2019 IL App (1st) 161680-U
No. 1-16-1680
Order filed March 12, 2019

Second Division

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. 15 CR 6433
	)	
JASON COOPER,	)	Honorable
	)	Neera Walsh,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: We vacate defendant's sentence and remand for resentencing where defendant was subjected to an improper double enhancement.

¶ 2 After a bench trial, defendant Jason Cooper was found guilty of unlawful use or possession of a weapon by a felon (UUWF) (720 ILCS 5/24-1.1(a) (West 2014)) and sentenced to seven years' imprisonment. On appeal, Cooper argues his sentence includes an improper double enhancement because the trial court considered a prior conviction both as an element of the offense of UUWF and to make him eligible for Class X sentencing. We agree. We vacate the sentence and remand for resentencing.

¶ 3 Background

¶ 4 Cooper was charged by information with one count of armed habitual criminal, two counts of UUWF, and six counts of aggravated unlawful use of a weapon (AUUW) stemming from events occurring on March 26, 2015. Relevant here, the information for UUWF under Count 2 charged that Cooper knowingly possessed on or about his person a handgun, after having been previously convicted of the felony offense of robbery, under case number 07 CR 1106501. Further, it charged that the State sought to sentence Cooper as a Class 2 offender as he has been previously convicted of robbery in case number 07 CR 1106501. (RC0037). The case proceeded to trial on all counts.

¶ 5 At trial, a Chicago police officer testified that, on March 26, 2015, he was working with his partner in the area of 80th and South Dobson Avenue, Chicago. They curbed a blue Jeep Cherokee for failure to signal a turn and for seat belt violations and, on approaching the Jeep, smelled an odor of cannabis. After the officer ordered Cooper out of the car, he performed a protective pat-down of Cooper and felt a large, heavy object near Cooper's chest area on the right side, believed to be a handgun. Cooper took off running. The officer pursued and detained Cooper. Another responding officer recovered a nine-millimeter handgun from the right side of Cooper's jacket, where the officer had felt the hard object earlier.

¶ 6 The State entered certified copies of Cooper's convictions in case Nos. 07 CR 11065 for robbery and 12 CR 19255 for unlawful use of a weapon by a gang member.

¶ 7 The trial court found Cooper not guilty of armed habitual criminal, but found him guilty of all other counts. Cooper filed a written motion for a new trial, which was denied.

¶ 8 At sentencing, the State highlighted Cooper's criminal background which included not only the robbery and unlawful use of a weapon by a gang member convictions, but also a Class 4

unlawful use of a weapon conviction and a "manufacturing and delivering, THC" conviction from Wisconsin for which he was sentenced to eight months in jail. The State argued Cooper was eligible to be sentenced as a Class X offender based on his background and asked for 15 years' imprisonment.

¶ 9 In mitigation, defense counsel argued that Cooper was in a relationship with the same woman for seven years and had a four-year-old child. Counsel noted that Cooper, who was 26 years old, worked in landscaping to support his family. Counsel argued Cooper was not out looking to commit a crime but had the gun on him for protection and asked for six years' imprisonment. In allocution, Cooper stated that he did not intend to go out and commit a crime and asked for mercy from the court so he could be a productive member of society.

¶ 10 The trial court entered judgment on Count 2, UUWF based on the prior robbery, and merged all other counts. At sentencing, the court sentenced Cooper to seven years in prison with three years of mandatory supervised release (MSR).. It did not expressly state it was merging the counts or that it was imposing the sentence on count 2, UUWF based on a prior robbery. But, the mittimus reflects only one sentence—on count 2—and notes counts 2 through 7 merge. The half sheet reflects counts 2 through 9 merged for sentencing and an unspecified seven-year sentence.

¶ 11 Based on the defendant's background, the trial court determined that Cooper was Class X by background. The court explained the sentencing range was, therefore, 6 to 30 years, and 30 to 60 years if an extended term was imposed, but that "the bottom" was 6 years.

¶ 12 Cooper filed a written motion to reconsider his sentence, which failed to assert that his sentence included an improper double enhancement. The trial court denied the motion, reasoning:

> "I believe that I have given this defendant towards the bottom end of the sentence. The sentencing range, as I pointed out, was 6 to 30 years in the Illinois Department of Corrections, 30 to 60 years extended term, a fine of up to $25,000, and three years mandatory supervised release."

