2018 IL App (1st) 151552-U
No. 1-15-1552
June 14, 2018

SECOND DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	Of Cook County.
Plaintiff-Appellee,)	
)	No. 14 CR 14222
v.)	
)	The Honorable
BRENON PENISTER,)	Geary W. Kull,
)	Judge Presiding.
Defendant-Appellant.)	

JUSTICE NEVILLE delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's stipulation at trial that he did not have a FOID card justified the court's inference that he did not have a concealed carry license. Because police conducting a valid *Terry* stop saw evidence that the defendant possessed a gun, motions to quash arrest and suppress evidence would not have produced a better result for the defendant. But the defendant sufficiently showed ineffective assistance of counsel by showing that counsel failed to present available evidence that the defendant had a prior conviction for a misdemeanor, not a felony.

¶ 2 The trial court found Brenon Penister guilty of possessing a loaded gun in a car without a concealed carry license and sentenced him to 3 years in prison. Penister argues that the

evidence does not prove that he lacked a concealed carry license for the gun, and that he received ineffective assistance of counsel because counsel failed to file motions to quash arrest and suppress evidence, and because counsel failed to present available evidence at sentencing.

¶ 3 We find that the evidence that Penister lacked an FOID card justifies the court's inference that he also lacked a concealed carry license. Motions to quash arrest and suppress evidence would not have prevented the prosecution from presenting evidence that Penister had a gun, and therefore defense counsel's failure to file those motions does not show ineffective assistance of counsel. But Penister showed that he received ineffective assistance at sentencing when counsel failed to present available evidence that Penister had a prior conviction only for a misdemeanor, not a felony. Accordingly, we affirm the conviction but vacate the sentence and remand for resentencing.

¶ 4 BACKGROUND

¶ 5 Around 3 a.m. on May 13, 2014, Officer Lonell Whitlock of the Maywood Police Department saw a yellow car run a red light. Whitlock and his partner followed the yellow car and signaled the driver to pull over. After the driver, Samuel Rockett, did so, the officers asked some questions and then asked Rockett and a passenger, Penister, to step out of the car. Whitlock opened the glove compartment and found a handgun.

¶ 6 A grand jury indicted Penister on three counts of aggravated unlawful use of a weapon in violation of section 24-1.6(a)(1)(3) of the Criminal Code. 720 ILCS 5/24-1.6(a)(1)(3) (West 2014). Count I charged a violation of subsection A-5 (720 ILCS 5/24-1.6(a)(1)(3)(A-5) (West 2014)) in that Penister carried a loaded gun in a car when he did not have "a currently

valid license under the Firearm Concealed Carry Act [430 ILCS 66/1 *et seq.* (West 2014)]." Count II charged a violation of subsection B-5 (720 ILCS 5/24-1.6(a)(1)(3)(B-5) (West 2014)) in that Penister carried in a car an unloaded gun with immediately accessible ammunition when he did not have a concealed carry license. In Count III, the grand jury charged Penister with possessing a gun when he did not have a valid FOID card, in violation of subsection C (720 ILCS 5/24-1.6(a)(1)(3)(C) (West 2014)).

¶ 7 At the bench trial, Whitlock testified that as he approached the stopped yellow car on May 13, 2014, he saw Penister place a large black object in the glove compartment. Whitlock asked Penister what he placed in the glove compartment. Penister said it was a package of cigarettes. Whitlock testified that the object he saw did not look like a pack of cigarettes. Whitlock asked Penister to open the glove compartment. Penister refused. Whitlock then asked Penister to step out of the car so that Whitlock "could conduct a safety search of his immediate area," because Whitlock "fear[ed] that [Penister] was attempting to conceal a weapon." Whitlock found a gun loaded with three rounds of ammunition.

¶ 8 Rockett testified that he did not know who owned the gun, and he had not seen Penister handle a gun that night. The parties stipulated that Penister did not have a valid FOID card.

¶ 9 The trial court asked the parties what distinguished the three counts. A prosecutor answered, "They are all going to merge into one." The court noted the distinction between the charge for lacking an FOID (count III) and the charge for lacking a concealed carry license (count I), but the court said, "I'm not exactly sure why there is 3." The court found Penister guilty as charged, but entered judgment only on count I, the count for carrying a loaded gun in a car without a concealed carry license.

