No. 127815

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. DEMETRIUS GRAY, Defendant-Appellee.	) Appeal from the Appellate Court of Illinois, First District, No. 1-19-1086)) There on Appeal from the Circuit Court of Cook County, Criminal Division, No. 16-CR-10202)) The Honorable Mary Margaret Brosnahan, Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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NATURE OF THE CASE

Following a jury trial, defendant was convicted of armed habitual criminal (AHC). The appellate court reversed defendant's conviction, holding that the prosecution failed to prove that he had two prior qualifying convictions, as is necessary to sustain an AHC conviction. No issue is raised on the pleadings.

ISSUES PRESENTED

The offense of AHC requires proof that a defendant possessed a firearm after having been convicted of two prior qualifying offenses. *See* 720 ILCS 5/24-1.7 (AHC Act). Defendant contends that the evidence was insufficient to convict him of AHC because he has not been convicted of two prior qualifying offenses, given that he was 17 years old at the time of one of his predicate offenses. This appeal presents the following issues:

1. Whether defendant's argument is barred because the parties stipulated at trial that defendant has two prior qualifying convictions, and defendant's argument rests on evidence not presented at trial.

2. Whether defendant's argument is irrelevant because the record shows that defendant has two *other* qualifying prior convictions, both of which were for offenses committed several years after he turned 18.

3. Whether defendant's claim is meritless because, under the plain language of the AHC Act, a conviction of a 17-year-old offender in adult court is a qualifying prior conviction.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315(a) and 604(a). This Court granted the People's petition for leave to appeal on November 30, 2022.

STATUTE INVOLVED

The AHC Act provides as follows:

> (a) A person commits the offense of being an armed habitual criminal if he or she receives, sells, possesses, or transfers any firearm after having been convicted a total of 2 or more times of any combination of the following offenses:
>
> (1) a forcible felony as defined in Section 2-8 of this Code;
>
> (2) unlawful use of a weapon by a felon; aggravated unlawful use of a weapon; aggravated discharge of a firearm; vehicular hijacking; aggravated vehicular hijacking; aggravated battery of a child as described in Section 12-4.3 or subdivision (b)(1) of Section 12-3.05; intimidation; aggravated intimidation; gunrunning; home invasion; or aggravated battery with a firearm as described in Section 12-4.2 or subdivision (e)(1), (e)(2), (e)(3), or (e)(4) of Section 12-3.05; or
>
> (3) any violation of the Illinois Controlled Substances Act or the Cannabis Control Act that is punishable as a Class 3 felony or higher.
>
> (b) Sentence. Being an armed habitual criminal is a Class X felony.

720 ILCS 5/24-1.7.

STATEMENT OF FACTS

Defendant's Prior Criminal History

Before he was charged with AHC in this case, defendant had a number of delinquency adjudications in juvenile court and felony convictions in adult court. Sec245-46.[1] Defendant's prior adjudications in juvenile court include:

- In 2001, when defendant was 16, he pleaded guilty in juvenile court to criminal trespass to a vehicle, and was sentenced to probation, which he violated; and
- Later in 2001, defendant pleaded guilty in juvenile court to battery, and was again sentenced to probation, which he violated.

SR14-15; Sec246. In adult court, defendant had four prior felony convictions:

- In 2001, after he turned 17, defendant pleaded guilty in adult court to transportation of narcotics, a Class 1 felony, and was sentenced to probation, which he violated;
- In 2002, just before he turned 18, defendant pleaded guilty in adult court to manufacturing and delivering 1-to-15 grams of cocaine, a Class 1 felony, and was sentenced to four years in prison;
- In 2008, when he was 24, defendant was convicted of manufacturing and delivering cannabis in a school zone, a Class 3 felony, and was sentenced to probation, which he violated; and
- Also in 2008, he pleaded guilty to unlawful use of a weapon by a felon, a Class 2 felony, and was sentenced to four years in prison.

SR21-22; Sec245-46; Def. App. Br. 15.

Defendant also was convicted of several misdemeanors, including domestic battery. Sec245; SR22. And, at the time of his trial in this case, he faced charges — in other cases — for exposing himself to women, including

[1] The common law record and report of proceedings are cited as "C_" and "R_," the supplemental report of proceedings and secured record as "SR_" and "Sec_." Defendant's brief in the appellate court is cited as "Def. App. Br. _."

an incident in which he exposed himself to the female attorney initially appointed to represent him in this case. Sec246; R61.[2]

Defendant's Armed Habitual Criminal Conviction in this Case

On June 10, 2016, defendant was arrested after threatening two people with a handgun. Sec54-56. Prosecutors charged defendant with numerous felonies, including AHC and unlawful use of a weapon by a felon. C5.