Cooper filed a timely notice of appeal.

¶ 13 Analysis

¶ 14 On appeal, Cooper argues he was sentenced using an improper double enhancement where a prior conviction was used both as an element of the offense of UUWF and to find Cooper eligible for mandatory Class X sentencing. Cooper makes cursory mention that no evidence regarding his lack of a concealed carry license or firearm ownership identification card was presented at trial, as necessary to find him guilty of the six counts of AUUW. But, these are not final judgments as no sentences were imposed on the findings of guilt. See *People v. Salem*, 2016 IL 118693, ¶ 12. Accordingly, the matter is not properly before us on appeal. See *People v. Relerford*, 2017 IL 121094, ¶ 75.

¶ 15 Acknowledging forfeiture of the issue, Cooper asserts we may review it under both prongs of the plain-error doctrine or as an ineffective assistance of counsel claim.

¶ 16 To preserve a sentencing issue for appeal, a defendant must raise the issue in the trial court, including through a written motion to reconsider sentence. *People v. Sharp*, 2015 IL App (1st) 130438, ¶ 132. Cooper failed to do this. Thus, the issue is forfeited on appeal. See *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 11. Sentencing issues, however. raised for the first time on appeal may be reviewed under the plain-error doctrine. *Id.*

¶ 17 To obtain relief under the plain-error doctrine with respect to a sentencing issue, the defendant must show "(1) the evidence at the sentencing hearing was closely balanced, or (2) the

error was so egregious as to deny the defendant a fair sentencing hearing." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). We first determine whether any error occurred. *Sauseda*, 2016 IL App (1st) 140134, ¶ 11.

¶ 18 An improper double enhancement takes place when either "(1) 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, or (2) the same factor is used twice to elevate the severity of the offense itself." *People v. Guevara*, 216 Ill. 2d 533, 545 (2005). A double enhancement is not improper where the legislature has clearly expressed an intent to allow double enhancement. *People v. Chaney*, 379 Ill. App. 3d 524, 532 (2008).

¶ 19 To sustain a conviction for UUWF, the State must prove the defendant (i) knowingly possessed a firearm or firearm ammunition and (ii) had a prior felony conviction. 720 ILCS 5/24-1.1(a) (West 2014). The State charged, and Cooper was convicted, of UUWF based on a previous robbery conviction in case No. 07 CR 1106501.

¶ 20 Generally, UUWF is a Class 3 felony. 720 ILCS 5/24-1.1(e) (West 2014). If, however, a defendant has a previous conviction for a forcible felony, the offense is a Class 2 felony. *Id.* Here, because, as charged, Cooper's prior felony conviction was for robbery, a forcible felony (720 ILCS 5/2-8 (West 2014)), he faced a Class 2 UUWF offense, which was the only class of UUWF applicable to him. See *People v. Easley*, 2014 IL 115581, ¶¶ 27-28. Thus, the State used Cooper's prior robbery conviction to satisfy an element of Class 2 UUWF. See *People v. McLaurin*, 2018 IL App (1st) 170258, ¶ 20.

¶ 21 Having proved Cooper guilty of Class 2 UUWF, the State then sought to sentence him as a Class X offender based on his criminal history. The State claimed Cooper was Class X by background based on the same Class 2 robbery conviction used as an element of his UUWF

offense, as well as the prior Class 2 unlawful use of a weapon by a gang member conviction. Section 5-4.5-95(b) of the Unified Code of Corrections (Code), provides, in pertinent part:

> "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 ***." 730 ILCS 5/5-4.5-95(b) (West 2014).

The court agreed in sentencing Cooper to seven years' imprisonment with three years' MSR as a Class X offender.

¶ 22 By using the same robbery conviction to both establish UUWF as a Class 2 felony, and to then impose a harsher sentence as a Class X offender, the improper double enhancement occurred. See *Chaney*, 379 Ill. App. 3d at 532. Nothing in the language of section 5-4.5-95(b) of the Code indicates the legislature intended to allow a double enhancement in Class X sentencing. *Id.* at 531-32 (analyzing section 5-5-3(c)(8) of the Code, which was renumbered as section 5-4-5-95(b), effective July 1, 2009, the statute at issue); *People v. Owens*, 377 Ill. App. 3d 302, 304-05 (2007) (same).

