

2019 IL App (1st) 162945-U

No. 1-16-2945

Order filed June 14, 2019

Fifth Division

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).

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. 16 CR 342
)	
KENNETH KEITH,)	Honorable
)	Thomas J. Byrne,
Defendant-Appellant.)	Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm defendant's sentence over his contention that the record was insufficient to show he was eligible for Class X sentencing.

¶ 2 Following a jury trial, defendant Kenneth Keith was convicted of aggravated battery of a peace officer (720 ILCS 5/12-3.05(d)(4) (West 2014)) and sentenced, based on his criminal history as a Class X offender, to six years' imprisonment. On appeal, defendant contends the trial

court erroneously sentenced him as a Class X offender where the record was insufficient to demonstrate he had the requisite qualifying convictions. For the following reasons, we affirm.

¶ 3 Because defendant does not challenge the sufficiency of the evidence to sustain his conviction, we recite only those facts necessary to our disposition. The evidence at trial showed that on September 13, 2015, defendant punched a uniformed armed security officer at Rush University Medical Center.

¶ 4 Following the jury's guilty verdict, the parties and court discussed defendant's criminal background. The court noted the State previously advised that defendant was "Class X by background." The State informed the court defendant had "a murder [conviction] which he served 25 years for" and a possession of a stolen motor vehicle (PSMV) conviction. Defense counsel stated that defendant had "a couple of deliveries. *** He had the murder when he was 19 years old." Defendant interjected that he was "17," not 19 years old. Based on that background, the court revoked defendant's bond, finding "It's mandatory Class X sentencing." The court also ordered a presentence investigation report (PSI).

¶ 5 The court denied defendant's posttrial motion to vacate the jury verdict or alternatively for a new trial. During the sentencing hearing, defense counsel made several corrections to defendant's PSI, including indicating the correct offense for which he was convicted and correcting the judge's name and date of the jury verdict. Defense counsel also pointed out that defendant had indicated that he was not honorably discharged from the military.

¶ 6 Defendant's PSI showed he had a prior conviction for manufacture and delivery of between 1 and 15 grams of cocaine in case number "97CR 3048001" and was sentenced to six years' imprisonment on January 14, 1998. Next, defendant had a prior conviction for PSMV in

case number “94 CR 1598201” and was sentenced to three years’ imprisonment on August 4, 1994. Finally, defendant had a prior conviction for murder in case number “81-8111” and was sentenced to 25 years’ imprisonment on May 6, 1982.

¶ 7 In aggravation, the State argued defendant’s criminal history mandated Class X sentencing and reiterated his convictions from the PSI. The State added that defendant’s convictions for PSMV and manufacture and delivery of cocaine were both Class 2 felonies.

¶ 8 Defense counsel “agree[d] with [defendant’s] criminal history” and asked for the “minimum sentence.” Counsel argued that defendant’s murder conviction occurred when he was a teenager in the military. Counsel further argued,

“Not to justify or mitigate that. But he gets -- makes a bad mistake and he’s a kid, he’s a teen-ager [*sic*]. He gets out with this in his background. He’s virtually unemployable with this in his background and right away he gets arrested on this PSMV and get out after that and gets these drug cases, but nothing after that. Even if he did half of the six years, he would have been out in 2000 and he’s done very well since then.”

¶ 9 Defendant spoke in allocution and raised issues from his trial. The court ultimately sentenced defendant to six years’ imprisonment, noting it was “bound by law to sentence [him] within a legal sentencing range. And that’s from a period of [6] years minimum, 30 years at the top end.” In imposing sentence, the court stated it considered his criminal history, the statutory factors in aggravation and mitigation, the PSI that defense counsel corrected, the attorneys’ arguments, and defendant’s statement in allocution. Defendant did not file a postsentencing motion.

¶ 10 On appeal, defendant contends the trial court erroneously sentenced him as a Class X offender where the record failed to demonstrate he was eligible for Class X sentencing pursuant to section 5-4.5-95(b) of the Uniform Code of Corrections (730 ILCS 5/5-4.5-95(b) (West 2016)).¹

¶ 11 As an initial matter defendant acknowledges that he failed to raise this issue in the trial court, but asks that we review it under the second prong of the plain error doctrine. Sentencing issues are forfeited for review unless the defendant both objects to the error at the sentencing hearing and raises the objection in a postsentencing motion. *People v. Powell*, 2012 IL App (1st) 102363, ¶ 7 (citing *People v. Hillier*, 237 Ill. 2d 539, 544 (2010)). Nevertheless, forfeited sentencing issues may be reviewed for plain error. *Powell*, 2012 IL App (1st) 102363, ¶ 7 (citing *Hillier*, 237 Ill. 2d at 545). To obtain relief under the plain error doctrine in the sentencing context, a defendant must show either that (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. Wooden*, 2014 IL App (1st) 130907, ¶ 10. Before we consider application of the plain error doctrine, however, we must determine whether any error occurred. *Id.* Here, we find no error.