The indictment for the AHC charge (which requires proof of two prior qualifying convictions) identified defendant's predicate offenses as his 2002 felony drug conviction and his 2008 unlawful use of a weapon by a felon conviction, and not his 2008 conviction for manufacturing and delivering cannabis in a school zone. Sec33. However, in a pre-trial hearing, the parties discussed the prosecution's intent to introduce evidence about defendant's criminal history, including both of his 2008 felony convictions. R179-80.

At that hearing, defense counsel argued that the evidence of defendant's criminal history should be barred. *Id.* To that end, defense counsel requested that the court read a stipulation to the jury that "merely instruct[s] the jury that [defendant] has two qualifying felonies, as opposed to going into the specifics" of the convictions. *Id.* The prosecutor responded that it was his "understanding" that he was required to agree to such a stipulation if the defense requested it. R180. The parties thus agreed to stipulate that defendant had two prior qualifying convictions sufficient to

[2] After defendant was charged with exposing himself to his attorney, this case was reassigned to other attorneys. R29.

support an AHC conviction rather than admit evidence about the specifics of his prior qualifying convictions. R180, 512.

Prosecutors subsequently elected to proceed only on the AHC charge, and the other charges were dismissed nolle prosequi. R204. At trial, the parties told the jury that they agreed that defendant had two prior qualifying convictions sufficient to support an AHC charge, and the only issue for the jury to decide was whether defendant possessed a firearm. R512, 539-40. Two police officers testified that on the day in question, a man and woman "frantically" flagged down a police car as it drove through a Chicago neighborhood and pointed to a parked car while yelling, "he's got a gun, he's got a gun." R430-31, 470-71. Defendant was sitting in the front seat of the car, a woman who looked "scared" was in the front seat next to him, and a child was in the backseat. R432-34, 453-54. An officer approached the car and saw defendant put something in the glove compartment. R432-34. The officer ordered defendant out of the car, recovered a handgun from the glove compartment, and arrested defendant. R434-35, 474-75.

Three police officers further testified that after defendant was arrested, he told police that (1) he had possessed the gun for several days; and (2) shortly before the officers arrived, he had engaged in "a verbal and a physical altercation" with "an individual" while walking to his car and he had lifted his shirt to expose the gun to that person. R437, 477-78, 483-86.

The parties then stipulated as follows: "It is hereby stipulated by and between the parties that the defendant, Demetrius Gray, has two prior qualifying felony convictions for the purposes of sustaining the charge of armed habitual criminal." R512. No evidence was admitted at trial regarding what those convictions were, defendant's age at the time of the offenses, or any other information about the offenses. *Id.*

Defendant did not testify or call any witnesses. R519-20. In closing, the prosecution again noted that the parties agreed that defendant had two prior qualifying convictions, so the only issue for the jury to decide was whether he possessed a firearm. R539-40. The prosecution further noted that the officers' testimony proved defendant possessed a gun. R540-43. The defense argued that the prosecution failed to prove defendant possessed the gun because the officers' testimony was uncorroborated, and the prosecution did not introduce any recordings of defendant's statements. R543-48.

The jury found defendant guilty of AHC. R569. Sentencing was delayed because defendant threatened one of his attorneys — including that he would "injure her" and "break her jaw" — and court personnel. SR8-9. Eventually, the court sentenced defendant to nine years in prison. SR44.

Defendant's Appeal

On appeal, defendant raised four claims, including that (1) the evidence was insufficient to prove him guilty of AHC, and (2) the trial judge should have granted defendant's request to plead guilty to AHC before trial

in exchange for a six-year sentence. *People v. Gray*, 2021 IL App (1st) 191086, ¶ 8. As to the sufficiency claim, defendant conceded that the evidence was sufficient to prove he possessed a gun but argued that the evidence failed to prove he had two prior qualifying offenses. *Id.* ¶ 9. In particular, defendant argued that his 2002 conviction for manufacture and delivery of cocaine when he was 17 years old was a not a qualifying conviction because — more than a decade after defendant was convicted of that offense — the Juvenile Court Act was amended to raise the age of eligibility for juvenile court from 16 to 17. *Id.* ¶¶ 9-11. Defendant claimed that, therefore, his 2002 conviction should be deemed a delinquency adjudication in juvenile court (which is insufficient to support AHC) even though it was in actuality a felony conviction in adult court. *Id.*

The appellate court agreed with defendant. *Id.* ¶ 15. Specifically, the court held that to establish that a prior conviction is a qualifying prior conviction, "the prosecution would need to prove that the defendant was at least 18 years old at the time of the [prior] offense, or that the defendant merited transfer to the criminal courts" under the amended Juvenile Court Act. *Id.* ¶ 15. The court further held that the evidence at trial was insufficient to carry that burden and reversed his AHC conviction:

> Here, the prosecution showed [defendant] had two prior felony convictions on his record, but for the [2002] conviction for delivery of narcotics, the prosecution did not show that the conviction was for conduct that "is punishable" as a felony as of the date of [his AHC charge] in 2016.

