2019 IL App (1st) 162414-U

Sixth Division
July 12, 2019

No. 1-16-2414

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 7816
	)	
JOSEPH SMITH,	)	Honorable
	)	Thomas J. Byrne,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Where defendant's prior conviction did not constitute a qualifying offense for background-based Class X sentencing, the trial court committed plain error by imposing a Class X sentence. Defendant's sentence is vacated and the cause is remanded for resentencing and to allow defendant to file a motion raising alleged errors regarding *per diem* credit against fines.

¶ 2 Following a bench trial, defendant Joseph Smith was convicted of robbery (720 ILCS 5/18-1(a) (West 2014)) and sentenced, based on his criminal history, as a Class X offender to seven years in prison, to be followed by three years of mandatory supervised release (MSR). On

appeal, defendant contends that his criminal history did not qualify him for Class X sentencing. He also contends that he is entitled to *per diem* presentence custody credit against a number of fines imposed by the trial court. For the reasons that follow, we vacate defendant's sentence and remand.

¶ 3 Defendant's conviction arose from the events of May 2, 2015. At trial, the State introduced evidence that on that date, defendant entered a Chicago barber shop, took a stack of money from an area near the cash register, and pushed an employee while attempting to run outside. Customers caught defendant and held him until the police arrived. The trial court found defendant guilty of robbery, a Class 2 felony, and subsequently denied his posttrial motion.

¶ 4 At sentencing, the State and the trial court agreed that defendant was "Class X mandatory based on *** two prior Class 2 felonies." A Chicago Police Department criminal history report reveals that these two felonies were (1) a conviction for robbery on August 23, 2011, when defendant was 17 years old, and (2) a conviction for robbery on December 14, 2012, when he was 18 years old. The State urged the trial court to impose a sentence of at least 15 years, while defense counsel asked that his client be sentenced "in the low range," noting that six years would be the minimum sentence. The trial court sentenced defendant to seven years in prison and three years of MSR, and imposed $469 in fines, fees, and costs. Defense counsel orally indicated that defendant waived reconsideration of the sentence.

¶ 5 On appeal, defendant first contends that his criminal history did not qualify him for Class X sentencing. Defendant's contention is based on the language of section 5-4.5-95(b) of the Unified Code of Corrections, which provides that when a defendant over the age of 21 is convicted of a Class 1 or Class 2 felony, Class X sentencing is mandatory if he has twice been

convicted "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." 730 ILCS 5-4.5-95(b) (West 2014). Defendant admits that his 2012 robbery conviction is a qualifying prior offense under the statute. But he asserts that his 2011 robbery conviction, because it was entered when he was 17 years old, is not. He argues that due to subsequent revisions to the Juvenile Court Act which raised the age for exclusive juvenile court jurisdiction from 16 to 17 (see Pub. Act 98-61 (eff. Jan. 1, 2014) (amending 705 ILCS 405/5-120)), his 2011 robbery conviction is not "an offense now [on May 2, 2015] classified in Illinois as a Class 2 or greater Class felony." Rather, according to his argument, it is an offense that on May 2, 2015, would have been resolved with delinquency proceedings in juvenile court and would not have been subject to criminal laws. Defendant asserts that the statute is ambiguous and that under the rule of lenity, the ambiguity must be resolved in his favor.

¶ 6 As an initial matter, we note the State's argument that defendant has forfeited this issue because he failed to raise an objection at his sentencing hearing and in a postsentencing motion. Defendant has responded in his reply brief that the issue may be reached as a matter of plain error. See *People v. Williams*, 193 Ill. 2d 306, 347-48 (2000) (plain error may be raised in reply brief). We agree with defendant. Under the plain error doctrine, a reviewing court may excuse a party's procedural default if a clear or obvious error has occurred and either: (1) 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) the 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. *People v. Staake*, 2017 IL 121755, ¶ 31. A sentence that is not

statutorily authorized affects a defendant's substantial rights and is reviewable as second prong plain error. *People v. Foreman*, 2019 IL App (3d) 160334, ¶¶ 41, 42 (plain error doctrine allowed review of the defendant's claim that a prior conviction did not constitute a qualifying prior offense for Class X sentencing). However, before we consider application of the plain error doctrine, we must determine whether any error occurred. *People v. Wooden*, 2014 IL App (1st) 130907, ¶ 10. This is because " 'without error, there can be no plain error.' " *Wooden*, 2014 IL App (1st) 130907, ¶ 10 (quoting *People v. Smith*, 372 Ill. App. 3d 179, 181 (2007)).

¶ 7 Whether defendant's 2011 robbery conviction constitutes a qualifying prior offense for purposes of mandatory Class X sentencing involves a question of statutory construction. As such, it is a question of law subject to *de novo* review. *People v. Baskerville*, 2012 IL 111056, ¶ 18. The primary objective when interpreting a statute is to ascertain and give effect to the intent of the legislature. *Id.* The best indicator of this intent is the statute's language, which is to be given its plain and ordinary meaning. *Id.* In determining the plain meaning of a statute, a court must consider the statute in its entirety and be mindful of the subject it addresses and the legislature's purpose in enacting it. *Id.* A court may not depart from the plain meaning of a statute and read into it exceptions, limitations, or conditions that are in conflict with the express legislative intent. *Id.* Only when the language of a statute is ambiguous may a court consider extrinsic aids, such as legislative history, to determine the meaning of the statutory language. *Foreman*, 2019 IL App (3d) 160334, ¶ 43.