¶ 10 For purposes of sentencing, the parties stipulated that Penister had a prior conviction in case number 09 C4 40415. The parties did not stipulate to the charge on which the court entered judgment in the prior case. According to the presentence investigation report, Penister had a conviction from 2009 for "Carry-Possess Conceal," for which the court sentenced him to 30 months probation. The presentence investigation did not specify the statutory basis for the prior conviction. The report included a criminal history sheet from the Chicago Police Department, and that sheet listed the 2009 conviction as a conviction for a violation of section 24-1(a)(9) of the Criminal Code, which makes carrying a gun while masked a Class 3 felony. See 720 ILCS 5/24-1(a)(9), (b) (West 2014).

¶ 11 At the sentencing hearing, the prosecutor identified the 2009 conviction as a conviction for a violation of section 24-1.6, the same section involved in the 2014 case. Defense counsel did not challenge the prosecutor's characterization of the prior conviction. The trial court applied section 24-1.6(d), which provides: "(1) Aggravated unlawful use of a weapon is a Class 4 felony; a second or subsequent offense is a Class 2 felony for which the person shall be sentenced to a term of imprisonment of not less than 3 years and not more than 7 years." 720 ILCS 5/24-1.6(d)(1) (West 2014). The court sentenced Penister to the minimum term under that section, 3 years in prison. Penister now appeals.

¶ 12 ANALYSIS

¶ 13 Penister argues that the evidence does not prove him guilty, and he received ineffective assistance of counsel in that his attorney failed to file motions to quash the arrest and suppress evidence, and his attorney failed to present evidence that the court in 2009 found him guilty of a misdemeanor, not a felony.

¶ 14 Sufficiency of the Evidence

¶ 15 Penister contends that the prosecution did not prove that he lacked a concealed carry license, as charged in count I. The parties stipulated that Penister had no FOID, but the prosecution presented no evidence as to a concealed carry license.

¶ 16 The State answers that the evidence supports an inference that Penister did not have a concealed carry license because section 25(2) of the Concealed Carry Act requires applicants for a concealed carry license to have "currently valid Firearm Owner's Identification Card[s]." 430 ILCS 66/25(2) (West 2014). Penister contends that he might have had a valid concealed carry license: he might have had an FOID card before 2014, he might have obtained a valid concealed carry license if he had applied for it while he had a valid FOID, and he might have had his FOID invalidated without also having his concealed carry license simultaneously invalidated.

¶ 17 When a defendant challenges the sufficiency of the evidence, the appellate court must decide "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Rush*, 294 Ill. App. 3d 334, 337 (1998). The trier of fact is "not required to search out a series of potential explanations compatible with innocence, and elevate them to the status of a reasonable doubt." *People v. Russell*, 17 Ill. 2d 328, 331 (1959). "The State is not required to exclude every reasonable hypothesis of innocence." *Rush*, 294 Ill. App. 3d at 337.

¶ 18 Penister's sequence of possibilities does not appear sufficient to leave a reasonable doubt as to whether he had a valid concealed carry license when police saw him holding a gun.

Penister stipulated that he did not have a FOID card, and from this stipulation the court could infer that Penister had not complied with section 25(2) of the Concealed Carry Act, which requires applicants for a concealed carry license to have a "currently valid Firearm Owners Identification Card." 430 ILCS 66/25(2)(West 2014). Therefore, the evidence sufficiently supports the conviction for carrying a loaded gun in a car without a concealed carry license.

¶ 19 Motion to Suppress Evidence

¶ 20 Penister argues that he received ineffective assistance of counsel when his attorney failed to file a pretrial motion to suppress the evidence derived from the search of the car. The State answered only that the motion would have failed because Penister lacked standing to object to a search of the car.