Id. ¶ 16. Because the appellate court reversed defendant's conviction, it did not address defendant's remaining claims, including that he should have been permitted to plead guilty to AHC before trial. *See id.* ¶ 18.

STANDARDS OF REVIEW

When considering a challenge to the sufficiency of the evidence, a court must determine "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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The construction of a statute is a legal question that is reviewed de novo. *People v. Johnson*, 2013 IL 114639, ¶ 9.

ARGUMENT

To prove defendant guilty of AHC, prosecutors had to prove that he (1) possessed a firearm and (2) had two prior qualifying convictions. *See* 720 ILCS 5/24-1.7. The evidence at trial was sufficient to prove those elements because several police officers testified that they saw defendant possess a gun, he admitted to possessing it, and the parties stipulated that defendant had "two prior qualifying felony convictions for the purposes of sustaining the charge of armed habitual criminal." *Supra* pp. 5-6.

Defendant's sufficiency claim — which rests on the argument that he does not have two qualifying prior convictions because he was 17 when he was convicted of manufacture and delivery of cocaine in adult court in 2002, and such an offense might be adjudicated in juvenile court if he committed it today, due to amendments made to the Juvenile Court Act in 2014 — fails for

several reasons. First, defendant's argument is barred because it relies on evidence not presented at trial. *See infra* Section I. Second, his argument is also irrelevant, because even if his 2002 conviction were not a prior qualifying conviction, he still has two *other* prior qualifying convictions. *See infra* Section II. And, third, his claim is meritless because it is contrary to the plain language of the AHC Act. *See infra* Section III. Lastly, even if defendant's claim had merit, the correct remedy would be to reduce defendant's conviction to the lesser-included offense of unlawful use of a weapon by a felon. *See infra* Section IV.[3]

I. Defendant's Argument Is Barred Because It Relies on Evidence Not Presented at Trial.

At trial, defendant disputed that he possessed a gun but stipulated that he "has two prior qualifying felony convictions for the purposes of sustaining the charge of armed habitual criminal." R512. However, on appeal, defendant has taken precisely the opposite position: he concedes the evidence proves he possessed a gun but argues, based on evidence not presented at trial, that he does not have two prior qualifying convictions. *Gray*, 2021 IL App (1st) 191086, ¶ 9. Defendant's new argument is barred.

[3] The arguments in Sections I, II and IV were not raised in the appellate court or the People's PLA, but the People were appellee in the appellate court and appellant here, so they may raise any argument supported by the record to affirm defendant's conviction. *E.g., People v. Artis*, 232 Ill. 2d 156, 164 (2009). Moreover, forfeiture is a limitation on the parties, not the Court. *People v. Donoho*, 204 Ill. 2d 159, 169 (2003) (addressing issue not raised by People in PLA or appellate court).

To begin, defendant's claim that the evidence was insufficient to prove he had two qualifying prior convictions is illogical, because he stipulated at trial that "has two prior qualifying felony convictions for the purposes of sustaining the charge of armed habitual criminal." R512. A sufficiency claim requires a reviewing court to determine whether the evidence at trial was sufficient to sustain a conviction. *See, e.g., Jackson*, 443 U.S. at 318-19; *People v. Cline*, 2022 IL 126383, ¶¶ 25, 32. And "a stipulation is conclusive as to all matters necessarily included in it and no proof of stipulated facts is necessary, since the stipulation is substituted for proof and dispenses with the need for evidence." *People v. Woods*, 214 Ill. 2d 455, 469 (2005) (internal citations and quotations omitted). Thus, the stipulation provided sufficient evidence of defendant's prior qualifying convictions, and there was no need to present evidence in support of the stipulated fact of defendant's prior qualifying offenses at all, much less beyond a reasonable doubt.