¶ 23 In reaching this conclusion, we are guided by our decision in *Chaney*. In *Chaney*, as here, the defendant had only two prior Class 2 felonies when he was charged with, as relevant here, UUWF, which is generally a Class 3 offense. *Chaney*, 379 Ill. App. 3d at 529. The State used one of the prior felony convictions as an element of UUWF. *Id.* at 526. Because that prior conviction was for delivery of a controlled substance, his UUWF charge constituted a Class 2 felony. See *id.* at 529. After being convicted of that Class 2 UUWF, the defendant had a total of

three separate Class 2 felonies, and the trial court sentenced him as a Class X felon under the then-section 5-5-3(c)(8) of the Code (now section 5-4-5-95(b)). *Id.* at 526-27, 529.

¶ 24 On appeal, this court vacated the sentences and remanded for resentencing, finding that sentencing the defendant as a Class X felon was improper double enhancement. *Id.* at 532. The court concluded that it was improper to use one of the defendant's prior Class 2 felonies to both "establish the offense as a Class 2 felony and then also to impose Class X sentencing." *Id.* The court explained the defendant's UUWF conviction constituted a Class 2 felony "only because of his prior Class 2 felony convictions under the Act." *Id.* at 531 (citing 720 ILCS 5/24-1.1(e) (West 2004)).

¶ 25 As in *Chaney*, Cooper was convicted of a Class 2 offense (here UUWF) based on a prior felony conviction proven as an element of UUWF, and was subsequently sentenced as a Class X offender based on the same prior felony (Cooper has only two Class 2 or higher prior convictions). Hence, an impermissible double enhancement.

¶ 26 The State asserts that Cooper's prior robbery conviction "was used to satisfy an element of the offense, and was never used to enhance a Class offense. Cooper was charged, convicted, and sentenced as a Class 2 offender." The State is correct that the classification of Cooper's offense did not change from a Class 2 to a Class X; rather, he was sentenced under Class X guidelines. See *People v. Thomas*, 171 Ill. 2d 207, 224 (1996). But, the trial court explicitly sentenced Cooper as a Class X offender, "based on the defendant's background, he is Class X by background," which consisted of only the robbery and one other felony conviction. See 730 ILCS 5/5-4.5-95(b) (West 2014) (where defendant's criminal background satisfies requirements of statute, "that defendant shall be sentenced as a Class X offender"). Therefore, Cooper's prior

conviction for robbery improperly was used both to satisfy an element of Class 2 UUWF and to require him to be sentenced as a Class X offender.

¶ 27 The State asserts that *Thomas* "is guiding law and precedent on the issue, so citations to appellate cases where the facts differ should not guide this Court in its decision." We disagree.

¶ 28 There, the defendant was convicted of second-degree murder, a Class 1 felony, and sentenced as a Class X offender based on his prior convictions to 15 years' imprisonment. *Thomas*, 171 Ill. 2d at 210. The appellate court affirmed the convictions but reversed the sentence and remanded for resentencing, finding the trial court erred in using defendant's prior conviction twice to enhance his sentence. *Id.*

¶ 29 Both the defendant and the State appealed. Relevant here, the State contended the appellate court erred in finding an improper double enhancement where the defendant's two prior Class 2 felony convictions were used both to qualify the defendant for Class X sentencing under section 5-5-3(c)(8) (now section 5-4-5-95(b)) and as an aggravating factor to increase his sentence beyond the minimum Class X term. *Id.* at 223. Our supreme court agreed with the State and held there was no double enhancement involved under the circumstances:

> "Section 5-5-3(c)(8) does not elevate the class of a crime, but merely sets forth criteria under which a defendant shall be sentenced according to the guidelines for a Class X felony. See *People v. Jameson*, 162 Ill. 2d 282, 290 (1994) (under section 5-5-3(c)(8), a defendant's sentence is increased because of prior felony convictions, but the classification of offense with which the defendant is charged and convicted remains the same). Under this statute, the legislature manifested its intent to subject certain defendants convicted of Class 1 and Class 2 felonies to an enhanced sentencing range of from 6 to 30 years. Therefore, defendant's *offense* was not enhanced from a Class 1 to a

Class X felony; he was simply subject to a *single punishment enhancement* to the Class X range." (Emphasis in original.) *Id.* at 224.