¶ 21 In *Rakas v. Illinois*, 439 U.S. 128 (1978), the United States Supreme Court held that courts should not apply a standing analysis to challenges to searches. The *Rakas* court said, "the question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas*, 439 U.S. at 140. Our supreme court adopted the analysis from *Rakas* and held, "the relevant inquiry is whether the person claiming the protections of the fourth amendment had a legitimate expectation of privacy in the place searched. [Citations.] Factors relevant in determining whether a legitimate expectation of privacy exists include the individual's ownership or possessory interest in the property; prior use of the property; ability to control or exclude others' use of the property; and subjective expectation of privacy." *People v.*

Johnson, 237 Ill. 2d 81, 90 (2010). We must determine whether Penister "ha[d] a subjective expectation of privacy, and [whether] society is prepared to recognize that expectation as objectively reasonable." *United States v. Harris*, 526 F.3d 1334, 1338 (11th Cir. 2008); see *People v. Juarbe*, 318 Ill. App. 3d 1040, 1050 (2001).

¶ 22 The State cites *Rakas, Johnson*, and *Juarbe*, in support of its contention that Penister lacks standing to challenge the search of the glove compartment. The courts in all three cases cited considered the *Johnson* factors under the circumstances of each case. The courts did not purport to state a general rule that passengers never have a right to challenge a search of a car the passenger did not own. In at least two cases, courts have held that non-owner passengers had rights to challenge searches of the cars in which they rode. In *Chapa v. State*, 729 S.W.2d 723 (Tx. Ct. Cr. App. 1987), Chapa, while riding in a taxi, stowed some personal effects under the front seat of the cab. The *Chapa* court found that Chapa "had a legitimate expectation of privacy in, and hence standing to challenge the search of, the area under the front seat of the taxicab." *Chapa*, 729 S.W.2d at 729. In *People v. Miller*, 182 N.W.2d 772 (Mich. App. 1970), police investigating a robbery stopped and searched the car in which Miller rode as a passenger. Miller sought to suppress evidence that police found $1300 in cash in the car's glove compartment. The *Miller* court said, "Prior to leaving the seat of the auto at the point of a police gun, the defendant was in a position to exert actual physical control over the money in the glove compartment by a mere flick of his wrist. *** [W]e hold that he had standing to raise the issue." *Miller*, 182 N.W.2d at 773.

¶ 23 Here, Penister showed a subjective expectation of privacy when he placed his property in the car's glove compartment, and, under the reasoning of *Chapa* and *Miller*, society

recognizes that expectation of privacy as objectively reasonable. Thus, Penister has established grounds for finding that, if defense counsel had filed a motion to suppress the evidence discovered in the search, the trial court should have addressed the motion on its merits.

¶ 24 The State, in its brief on appeal, did not argue that the trial court should have denied the motion on its merits. After oral argument, the State sought leave to cite additional authority – from 2013, 2012, 1996, 1984, and 1970 – to argue that if defense counsel filed a motion to suppress, the trial court should have denied it because police lawfully searched the car.

¶ 25 We find the reasoning of *People v. Molina*, 379 Ill. App. 3d 91 (2008), applicable here. The *Molina* court said:

> "The purpose of allowing parties to cite additional authority is to bring this court's attention to relevant or dispositive case law that was decided after the parties' briefs were filed. While we attempt to give the parties the benefit of the doubt when they seek to file additional authority, we certainly do not appreciate the State's attempt here to 'sneak in' a new argument obviously initially overlooked, based on a case that was clearly available at the time its briefs were filed. Consequently, any and all arguments raised in the State's motion to cite additional authority will be disregarded." *Molina*, 379 Ill. App. 3d at 99-100.

¶ 26 By failing to raise the argument in its brief, the State forfeited the issue of whether police lawfully searched the car as part of a valid *Terry* stop. *See People v. Exson*, 384 Ill. App. 3d 794, 803 (2008).

¶ 27 This court has authority to address the issue despite the forfeiture. *People v. Vasquez*, 368 Ill. App. 3d 241, 251 (2006). To find that the failure to file a motion to suppress shows that trial counsel provided ineffective assistance, we must find a reasonable probability that Penister would have achieved a better result if counsel had filed the motion. *People v. Cherry*, 2016 IL 118728, ¶ 24. If we reverse the conviction based on ineffective assistance of counsel, finding that competent counsel would have filed a motion to suppress, the State on remand could assert that all of the cases cited as additional authorities mandate denial of the motion to suppress. To obviate the need for a futile motion, we address the waived issue of whether police lawfully searched the car as part of our determination of whether Penister has shown that he received ineffective assistance of counsel.