In an attempt to get around his stipulation and establish his sufficiency claim, defendant relies solely on evidence not presented at trial. Specifically, defendant asked the appellate court (and the appellate court agreed) to take judicial notice of a Pre-Sentence Investigative Report (PSI Report) — created after trial — that shows some of defendant's criminal history. Def. App. Br. 15 (citing Sec246). According to defendant, the PSI Report shows that his 2002 felony drug conviction in adult court occurred when he was 17 and, thus, cannot serve as a qualifying prior conviction for

AHC because, if that offense were committed by a 17 year old today, it *might* be adjudicated in juvenile court. *Id.* As discussed below, defendant's argument is irrelevant (because he has two other qualifying felony convictions) and meritless (as it misreads the plain language of the AHC Act). *See infra* Sections II-III. But there is a more fundamental problem with defendant's argument: it is barred because it relies entirely on evidence that was not introduced at trial.

This Court's decision in *Cline*, 2022 IL 126383, is directly on point. There, the defendant was convicted of burglary, and the only evidence tying him to the crime was a fingerprint found in the victim's home. *Id.* ¶ 1. On appeal, the defendant argued that the evidence was insufficient to convict because the prosecution's fingerprint examiner did not follow the accepted methodology for identifying latent fingerprints. *Id.* ¶ 29. In making that argument, the defendant asked this Court to take "judicial notice" of the ACE-V method of examination as the standard followed by forensic fingerprint examiners. *Id.* This Court rejected the defendant's argument:

> Defendant is now asking this court to take judicial notice of extra-record materials for the purpose of evaluating the evidence presented at trial. Our review of the sufficiency of the fingerprint evidence in this case, however, must be limited to evidence actually admitted at trial, and judicial notice cannot be used to introduce new evidentiary material not considered by the fact finder during its deliberations.

Id. ¶ 32. Accordingly, this Court denied the defendant's sufficiency claim. *Id.* ¶¶ 32-33, 42.

Similarly, in this case defendant is asking this Court to take judicial notice of information not admitted at trial (the PSI Report) to support a sufficiency claim. Accordingly, just as in *Cline*, his argument is barred.

Allowing defendant to rely on extra-record evidence to challenge the sufficiency of the evidence supporting his conviction is not only contrary to this Court's precedent, it would lead to an unjust result. The appellate court held that to establish that a prior conviction is a qualifying conviction under the AHC Act, prosecutors must "prove" either that (1) "defendant was at least 18 years old at the time of the [prior] offense" or (2) "defendant merited transfer to the criminal courts under the" amended Juvenile Court Act, which requires proof of numerous factors, including factors regarding defendant's prior offense (such as whether it was "committed in an aggressive and premediated manner," and the harm it caused) and defendant's characteristics at the time of the prior offense (such as his chance of being rehabilitated and his mental health). *Gray*, 2021 IL App (1st) 191086, ¶ 15; *see also* 705 ILCS 405/5-805 (juvenile transfer provisions). Because the prosecution presented no evidence at trial regarding those issues, the appellate court held that the People "failed to prove" that defendant's 2002 conviction is a qualifying conviction. *Gray*, 2021 IL App (1st) 191086, ¶ 16. And the appellate court's finding that the evidence was insufficient to convict defendant of AHC overturned defendant's conviction and precludes the People from retrying him. *Id.*; *see also People v. Lopez*, 229 Ill. 2d 322, 367

(2008) ("The State cannot retry a defendant once it has been determined that the evidence introduced at trial was insufficient to sustain a conviction.").

But, before trial, the defense argued that the prosecution should be *barred* from presenting evidence about the nature and facts of defendant's prior convictions. R179-180. Therefore, at defendant's request, the parties stipulated that defendant "has two prior qualifying felony convictions for the purposes of sustaining the charge of armed habitual criminal." R512. Of course, the point of a stipulation is to remove the need to present evidence establishing a particular fact or element at trial. *See, e.g., Woods*, 214 Ill. 2d at 468-69 (collecting cases). Indeed, defense counsel routinely stipulate to a defendant's felony status "to avoid disclosure of the name and nature of the prior felony conviction" to the jury. *People v. Phillips*, 217 Ill. 2d 270, 285 (2005). This Court has held that when a defendant wishes to stipulate to "his status as a convicted felon," the prosecution *must* accept that stipulation, and cannot introduce evidence regarding the defendant's criminal history at trial. *People v. Walker*, 211 Ill. 2d 317, 338, 341 (2004); *see also* R179-80 (prosecutor noting his "understanding" that he was required to enter into stipulation requested by defendant). And that is exactly what happened here: the People introduced no evidence of defendant's prior qualifying offenses precisely because defendant insisted on stipulating to their existence.