¶ 30 Unlike the defendant in *Thomas*, who was convicted of Class 1 second-degree murder with no consideration of his prior Class 2 felonies as an element of the offense, Cooper's conviction for UUWF constituted a Class 2 felony only because of his prior Class 2 felony robbery conviction. See *Chaney*, 379 Ill. App. 3d at 531 (distinguishing *Thomas* on this point). Accordingly, as none of the *Thomas* defendant's prior felony convictions were used to prove an element of the Class 1 second-degree murder offense, and one of Cooper's prior felony convictions was used to satisfy an element of Class 2 UUWF, *Thomas* is distinguishable.

¶ 31 Finally, the State argues our supreme court's decision in *Easley* "rejected the argument that double enhancement exists where the same prior felony conviction was used both to prove an element of the offense and to impose a harsher sentence." But, in *Easley*, the defendant argued he was subjected to an improper double enhancement because his same prior felony conviction for UUWF was used to prove an element of the charged UUWF and to enhance that charge from a Class 3 offense to a Class 2 felony. *Easley*, 2014 IL 115581, ¶ 27. Our supreme court rejected the argument that the defendant's UUWF charge was ever enhanced from a Class 3 to a Class 2 felony. *Id.* ¶¶ 27-28. Instead, the defendant faced the only UUWF charge he could based on his prior UUWF conviction: Class 2 UUWF charge. *Id.* ¶ 28. Because the prior UUWF conviction was a felony violation of Article 24 of the Criminal Code, section 24-1.1(e) mandated that the charged UUWF was a Class 2 offense, and the defendant was then sentenced as a Class 2 offender on that charge. *Id.* ¶¶ 26, 28.

¶ 32 Here, unlike in *Easley*, Cooper's prior robbery conviction was used to prove an element of Class 2 UUWF and to subject Cooper to mandatory Class X sentencing. Unlike in *Easley*,

Cooper here did not receive a Class 2 sentence but, instead, was sentenced as a Class X offender. This was an impermissible double enhancement.

¶ 33 We are mindful that Cooper was sentenced to seven years' imprisonment, which is within the sentencing range for Class 2 UUWF. See 720 ILCS 5/24-1.1(e) (West 2014) (Class 2 UUWF carries a sentencing range of 3 to 14 years' imprisonment). Nevertheless, Cooper was sentenced as a Class X offender, which carries a non-extended prison term of 6 to 30 years. See 730 ILCS 5/5-4.5-25(a) (West 2014). Class X sentences also include a three-year term of MSR, which defendant received. See 730 ILCS 5/5-4.5-25(l) (West 2014). On the other hand, Class 2 sentences mandate two years' MSR. 730 ILCS 5/5-4.5-35(l) (West 2014). Accordingly, "[a]lthough, defendant's seven-year sentence fell within the permissible sentencing range for a Class 2 felony the cause must still be remanded for resentencing as the trial court relied upon the wrong sentencing range in imposing sentence." *People v. Hall*, 2014 IL App (1st) 122868, ¶ 15; see also *Owens*, 377 Ill. App. 3d at 305-06.

¶ 34 Having found error occurred, we may provide Cooper relief under the plain-error doctrine. See *Owens*, 377 Ill. App. 3d at 304; see also *People v. Fort*, 2017 IL 118966, ¶19 (holding. "'[t]he imposition of an unauthorized sentence affects substantial rights' and, thus, may be considered by a reviewing court even if not properly preserved in the trial court" (quoting *People v. Hicks*, 181 Ill. 2d 541, 545 (1998)).

¶ 35 We vacate Cooper's sentence and remand the matter to the circuit court of Cook County with directions to sentence Cooper as a Class 2 offender for UUWF, which carries a sentencing range of 3 to 14 years' imprisonment. See 720 ILCS 5/24-1.1(e) (West 2014).

¶ 36 Vacated in part; remanded with directions.