¶ 28 The State sought leave to cite *People v. Colyar*, 2013 IL 111835, as authority showing that a motion to suppress would fail. In *Colyar*, police approached a car as part of a *Terry* stop. When they saw a bullet in the car's center console, they ordered Colyar and his passengers to get out of the car. Officers found another bullet in Colyar's pocket and a gun on the floor of the car. The State charged Colyar with weapons offenses. Colyar filed a motion to suppress the evidence seized from the car.

¶ 29 Colyar "argued that the police officers lacked probable cause for any of their conduct because possession of a bullet is not per se illegal and the police officers failed to ask defendant whether he possessed a valid Firearm Owner's Identification (FOID) card. *** Defendant noted that no criminal activity had been reported in the area at the time of the incident and no evidence suggested that he was engaged in criminal activity." *Colyar*, 2013

IL 111835, ¶ 11. The circuit court granted the motion to suppress the evidence. The State appealed. The *Colyar* court said:

> "Reviewing the actions of [the officers] under an objective standard, we believe that a reasonably cautious individual in a similar situation could reasonably suspect the presence of a gun, thus implicating officer safety, based on the bullet clearly visible in defendant's center console. ***
>
> Certainly, based on the presence of a bullet and a reasonable inference that a gun may be present in the vehicle, it was reasonable for [the officers] to suspect that their safety was in danger. As *Terry* instructs, '[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.' [Citation.] Based on the circumstances of this case, we believe that question must be answered affirmatively.
>
> Similarly, because [the officers] could reasonably suspect that their safety was in danger, it was reasonable for them to order defendant and his two passengers out of the vehicle and search them for weapons. In fact, when an officer has a reasonable suspicion during an investigatory stop that the individual may be armed and dangerous, the officer is permitted to take necessary measures to determine whether the person is armed and to neutralize any threat of physical harm. [Citation.]
>
> ***

> *** [U]nder the circumstances of this case, and consistent with [the] extension of *Terry* to permit protective searches of a vehicle's passenger compartment during a *Terry* stop, [the officers], acting on a reasonable fear for their safety, properly searched the passenger compartment of defendant's vehicle and recovered the .454–caliber handgun under the front passenger floor mat.
>
> ***
>
> *** Although the circumstances will vary with each case, the risk to a police officer posed by a potentially armed individual is not always eliminated simply because the weapon is possessed legally.
>
> Accordingly, *** we conclude that defendant's fourth amendment constitutional rights were not violated by the officers' conduct under the circumstances of this case. Following the initial lawful *Terry* stop and the observation of the bullet in plain view in defendant's center console, the conduct of [the officers] was justified by their reasonable suspicion that a gun was present that threatened their safety. The officers' conduct and resulting protective searches were properly limited to locating that gun and neutralizing the threat. Consequently, we conclude that the recovered bullets and handgun are admissible as evidence." *Colyar*, 2013 IL 111835, ¶¶ 43-52.

¶ 30 Here, Whitlock could have had some reasonable apprehension about the black object he saw, and that apprehension justified questioning Penister about the object. See *People v. Sorenson*, 196 Ill. 2d 425, 432 (2001). Penister's apparently false answer to the question warranted the further request that Penister open the glove compartment, and Penister's refusal

gave Whitlock grounds to check the glove compartment, just to protect himself from the real possibility that Penister might have a weapon within reach in the car. See *Michigan v. Long*, 463 U.S. 1032, 1048-49 (1983). If Penister's attorney had brought a motion to suppress evidence, and the trial court had reached the merits of the motion, the trial court should have denied the motion on grounds that the police discovered the evidence in the course of a valid *Terry* stop. Therefore, Penister has not shown a reasonable probability that he would have achieved a better result if his attorney had filed a motion to suppress evidence. *People v. Givens*, 237 Ill. 2d 311, 331 (2010).