Defendant's conduct in this litigation and the appellate court's decision thus have put the People in an impossible position: (1) defendant stipulated

at trial that he has two prior qualify convictions (thus preventing the prosecution from presenting evidence about his convictions, including the very evidence the appellate court believes is required to prove a conviction is a prior qualifying conviction); (2) then defendant presented new evidence on appeal to support his new contention that he does not have two qualifying offenses; and (3) the appellate court overturned defendant's conviction precisely because the People did not present evidence about defendant's prior convictions. Such a result is plainly unjust.

This is not to say that a defendant has no means of seeking relief if he believes new evidence shows that a stipulation was entered erroneously. For example, such a defendant could allege that his counsel provided ineffective assistance by agreeing to the purportedly erroneous stipulation. *E.g.*, *People v. Morris*, 2014 IL App (1st) 130512, ¶ 40 (defendants may claim counsel erred by entering "incorrect or erroneous stipulation"). If the defendant proves that his counsel should have disputed a particular fact or element at trial, the defendant would be entitled to a new trial where both the People and the defendant could present their evidence to the jury.

But what a defendant cannot do is what the appellate court allowed him to do in this appeal: pursue a *sufficiency* claim based on new evidence not presented at trial to contradict a stipulation the defense requested, and prevent the People from re-trying him. *Cline*, 2022 IL 126383, ¶ 32. Accordingly, this Court should hold that defendant's argument is barred.

II. Defendant's Argument Is Also Irrelevant Because He Has Two Other Qualifying Prior Convictions.

There is a second basis to deny defendant's sufficiency claim: even if this Court could consider defendant's new evidence, and he were correct that his 2002 felony drug conviction is not a qualifying conviction, defendant's own evidence shows that he has two *other* prior qualifying convictions.

Specifically, the new evidence defendant relies on — the PSI Report — shows that in 2008, when defendant was 24 years old, he was convicted of unlawful use of a weapon by a felon. Sec245; SR22. That is one qualifying prior conviction under the plain language of the AHC Act. *See* 720 ILCS 5/24-1.7(a)(2) ("unlawful use of a weapon by a felon" is a qualifying prior conviction). The report also shows that that same year, in a different case, defendant was convicted of manufacturing and delivering cannabis in a school zone, a Class 3 felony under the Cannabis Control Act. Sec245; SR22. That is a second qualifying prior conviction under the AHC Act. *See* 720 ILCS 5/24-1.7(a)(3) ("Class 3 felony conviction" under the "Cannabis Control Act" is a qualifying prior conviction).[4] In sum, the PSI Report shows that defendant had two qualifying prior offenses under the AHC Act.

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[4] That defendant's 2008 cannabis conviction was not identified in the indictment as one of defendant's prior qualifying convictions is irrelevant because, among other reasons, defendant cannot credibly argue that this omission affected the defense he raised at trial given that (1) he knew the prosecution intended to introduce evidence about the cannabis conviction; and (2) he agreed to a stipulation to prevent prosecutors from doing so. *See, e.g.*, *People v. Collins*, 214 Ill. 2d 206, 219-20 (2005) (variance between the allegations in an indictment and the evidence of guilt at trial is irrelevant if it does not "mislead the accused in making his defense"); *see also* R179-80.

Accordingly, defendant's argument that his 2002 conviction is not a qualifying prior conviction is irrelevant because the very evidence he relies on shows that he has two other prior qualifying convictions, which he does not contest. Defendant's sufficiency claim therefore fails for this additional, independent reason.

III. The Appellate Court's Interpretation Is Contrary to the Plain Language of the Armed Habitual Criminal Act and Is Incorrect for Several Other Reasons.

There is a third basis to affirm defendant's AHC conviction and reject his sufficiency claim: under the plain language of the AHC Act, defendant's 2002 felony drug conviction in adult court is a qualifying prior conviction. The appellate court's ruling to the contrary is inconsistent with the plain language of the AHC Act and is incorrect for several additional reasons.

A. Under the Plain Language of the Act, Defendant's 2002 Class 1 Felony Drug Conviction in Adult Court Is a Qualifying Prior Conviction.

When interpreting a statute, courts "must give the language its plain and ordinary meaning." *People v. Carlson*, 2016 IL 120544, ¶ 17. Under the plain language of the AHC Act, defendant's 2002 conviction in adult court for a Class 1 felony violation of the Controlled Substances Act is a qualifying prior conviction even though he was 17 at the time of that offense.