¶ 8 The statute at issue here is section 5-4.5-95(b) of the Unified Code of Corrections (Code), which falls under the heading "General Recidivism Provisions" and provides as follows:

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

This court has previously found that the language of this statutory section "is clear and unambiguous," and that its "focus is on the elements of the prior offense." *Foreman*, 2019 IL App (3d) 160334, ¶ 46. Because the statute is unambiguous, we need not consider its legislative history. *Id.* ¶ 43. Similarly, we need not rely on the rule of leniency to resolve this case. See *People v. Jamison*, 162 Ill. 2d 282, 296 (1994) (ambiguities in criminal statutes must be resolved in favor of the criminal defendants).

¶ 9 We agree with defendant that because his 2011 robbery, had it been committed on May 2, 2015, would have been resolved with delinquency proceedings in juvenile court rather than criminal proceedings, it is not "an offense now *** classified in Illinois as a Class 2 or greater Class felony" and therefore, is not a qualifying offense for Class X sentencing. In arguing against this conclusion, the State asserts that even if defendant's 2011 robbery conviction had been a juvenile court delinquency adjudication, our supreme court held in *People v. Jones*, 2016 IL 119391, ¶ 42 (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)), that juvenile adjudications fall within *Apprendi*'s "prior conviction" exception and can be used to enhance a defendant's

sentence. The State's reliance on *Jones* is in error because that case involved a statute that, unlike section 5-4.5-95(b), specifically provided for the consideration of juvenile adjudications.

¶ 10 In *Jones*, the defendant had been sentenced to an extended-term sentence based on a prior juvenile adjudication of delinquency. *Id.* ¶ 1. The issue presented to our supreme court was whether a prior juvenile delinquency adjudication was the equivalent of a prior conviction for purposes of extended-term sentencing under *Apprendi* and whether such a fact must have been alleged in the indictment and proved beyond a reasonable doubt. *Id.* ¶ 9. To resolve this issue, the *Jones* court looked to section 5-5-3.2 of the Code (730 ILCS 5/5-5-3.2 (West 2010)), which sets forth various factors to be considered as reasons to impose an extended-term sentence. *Id.* ¶ 12. The factor relevant in *Jones* appeared in subsection (b)(7), which provides as follows:

> "(7) When a defendant who was at least 17 years of age at the time of the commission of the offense is convicted of a felony and has been previously adjudicated a delinquent minor under the Juvenile Court Act of 1987 for an act that if committed by an adult would be a Class X or Class 1 felony when the conviction has occurred within 10 years after the previous adjudication, excluding time spent in custody." 730 ILCS 5/5-5-3.2(b)(7) (West 2010).

¶ 11 The *Jones* court observed that because the defendant had been adjudicated delinquent of the offense of residential burglary, section 5-5-3.2(b)(7) authorized the circuit court to impose an extended-term sentence. *Jones*, 2016 IL 119391, ¶ 12. The *Jones* court then went on to hold that "for purposes of extended-term sentencing," a juvenile adjudication is no less valid or reliable a form of recidivism than is a prior conviction (*id.* ¶ 29), and that the State was not required to allege the fact of the defendant's juvenile adjudication in the indictment or to prove its existence

beyond a reasonable doubt, as the juvenile adjudication fell within *Apprendi*'s prior-conviction exception (*id.* ¶ 33).

¶ 12 Unlike *Jones*, the instant case does not involve *extended-term* sentencing based on a defendant's criminal background, but rather, recidivism-based *Class X* sentencing. The statute at issue in *Jones* specifically provides for the consideration of prior juvenile adjudications as a reason for imposing an extended-term sentence. See 730 ILCS 5/5-5-3.2(b)(7) (West 2014). In contrast, the statute at issue here is silent with regard to adjudications of delinquency. See 730 ILCS 5/5-4.5-95(b) (West 2014). We find this difference dispositive. "When the legislature decides to authorize certain sentencing enhancement provisions in some cases, while declining to impose similar limits in other provisions within the same sentencing code, it indicates that different results were intended." *People v. Bailey*, 2015 IL App (3d) 130287, ¶ 13.

¶ 13 Moreover, in *People v. Taylor*, 221 Ill. 2d 157, 159, 163, 173 (2006), our supreme court distinguished the question of the constitutionality of using juvenile adjudications as functional equivalents of convictions for enhancement purposes under *Apprendi* from the question of whether juvenile adjudications constitute "convictions" under the Criminal Code of 1961. In doing so, the *Taylor* court observed that in the absence of a statute expressly defining a juvenile adjudication as a conviction, Illinois courts have consistently held that juvenile adjudications do not constitute convictions. *Id.* at 176. Noting that "[i]t is readily apparent that the legislature understands the need for specifically defining a juvenile adjudication as a conviction when that is its intention," the *Taylor* court found that because the legislature had not done so in the statutory sections at issue in that case, it was "constrained to find that [the legislature] had no intent to do so." *Id.* at 178.