¶ 31 Motion to Quash Arrest

¶ 32 Penister contends that his attorney provided ineffective assistance in that she failed to file a motion to quash his arrest. Penister points out that his possession of a gun did not give Whitlock reason to believe he had committed any offense, because Whitlock had no grounds for concluding that Penister did not have a valid FOID card. The State contends that Whitlock had probable cause to arrest Penister because the circumstances showed a substantial possibility of criminal activity. *People v. Loucks*, 135 Ill. App. 3d 530, 532 (1985).

¶ 33 Whitlock testified that the object Penister put in the glove compartment did not look at all like a package of cigarettes. Thus, Whitlock had reason to believe that Penister lied about what he had put in the glove compartment. False statements to police, without circumstances giving rise to a reasonable suspicion of criminal activity, do not create probable cause to arrest the person who lied. *People v. Booker*, 209 Ill. App. 3d 384, 394 (1991); *People v. Reynolds*, 257 Ill. App. 3d 792, 802 (1994). Police had heard no report of nearby criminal

activity and had no reason to believe the car's occupants guilty of any infraction other than running a red light. Penister's false statement that he put cigarettes in the glove compartment did not give police probable cause to arrest him.

¶ 34 The State argues that the discovery of the gun gave Whitlock probable cause to arrest Penister, reasoning that "the police were not required to *** determine whether he had a valid FOID card or a Conceal Carry Permit prior to effectuating his arrest." According to the State's reasoning, an officer has probable cause to arrest anyone engaged in an activity that requires a license, and the officer can wait until after the arrest to determine whether the arrested person has the required license. So any officer can wait outside any courtroom, arrest all persons who acted as attorneys, and find out after the arrests whether the persons had the requisite licenses to practice law. See 705 ILCS 205/1 (West 2016) (unlicensed practice of law punishable as contempt); *People v. Flinn*, 47 Ill. App. 3d 357, 361 (1977) ("arrest and imprisonment may be imposed for civil contempt of court"). If any officer sees a person driving a car, the officer has probable cause to arrest the driver, and the officer can find out later whether the arrested person has a license to drive. See 625 ILCS 5/6-101(b-5) (West 2016).

¶ 35 The police here operated on an outdated assumption – possession of a firearm in and of itself is a crime. Until recently, that was true in the City of Chicago. But the law has shifted dramatically during this decade. Since the legislature has legalized gun possession and concealed carry, many citizens may now possess firearms provided they have followed the regulations. Our legislature has made a policy decision that has legal consequences for how law enforcement officers must deal with possession of firearms. No longer can police

assume that a person seen with a firearm is involved in criminal activity. Law enforcement officers must adjust their procedures so that law-abiding citizens do not face the undue burden of arrest for licensed activity.

¶ 36 Once Officer Whitlock discovered the gun in the glove compartment, he could have attempted to find out whether Penister or Rockett had a license for the gun. If he found evidence that they had no such license, he would have had probable cause to arrest. But if police can lawfully arrest Penister here, without making any effort to determine whether he had a license for the gun, everyone found with a firearm would be subject to arrest, no questions asked.

¶ 37 Firearm owners who might wish to carry a concealed weapon should find that the facts of this case give them some cause for alarm. Even a person who could quickly prove the legality of gun possession would still face onerous arrest. Arrests can have significant legal and reputational consequences. (Imagine, for example, a citizen legally carrying a concealed weapon who is arrested during her morning commute, who then must explain to her supervisor why she arrived hours late for work.) The approach the State advocates here – arrest first, sort it out later – would cause fundamental and manifest injustice.

¶ 38 We must not naively overlook the racially disparate impacts of this kind of police procedure. Consider the police homicide of Philando Castile. See https://www.washingtonpost.com/news/post-nation/wp/2017/06/16/minn-officer-acquitted-of-manslaughter-for-shooting-philando-castile-during-traffic-stop/?utm_term=.364376232971. Castile, stopped for a traffic violation, told the officer that he was carrying a handgun. The officer pulled out his own gun and screamed, "Don't pull it

out." Castile responded, "I'm not pulling it out." The officer fired seven shots, killing Castile. See also https://www.cnn.com/2017/06/20/us/philando-castile-shooting-dashcam/index.html. The entire encounter – from the officer approaching Castile's car to the shooting – took less than a minute.