The AHC Act provides that a person is guilty of AHC if they possess a gun "after having been convicted" at least twice for certain offenses listed in subparagraphs 1-3. 720 ILCS 5/24-1.7(a). Therefore, the first requirement of a qualifying conviction under the AHC Act focuses on the past and asks was

the defendant previously "convicted." *Id.* "Conviction" is defined as a judgment entered on "a plea of guilty or upon a verdict or finding of guilty" in a "court of competent jurisdiction." 720 ILCS 5/2-5. Defendant's 2002 offense plainly meets the first requirement of a qualifying conviction because in 2002 he pleaded guilty in adult court to a Class 1 felony violation of the Controlled Substances Act. Sec246; SR22. That defendant was 17 years old at that time is irrelevant because it is settled that "the plain meaning" of the word "conviction" includes "the conviction of [a defendant] while a juvenile in adult court." *Fitzsimmons v. Norgle*, 104 Ill. 2d 369, 372-73 (1984) (statute prohibiting probation for defendants with certain prior convictions includes prior conviction in adult court when defendant was 14).[5]

The second requirement of a qualifying prior conviction under the AHC Act focuses on a statutory analysis of the prior offense. That is, subparagraphs 1-3 of the Act provide that the following are qualifying prior offenses:

(1) "a forcible felony" as defined in 720 ILCS 5/2-8; or

(2) certain enumerated offenses, including unlawful use of a weapon by a felon and home invasion; or

(3) "any violation" of the Controlled Substances Act or the Cannabis Control Act "that is punishable as a Class 3 felony or higher."

720 ILCS 5/24-1.7(a). Defendant's 2002 conviction plainly fits within subparagraph 3: he was convicted of violating the Controlled Substances Act

[5] By contrast, a delinquency adjudication in juvenile court is not a "conviction." *People v. Taylor*, 221 Ill. 2d 157, 176-78 (2006).

by manufacturing and delivering up to 15 grams of cocaine, *see* Sec246 & Def. App. Br. 15, which is punishable as a Class 1 felony, 720 ILCS 570/401(c).

Accordingly, under the plain language of the AHC Act, defendant's 2002 conviction is a qualifying prior conviction. That defendant was 17 at the time of that offense is irrelevant under the plain language of the AHC Act because defendant's age does not change the fact that he was "convicted," nor does it change the fact that manufacturing and delivering up to 15 grams of cocaine "is punishable" as a Class 1 felony under the Controlled Substances Act. *See, e.g., People v. Irrelevant*, 2021 IL App (4th) 200626, ¶¶ 35-39 (age at time of prior conviction is not an element of an offense under the AHC Act).

B. The Appellate Court Impermissibly Read a Limitation Into the Act Not Found in its Plain Language.

The appellate court interpreted the AHC Act to have an additional element: the court interpreted the AHC Act to require prosecutors to prove that if the defendant were tried *today* for his past offense, he would be tried in adult court, rather than being adjudicated in juvenile court. *Gray*, 2021 IL App (1st) 191086, ¶¶ 15-16. To reach that conclusion, the appellate court added language not found anywhere in the AHC Act.

The appellate court began by noting that in 2014 — more than a decade after defendant's 2002 drug conviction — the Juvenile Court Act was amended to raise the age of defendants who are potentially eligible for juvenile court from 16 to 17. *Id.* ¶¶ 9-11. The court next stated, without citation to any precedent, that "[i]n view of the changes to the Juvenile Court

Act [made in 2014], for most offenses age of the defendant operates as an element of the offense." *Id.* ¶ 15. The court then turned to subparagraph 3 of the AHC Act, which states that a qualifying prior conviction includes "'any violation of the Illinois Controlled Substances Act or the Cannabis Control Act that is punishable as a Class 3 felony or higher.'" *Id.* (citing 720 ILCS 5/24-1.7). The court held that the phrase "is punishable" means the prosecution must prove beyond a reasonable doubt that if the defendant were charged with the same offense today he would be tried in adult court (rather than having a delinquency adjudication in juvenile court), which means prosecutors "need to prove that the defendant was at least 18 years old at the time of the [prior] offense" because the amended Juvenile Court Act provides that anyone 18 or older is ineligible for juvenile court, "or that the defendant merited transfer to the criminal courts" pursuant to the amended Juvenile Court Act. *Id.* ¶ 15. The appellate court's interpretation misreads the AHC Act.

The "primary goal when construing a statute is to determine and give effect to the legislature's intent." *Carlson*, 2016 IL 120544, ¶ 17; *see also People v. Grant*, 2022 IL 126824, ¶ 24 (same). The "most reliable indicator of legislative intent is the statutory language itself," so courts "must give the language its plain and ordinary meaning." *Carlson*, 2016 IL 120544, ¶ 17; *see also Grant*, 2022 IL 126824, ¶ 24 (same). A court "may not" add new language to a provision or "add exceptions, limitations, or conditions, or

otherwise change the law so as to depart from the plain meaning of language employed in the statute." *Grant*, 2022 IL 126824, ¶ 25; *see also Carlson*, 2016 IL 120544, ¶ 17 (courts "should not read into the statute exceptions, conditions, or limitations not expressed by the legislature").

