. 2d 242 (1981)). But a rule that prohibited the sentencing judge from considering a defendant's complete criminal history, for the purpose of imposing a sentence *within* the enhanced range, would force the judge "to ignore factors relevant to the imposition of sentence" (*id.* at 227 (quoting *Saldivar*,

113 Ill. 2d at 268)), factors the judge is constitutionally required to consider (*id.* at 229). The rule against double enhancement, the supreme court cautioned, must not be "rigidly applied," so as to "impede" that "entirely proper" exercise of a trial court's sentencing discretion. See *id.*

¶ 24 In his reply brief, defendant argues that the holding of *Thomas* is "crucially limited" by *Saldivar*, 113 Ill. 2d at 271-72, which held that the rule against double enhancement permits a sentencing judge to consider facts related "to the nature and circumstances" of a factor inherent in the offense, but not the inherent factor itself. For example, in sentencing a defendant for manslaughter, the judge may not "focus[ ] primarily" on the victim's death, since that is inherent in the offense; but the judge may consider the force that was employed or the manner in which the victim was killed. *Id.* By analogy, defendant says, the judge here could properly consider any "distinctive features" of his qualifying offenses (which is not what the judge did), but could not properly consider the mere fact of those prior convictions as an aggravating factor.

¶ 25 The problem with defendant's argument should be obvious: There is not one word about any distinctive features or circumstances of Thomas's qualifying offenses in our supreme court's opinion. Nothing in the supreme court's analysis turned on any details of those offenses, as opposed to the mere fact that they had been committed. Rather, the supreme court held, without qualification, that the sentencing judge could consider Thomas's full criminal history, including his qualifying offenses; and the court said, in so many words, that this holding was consistent with *Saldivar*. See *Thomas*, 171 Ill. 2d at 227 (consideration of criminal history in imposing Class X sentence was consistent "[b]y analogy" to *Saldivar*). The holding of *Thomas* is not "limited" as defendant maintains.

¶ 26 That holding applies here too. We recognize that in *Thomas*, the qualifying offenses were used to enhance the applicable sentencing range for the underlying offense, whereas here, the

qualifying offenses enhanced the crime itself, turning what otherwise would have been a lesser gun possession charge (for instance, aggravated unlawful use of a weapon) into the more serious Class X felony of being an AHC. But for purposes of the rule against double enhancement, this is a distinction without a difference. Either way, the question is whether prior convictions that subject a defendant to enhanced punishment can also be considered as aggravating factors that affect the sentence imposed within the enhanced penalty range. Our supreme court answered yes in *Thomas*, and so we do the same here.

¶ 27 In short, if the trial court considered defendant's two qualifying convictions as part of his overall criminal history, for the purpose of choosing an appropriate sentence within the Class X range, then there was no double enhancement. And the trial court did just that.

¶ 28 The judge explained his sentence as follows:

> "Well, this is a possessory offense, but you have several prior convictions which makes this an armed habitual criminal case. A gun was possessed and not used.
>
> I have discretion to sentence him up to 30 years in the penitentiary. I don't believe that the facts of the case or by reading the pre-sentence investigation indicates that that would be appropriate. So I will try to be more moderate.
>
> The sentence will be 90 months in the penitentiary."

¶ 29 Taking these remarks as a whole, we think the trial judge was considering defendant's overall criminal history as an aggravating factor. The judge referred to defendant's "*several* prior convictions," and specifically stated that he had reviewed defendant's PSI, to which the State had previously referred as the basis for its brief argument in aggravation. ("Your Honor, you see the background in front of you.") And in mitigation, defense counsel had argued that defendant's

"background *** is *all* drug related." Thus, the focus throughout was on defendant's "entire" or "complete" criminal history. See *Thomas*, 171 Ill. 2d at 226, 229.

¶ 30 Defendant emphasizes that both the State and the judge said that his background made this an AHC case, thus referring, at least implicitly, to his two qualifying offenses. But the mere mention of those offenses in this context does not transform the trial judge's proper consideration of defendant's criminal history into an improper double enhancement. The trial judge was not required to scrupulously avoid any reference to defendant's qualifying offenses when discussing his criminal history. See *People v. Andrews*, 2013 IL App (1st) 121623, ¶ 15 (trial judge "is not required to refrain from any mention of the factors which constitute elements of an offense, and the mere reference to the existence of such a factor is not reversible error").

¶ 31 Nor is it fair to say that the trial judge singled out those two offenses, giving them special weight or consideration in any way. And there is no reason why he would have. They were but two of seven prior felonies; and relatively minor ones to boot—defendant received probation for each of his two qualifying offenses, but was sentenced to prison for three of his other offenses.

¶ 32 In sum, the trial judge considered defendant's two qualifying offenses as part of his overall criminal history, and nothing more. Defendant's sentence does not include an improper double enhancement. We find no error in the sentence and affirm it.

¶ 33 Affirmed.