

NOTICE

Decision filed 11/13/13. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2013 IL App (5th) 110416-U

NO. 5-11-0416

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Fayette County.
)	
v.)	No. 09-CF-144
)	
BRIAN E. SCHOLLES,)	Honorable
)	Ericka A. Sanders,
Defendant-Appellant.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Welch and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in entering convictions and sentencing defendant on charges in which a *nolle prosequi* order had been entered because the charges were properly reinstated; however, the trial court did err in sentencing defendant to an extended term on count II. We, therefore, reduce defendant's sentence on count II from 10 years to 5 years in the Department of Corrections.

¶ 2 After a jury trial in the circuit court of Fayette County, defendant, Brian E. Scholes, was convicted of one count of unlawful possession of methamphetamine-manufacturing materials (720 ILCS 646/30(a)(1) (West 2008)) (count I) and one count of possession of methamphetamine (720 ILCS 646/60 (West 2008)) (count II). Defendant was sentenced to 12 years on count I and to an extended term of 10 years on count II, to be served concurrently to each other and consecutively to a sentence he was serving on a previous conviction. On appeal, defendant contends: (1) the trial court erred in entering convictions and sentencing him on charges in which a *nolle prosequi* order had been entered; (2) in the alternative, the trial court erred in imposing an extended-term sentence on count II. We affirm, but agree

that defendant's sentence on count II should be reduced to the maximum sentence of five years.

¶ 3

BACKGROUND

¶ 4 On August 20, 2009, the State filed count I and count II against defendant. After a preliminary hearing, the trial court found probable cause. On February 1, 2010, the State filed a motion to nol-pros both counts. The trial court granted the motion. On July 1, 2010, the State filed a motion to reinstate the charges. The State pointed out that the statute of limitations had not run on the charges and argued that reinstatement of the charges "will not result in any unfair prejudice to the defendant." A hearing was scheduled for July 7, 2010.

¶ 5 On that date, defendant appeared *pro se*. Defendant was already in custody and admitted he was currently in jail on "[a]bout 30 other things." Defendant specifically stated he had reasons why the instant charges should not be reinstated. The trial court appointed a public defender on the instant charges. The trial court told defendant to take up his objections with regard to the reinstatement of the charges with his attorney, but specifically stated that charges "are re-filed and reinstated as of today." The trial court then scheduled the first appearance on July 12, 2010.

¶ 6 At the first appearance, defendant was represented by his appointed counsel who requested a preliminary hearing on the reinstated charges. The State argued that another preliminary hearing was not necessary because a preliminary hearing was previously conducted and probable cause was found before the *nolle prosequi* order was entered. The trial court continued the case and reset it for July 21, 2010. At that time, defense counsel argued that defendant was entitled to another preliminary hearing because "the *nolle pros* has the effect of returning its case to the posture before the commencement of the action." The trial court concluded: "We can have a preliminary hearing today. [The State] can offer the preliminary hearing transcript from the last one and probable cause is found." Thereafter,

the State submitted a copy of the transcript from the preliminary hearing conducted on March 10, 2010. Ultimately, the trial court denied defense counsel's request for a new preliminary hearing.

¶ 7 After a jury trial, defendant was convicted on both counts and sentenced to 12 years on count I and an extended term of 10 years on count II, with the sentences to run concurrently, but consecutively to a previous sentence. Defendant filed a timely notice of appeal, raising the two issues previously set forth. Because defendant does not raise any arguments concerning the sufficiency of the evidence presented at trial, we need not recite the evidence presented against him.

¶ 8 ANALYSIS

¶ 9 I. *Nolle Prosequi*

¶ 10 The first issue raised by defendant is whether the trial court erred in entering convictions and sentencing him on charges which were subject to a previous *nolle prosequi* order. Defendant argues that once a *nolle prosequi* was entered, no charges remained, and merely filing a motion to reinstate was insufficient, as it was necessary for the State to refile the charges and conduct another preliminary hearing. The State responds that the trial court properly permitted reinstatement of the nol-prossed charges. The State further responds that given the fact that defendant had previously been afforded a full preliminary hearing, he suffered no prejudice as a result of the trial court's refusal to conduct a second preliminary hearing. We agree with the State.