The legislature's intent when it included the phrase "any violation of the Illinois Controlled Substances Act or the Cannabis Control Act that is punishable as a Class 3 felony or higher," is clear and straightforward, and it has nothing to do with jurisdictional matters (*i.e.*, whether the juvenile court or adult court would have jurisdiction if the prior offense were retried today). Both the Controlled Substances Act and the Cannabis Control Act provide for a number of different potential drug offenses. *See* 720 ILCS 570/100 *et seq*. & 720 ILCS 550/1 *et seq*. And, importantly, those statutes provide for not only a number of felony offenses, but also many misdemeanors and petty offenses (*i.e.*, offenses that can only result in fines, not jail time). For example, under the Controlled Substances Act, it is a petty offense to possess a "look-alike substance" that appears to be an illegal drug (but is not actually an illegal drug) and a misdemeanor to possess anabolic steroids. 720 ILCS 570/402(d) & 404(c). Similarly, the Cannabis Control Act provides that possession of certain quantities of cannabis are either misdemeanors, petty offenses, or Class 4 felonies. *See, e.g.*, 720 ILCS 550/4(a)-(c).

The intent of the phrase "any violation of the Illinois Controlled Substances Act or the Cannabis Control Act that is punishable as a Class 3

felony or higher" in subparagraph 3 of the AHC Act is to make clear that *only* Class 3 or higher felony convictions under those drug statutes are qualifying offenses, and that Class 4 felonies, misdemeanors and petty offenses are *not*. Absent this language, someone who had no criminal history other than being fined on two occasions for possessing a gram of cannabis (a petty offense) could be convicted of AHC (and subject to a Class X sentence) simply because they possessed a gun.

In this respect, it is telling that the "is punishable" language appears only in subparagraph 3 of the AHC Act, and not in subparagraphs 1 or 2. The reason the legislature did not include that language in those subparagraphs is because all of the offenses listed in subparagraph 1 (which states that "forcible felonies" are qualifying prior offenses) and subparagraph 2 (which states that certain other enumerated felonies are qualifying prior offenses) are *already* Class 3 or higher felonies by definition. For example, aggravated criminal sexual assault — which is a forcible felony that can serve as a prior qualifying conviction under subparagraph 1 — is a Class X felony. 720 ILCS 5/11-1.30(d). And home invasion — which is one of the enumerated offenses in subparagraph 2 that can serve as a prior qualifying conviction — is a Class X felony as well. 720 ILCS 5/19-6(c).

If the appellate court were correct that the legislature was concerned with which court would have jurisdiction if a defendant were retried for a past offense today — and that the "is punishable" language therefore means

that prosecutors are required "to prove that the defendant was at least 18" at the time of the prior offense or that the defendant would have "merited transfer" to the adult courts under the amended Juvenile Courts Act — then the legislature would have included the phrase "is punishable" in subparagraphs 1 and 2, and not just subparagraph 3, so that the offenses in subparagraphs 1 and 2 would be subject to the same jurisdictional requirement. That the legislature did not do so is further evidence that the intent of the phrase "any violation of the Illinois Controlled Substances Act or the Cannabis Control Act that is punishable as a Class 3 felony or higher" is to make clear that only Class 3 or higher convictions under those drug statutes are qualifying offenses, and Class 4 felonies, misdemeanors and petty offenses are not.

The appellate court's interpretation is also incorrect for another reason. The appellate court held that the "is punishable" language means the prosecution must prove beyond a reasonable doubt that if the offender were charged with the same offense today, he *necessarily would be punished* for a Class 3 or higher felony in adult court (rather than receiving a delinquency adjudication in juvenile court), either because he was an adult at the time of the prior offense or, if he were 17 at that time, because he would be transferred to adult court under the current version of the Juvenile Court Act. *Gray*, 2021 IL App (1st) 191086, ¶ 15. But when interpreting criminal statutes, it has long been settled that "punishable" does "not mean [a crime]