¶ 39 What led police here to guess that Penister did not have an FOID card or a concealed carry license? The Second Amendment protects all citizens – not just those who appear to police likely to possess an FOID card. Police, prosecutors and judges need to stay alert to potential discriminatory treatment in the arrest of Blacks and other minorities for FOID card and concealed carry violations.

¶ 40 We hold that Penister's possession of a gun did not constitute probable cause to arrest him, as the gun possession did not support an inference that any offense had occurred. See *People v. Aguilar*, 2013 IL 112116, ¶ 20 (the second amendment right to bear arms extends beyond the home); see also *People v. Holliday*, 318 Ill. App. 3d 106, 111 (2001) (more evidence is required to establish probable cause when the question is whether a crime has been committed, rather than whether a suspect committed a known crime); *People v. Rainey*, 302 Ill. App. 3d 1011, 1015 (1999) (defendant's act of furtively concealing object as police approached did not give police probable cause to arrest). Thus, if defense counsel had filed a motion to quash the arrest, the trial court should have granted the motion.

¶ 41 However, we find that Penister has not shown a reasonable probability that he would have achieved a better result from the trial if his attorney had filed a motion to quash the arrest. Under the reasoning of *Colyar*, testimony concerning the gun would remain

admissible as testimony about a search incident to a valid *Terry* stop, even though Whitlock did not have probable cause to arrest Penister.

¶ 42 Sentencing

¶ 43 Finally, Penister argues that he received ineffective assistance of counsel, because his attorney failed to present to the court the sentencing order from his prior conviction, and that sentencing order included evidence of a misdemeanor conviction, not a felony conviction. We note that Penister has served his sentence. However, we find the issue is not moot because having on his criminal record a class 2 felony, rather than a class 3 or class 4 felony, affects his rights. "[T]he probability that a criminal defendant may suffer collateral legal consequences from a sentence already served precludes a finding of mootness." *People v. Jones*, 215 Ill. 2d 261, 267 (2005).

¶ 44 After filing the notice of appeal, Penister supplemented the trial court record with the sentencing order entered in 09 C4 40415. The order identified the statute violated as "720 5/24-1(a)(4)(c-1)," and imposed a sentence of 30 months probation. Section 24-1(a)(4) establishes that violations of the section constitute misdemeanors, not felonies. The State does not address the contention that competent counsel would have presented this evidence to the trial court before sentencing. Instead, the State relies on a computer record of the same conviction, a record never shown to the trial court, which identifies the statute violated as "720 – 5/24 – 1(A)(9)."

¶ 45 The State argues primarily that this court should ignore the sentencing order in 09 C4 40415, because section 24-1(a)(4) has no subsection c-1, and because the trial court should not have imposed a sentence of 30 months probation for a misdemeanor.

¶ 46 The trial judge, at sentencing, saw no reference to either section 24-1(a)(4) or 24-1(A)(9). The parties' arguments at sentencing assumed that the court in 09 C4 40415 found Penister guilty of violating section 24-1.6. The parties now agree that the prior conviction did not arise from a violation of that section. Both parties point to inconsistencies in the public records regarding the conviction in 09 C4 40415. We find that that counsel provided objectively unreasonable assistance when she failed to find the sentencing order in 09 C4 40415 prior to sentencing here. See *People v. Billups*, 2016 IL App (1st) 134006 ¶ 14. Penister has established a reasonable probability that he would have achieved a better result if counsel had presented the evidence, so that the trial court could resolve the conflicts and identify correctly the applicable sentencing statute. We vacate the sentence and remand for resentencing.

¶ 47 CONCLUSION

¶ 48 Because Penister needed to have a valid FOID card to obtain a concealed carry license, the trier of fact could infer from his lack of an FOID card that he had no concealed carry license. Counsel's failure to file motions to quash arrest and suppress evidence does not show ineffective assistance of counsel, because such motions should not have led the court to bar evidence that police found the gun in a valid search incident to a *Terry* stop. However, Penister showed that he received ineffective assistance of counsel when his attorney failed to present to the trial court the sentencing order from his prior conviction, as that order casts doubt on the State's contention that the applicable sentencing statute for the current conviction required a sentence of at least 3 years in prison.

¶ 49 Conviction affirmed; sentence vacated and cause remanded.