¶ 11 Our supreme court recently addressed this issue in *People v. Hughes*, 2012 IL 112817, 983 N.E.2d 439. The court acknowledged that it "previously stated that a *nolle prosequi* order 'requires the institution of a new and separate proceeding to prosecute the defendant[,]'
Ferguson v. City of Chicago, 213 Ill. 2d [94,] 101 [(2004)]; *People v. Woolsey*, 139 Ill. 2d 157, 168 (1990)," but pointed out that in such cases it had not considered whether the State

could alternatively move to vacate and reinstate an identical charge. *Hughes*, 2012 IL 112817, ¶ 24, 983 N.E.2d 439. The *Hughes* court then went on to state that it addressed this particular issue in *People v. Watson*, 394 Ill. 177, 68 N.E.2d 265 (1946):

"There, the court considered whether the trial court had the authority to set aside, *i.e.*, vacate, the previous *nolle prosequi* order and reinstate a burglary charge. The court found vacating to be a proper exercise of the trial court's authority. Citing cases from other jurisdictions that had allowed this procedure, *Watson* recognized that the entry of the *nolle prosequi* does not deprive the court of its inherent authority ' "to vacate any judgment or order that may have been made at that term." ' *Id.* at 181 (quoting *State v. Lonon*, 56 S.W.2d 378, 380 (Mo. 1932)); see also *People v. DeBlieck*, 181 Ill. App. 3d 600, 606 (1989) (recognizing *Watson*'s holding and stating, 'If the dismissal was a *nolle prosequi*, the State could either refile the complaint or move to vacate the *nolle prosequi*, have the original charge reinstated, and proceed on the original charge.'). We continue to recognize the validity of this procedure when done before jeopardy attaches, prior to a final judgment, and in the absence of any applicable constitutional or statutory limitations which a defendant may raise." *Hughes*, 2012 IL 117817, ¶ 25, 983 N.E.2d 439.

In *Hughes*, the charge in question to which the defendant pled guilty had been nol-prossed, but the record reflected that the State was unaware of the previous dismissal and, therefore, failed to either refile the charging instrument or seek to vacate the dismissal and reinstate the charge. *Hughes*, 2012 IL 112817, ¶ 26, 983 N.E.2d 439.

¶ 12 Despite the fact that the supreme court found the indictment under which the defendant pled was defective because it failed to charge the offense to which the defendant pled guilty, it did not find that the circuit court had been divested of jurisdiction. While it found that a successful challenge could render the conviction voidable, it was not void for

lack of jurisdiction. Ultimately, "the failure to refile the charging instrument or seek to vacate and reinstate the charge based on the same offense as previously charged in count VI of the indictment did not affect the power of the circuit court to hear and render a judgment on the plea." *Hughes*, 2012 IL 112817, ¶ 30, 983 N.E.2d 439.

¶ 13 Defendant insists that *Hughes* is inapplicable because *Hughes* is an appeal after a guilty plea and the first time anyone objected to the problem created by the entry of *nolle prosequi* order was on direct appeal; however, we believe the instant case presents as strong a challenge as *Hughes* in terms of finding jurisdiction and allowing a defendant to be reprosecuted based upon counts which were subject to a previous *nolle prosequi* order. In *Hughes*, it was clear that the State was unaware of the previous dismissal via *nolle prosequi* and failed to either refile the charging instrument or seek to vacate the dismissal and reinstate the charge. *Hughes*, 2012 IL 112817, ¶ 26, 983 N.E.2d 439. In the instant case, the State was well aware of the previous entry of a *nolle prosequi* order, and, thus, on July 1, 2010, filed a motion to reinstate the charges.

¶ 14 The motion to reinstate specifically set forth that the two counts had been previously nol-prossed, but the State "now decided to proceed with the charges of Unlawful Possession of Methamphetamine Manufacturing Materials and Unlawful Possession of Methamphetamine." The State pointed out that the statute of limitations had not run on the charges and that reinstatement of the charges would not result in any unfair prejudice to defendant. Nevertheless, defense counsel argued vigorously that defendant was entitled to a new preliminary hearing. The trial court pointed out that a preliminary hearing had previously been conducted and probable cause was found. A copy of the transcript from the preliminary hearing which was conducted on March 10, 2010, was submitted for the record.

¶ 15 A trial judge is presumed to know the law, and a reviewing court ordinarily presumes the trial judge followed the law unless the record indicates otherwise. *People v. Groel*, 2012

IL App (3d) 090595, ¶ 43, 970 N.E.2d 1259. Under the circumstances presented here, we can presume that the trial court was well aware that the reinstatement of the charges also required vacatur of the previous *nolle prosequi* order. Most importantly, it is clear that defendant suffered no prejudice from the procedure followed below and the reinstatement of counts I and II which were previously subject to a *nolle prosequi* order. Relying on *Hughes*, we find the trial court acted properly, and no error occurred.

¶ 16

II. Extended-Term Sentence

¶ 17 The State concedes, and we agree with defendant that he was improperly given an extended-term sentence on count II because that charge was not the most serious offense for which he was convicted. Accordingly, pursuant to this court's authority under Illinois Supreme Court Rule 366 (eff. Feb. 1, 1994), we hereby modify defendant's sentence on count II by reducing it from an extended 10 years' imprisonment to 5 years' imprisonment.

¶ 18

CONCLUSION

¶ 19 For the foregoing reasons, the judgment of the circuit court of Fayette County is hereby affirmed, but defendant's sentence on count II is reduced from 10 years' imprisonment to 5 years' imprisonment.

¶ 20 Affirmed as modified.