¶ 14 The statute providing for Class X sentencing by background, section 5-4.5-95(b), is limited by its plain language to prior "convictions." 730 ILCS 5/5-4.5-95(b) (West 2014). Conversely, the statute providing for background-based extended-term sentencing, section 5-5-3.2(b), specifically authorizes the use of juvenile adjudications in addition to convictions. 730 ILCS 5/5-5-3.2(b)(1), (7) (West 2014). The subsection allowing the use of juvenile adjudications for this purpose is necessary precisely because juvenile adjudications are not convictions.

¶ 15 The State's blanket assertion that juvenile adjudications fall within *Apprendi*'s "prior conviction" exception and can be used to enhance a defendant's sentence is misguided. A juvenile adjudication is not a criminal conviction in Illinois, except where specifically provided by law. See *Taylor*, 221 Ill. 2d at 176, 178-79. *Apprendi* may indeed permit the use of a juvenile adjudication to extend a sentence without proving that adjudication beyond a reasonable doubt. See *Jones*, 2016 IL 119391, ¶ 28. But this is so only because subsection 5-5-3.2(b)(7) specifically allows prior juvenile adjudications to be considered as grounds for imposing an extended-term sentence. That the legislature added this specific provision to section 5-5-3.2(b) reinforces the point that it also could have expressly allowed juvenile adjudications to be used to impose background-based Class X sentences under section 5-4.5-95(b) had it intended that result. Where the legislature did not include such language in section 5-4.5-95(b), we cannot find that prior juvenile adjudications may be used to qualify defendants for Class X sentencing.

¶ 16 Had defendant committed his 2011 robbery under the laws in effect on May 2, 2015, the juvenile court would have had exclusive jurisdiction. See Pub. Act 98-61 (eff. Jan. 1, 2014) (amending 705 ILCS 405/5-120). The offense would have led to a juvenile adjudication rather than a Class 2 felony conviction. As such, we find that defendant's 2011 robbery it is not "an

offense now *** classified in Illinois as a Class 2 or greater Class felony" and should not have been considered a qualifying offense for Class X sentencing by background. Where the Class X sentence was not statutorily authorized and affected defendant's substantial rights (see *Foreman*, 2019 IL App (3d) 160334, ¶ 42), the trial court committed plain error in sentencing defendant as a Class X offender based on his criminal background.

¶ 17 As relief, defendant requested in his opening brief that this court simply order the circuit court to issue a corrected mittimus reducing his term of MSR from a Class X term of three years to a Class 2 term of two years. Defendant reasoned that his seven-year sentence was within the range for a Class 2 felony, and because he was scheduled to be released from prison on October 23, 2018 – a date he predicted would precede our decision – the only relief that could be granted would be a reduction of the term of MSR. However, since the time defendant filed his opening brief, his release date has changed. As defendant notes in his reply brief, his current projected discharge date is July 16, 2020. Illinois Department of Corrections, *Internet Inmate Status*, https://www.idoc.state.il.us/subsections/search/inms_print.asp?idoc=M33684 (last visited June 28, 2019) [https://perma.cc/FN8S-JYUW]. In light of this change in circumstances, we believe the better course is to vacate defendant's Class X sentence and remand to the circuit court for resentencing as a Class 2 offender.

¶ 18 Defendant's second contention on appeal is that he is entitled to *per diem* presentencing custody credit against a number of assessments imposed by the trial court. On February 26, 2019, while this appeal was pending, our supreme court adopted new Illinois Supreme Court Rule 472, which sets forth the procedure in criminal cases for correcting sentencing errors in, as relevant here, the application of *per diem* credit against fines. Ill. S. Ct. R. 472(a)(2) (eff. Mar. 1, 2019).

On May 17, 2019, Rule 472 was amended to provide that "[i]n all criminal cases pending on appeal as of March 1, 2019, or appeals filed thereafter in which a party has attempted to raise sentencing errors covered by this rule for the first time on appeal, the reviewing court shall remand to the circuit court to allow the party to file a motion pursuant to this rule." Ill. S. Ct. R. 472(e) (eff. May 17, 2019). "No appeal may be taken" on the ground of any of the sentencing errors enumerated in the rule unless that alleged error "has first been raised in the circuit court." Ill. S. Ct. R. 472(c) (eff. May 17, 2019). Here, defendant did not file a postsentencing motion or otherwise raise the issue of *per diem* credit in the circuit court. Therefore, pursuant to Rule 472, we "remand to the circuit court to allow [defendant] to file a motion pursuant to this rule," raising the alleged errors regarding *per diem* credit. Ill. S. Ct. R. 472(e) (eff. May 17, 2019).

¶ 19 For the reasons explained above, we vacate defendant's Class X sentence. We remand to the circuit court for resentencing as a Class 2 offender and to allow defendant to file a motion pursuant to Rule 472(c).

¶ 20 Sentence vacated; remanded.