¶ 12 While the imposition of a sentence within a statutory sentencing range is reviewed for an abuse of discretion (*People v. Jones*, 168 2d 367, 373 (1995)), the determination of whether a defendant is eligible for Class X sentencing is a question of law mandating *de novo* review (*People v. Baumann*, 314 Ill. App. 3d 947, 948 (2000)).

¹ Defendant's mittimus shows he was convicted as a Class X offender pursuant to 730 ILCS 5/5-5-3(c)(8), which was recodified at 730 ILCS 5/5-4.5-95(b).

¶ 13 Whether a defendant is eligible for Class X sentencing depends on whether the defendant's criminal history satisfied the requirements of section 5-4.5-95 of the Unified Code of Corrections (Code of Corrections). As relevant here, section 5-4.5-95(b) provides:

“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. This subsection does not apply unless:

(1) the first felony was committed after February 1, 1978 ***;

(2) the second felony was committed after conviction on the first; and

(3) the third felony was committed after conviction on the second.” 730 ILCS 5/5-4.5-95(b) (West 2016).

¶ 14 In this court, defendant does not dispute that his prior conviction for manufacture and delivery of a controlled substance, a Class 2 felony, was a qualifying offense for Class X sentencing purposes. Rather, he challenges the reliability of his PSMV and murder convictions. Specifically, he argues that because at his bond hearing the State indicated his PSMV conviction was a Class 3 felony the trial court likely did not rely on it as a qualifying prior conviction. He then maintains that because “it is entirely conceivable” that the commission date for his murder conviction was prior to February 1, 1978, that conviction too could not be relied on by the court to qualify him for Class X sentencing.

¶ 15 Even assuming, *arguendo*, that defendant's murder conviction did not qualify under section 5-4.5-95(b), the trial court still did not err in finding him Class X mandatory where his PSMV, a Class 2 felony, was a qualifying offense.

¶ 16 The State is not required to prove defendant's prior convictions beyond a reasonable doubt to establish defendant's eligibility for Class X sentencing. *People v. Williams*, 149 Ill. 2d 467, 489 (1992). It is well established that the rules of evidence that govern the guilt or innocence phase of a trial are relaxed at sentencing. *Id.* at 490. The trial court is instead given broad discretion to consider various types of information in order to impose a sentence within the applicable sentencing range, so long as the evidence relied on is relevant and reliable. *Id.* Thus, formal proof is not required for proving a defendant's criminal history, and a PSI is generally sufficient. *Id.* at 491.

¶ 17 Here, the record demonstrates that the evidence before the trial court was sufficient to show defendant was eligible for Class X sentencing. The court relied on defendant's PSI and the parties' arguments in order to determine that he was eligible for Class X sentencing. See *Williams*, 149 Ill. 2d at 491 (a PSI is sufficient to show a defendant is eligible for Class X sentencing). Defendant's PSI showed he had three prior convictions: murder (case number 81-8111), PSMV (case number 94 CR 1598201), and manufacture or delivery of cocaine (case number 97CR 3048001). Although at the bond hearing the State indicated that defendant's PSMV conviction was a Class 3 felony, at sentencing the State informed the court that the convictions for PSMV and manufacture and delivery of cocaine were both Class 2 felonies. See Ill. Rev. Stat. 1991, ch. 95½, par. 4-103(b) (recodified as 625 ILCS 5/4-103(b) (The offense of PSMV was a Class 2 felony both at the time of defendant's 1994 conviction and at the time he

was sentenced in the instant case). Defendant's conviction in the instant case was a Class 2 felony. Thus, defendant's history showed he was convicted of a Class 2 felony after having twice been convicted of two prior Class 2 felonies. Accordingly, pursuant to section 5-4.5-95(b) defendant was required to be sentenced as a Class X offender.

¶ 18 Nevertheless, defendant maintains that his PSI was insufficient because it did not contain the commission dates of his prior convictions. We are not persuaded by this argument. The dispositional dates listed in defendant's PSI indicate that defendant committed the offense of manufacture or delivery of cocaine following his conviction for PSMV. The disposition date for his PSMV conviction was August 4, 1994, and he was not charged with manufacture or delivery of cocaine until 1997. Based on this record, we find the evidence at sentencing sufficient to enable the trial court to determine defendant committed the second felony after conviction on the first and, accordingly, was eligible for Class X sentencing. See *Williams*, 149 Ill. 2d at 489 (the State is not required to prove defendant's prior convictions beyond a reasonable doubt to establish his eligibility for Class X sentencing). Because the court did not err in sentencing defendant as a Class X offender, defendant cannot show plain error. *People v. Spicer*, 379 Ill. App. 3d 441, 449 (2007) (without error, there is no plain error).

¶ 19 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 20 Affirmed.