which must be" so punished, but instead "one which *might* be" so punished. *People v. Munday*, 293 Ill. 191, 204-05 (1920) (statute that applied to crimes "punishable" by imprisonment meant crimes that "might be" punished by imprisonment) (emphasis added); *see also United States v. Coleman*, 656 F.3d 1089, 1092 (10th Cir. 2011) (federal habitual criminal statute's reference to prior convictions for crimes "punishable" by at least a year in prison "focuses on the maximum punishment for *any* defendant charged with that crime, not the characteristics of a particular offender") (quotations omitted). And it cannot be disputed that a violation of the Controlled Substances Act by manufacturing and delivering up to 15 grams of cocaine, as defendant did, is an offense that "*might* be" punished as a Class 1 felony in adult court. Requiring the prosecution to prove beyond a reasonable doubt that the defendant *would* be punished in adult court if retried today, due to the defendant's personal characteristics and other factors relevant to the transfer provisions, is therefore contrary to the settled meaning of "punishable."

To be sure, as the appellate court noted, subparagraph 3 uses the present tense in the phrase "is punishable as a Class 3 or higher felony" violation of the drug statutes. *Gray*, 2021 IL App (1st) 191086, ¶ 11. But it cannot reasonably be said that the mere present tense form of the verb "is" was intended to add an additional element to the crime of AHC, especially the complicated, multifaceted jurisdictional element that the prosecution must "prove that the defendant was at least 18 years old at the time of the

[prior] offense or that the defendant merited transfer to the criminal courts." Rather, interpreting subparagraph 3 as applying to any felony under the controlled substances act that *might*, today, be punished as a Class 3 felony or higher is consistent with the present tense framing of the subparagraph; and, unlike the appellate court's interpretation, it does not contradict the ordinary meaning of the rest of the subparagraph, such as the meaning of the word "punishable."

That is to say, the use of the present tense "is" means that the analysis focuses on the current version of the Controlled Substances Act and Cannabis Control Act. By focusing on the current version of those statutes, the legislature allowed for the fact that society's attitudes towards drugs can change over time. *See, generally, People v. Stribling,* 2022 IL App (3d) 210098, ¶ 17 (discussing changes to Illinois drug laws over the last decade, and noting some offenses are no longer crimes and the felony classifications of some drug offenses have been downgraded). Therefore, for example, the legislature intended to allow for the possibility that if a defendant was once convicted of a Class 3 drug offense, but that same offense is later statutorily re-classified as a Class 4 felony, the prior conviction would not be considered a qualifying prior conviction.

Moreover, when the legislature wishes to enact a law that exempts juveniles who previously were convicted in adult court, or that imposes age requirements, it knows how to do so, and it does so expressly, not obliquely.

See, e.g., *People v. Christopherson*, 231 Ill. 2d 449, 455-57 (2008) (declining to read an exception for juveniles into criminal statute because the legislature knows how to impose age requirements when it wishes to do so); *see also, e.g.*, 730 ILCS 150/3-5(i) (sex offender registration provision "does not apply to minors prosecuted under the criminal laws as adults"); 730 ILCS 5/5-4.5-95 (Class X recidivist sentencing statute applies only if the defendant's two prior Class X offenses were "committed when the person was 21 years of age or older"); 720 ILCS 5/12-305(b) (aggravated battery of a person with an intellectual disability requires proof the defendant is "at least 18 years of age"); 720 ILCS 5/11-160(d) (aggravated criminal sexual abuse requires prosecutors to prove the victim was 13 to 17 years old and the defendant was "at least 5 years older than the victim"). No such language imposing age requirements appears in the AHC Act.

In sum, by holding that the prosecution must "prove that the defendant was at least 18 years old at the time of the [prior] offense or that the defendant merited transfer to the criminal courts," the appellate court failed to apply the plain language of the AHC Act and instead added language and requirements to the statute that the legislature did not intend. Therefore, its interpretation is incorrect and must be rejected.

C. The Appellate Court's Interpretation Also Misunderstands the Juvenile Court Act.

The appellate court's ruling is also premised on two fundamental misunderstandings of the Juvenile Court Act. To begin, the appellate court

based its decision on its belief that, "[i]n view of the changes to the Juvenile Court Act [in 2014], for most offenses age of the defendant operates as an element of the offense." *Gray*, 2021 IL App (1st) 191086, ¶ 15. The appellate court cited no support for that premise, and the premise is clearly incorrect.

By its own terms, the amendment to the Juvenile Court Act merely expanded the potential jurisdiction of juvenile courts to offenders who are 17; nothing in the amendment purported to change the elements of any criminal offense, let alone to add age as an element for "most offenses." *See* 705 ILCS 405/5-120 (2014). Indeed, it has long been settled that the elements of an offense are exactly the same whether the case is adjudicated in juvenile or adult court. *E.g., People v. Fiveash*, 2015 IL 117669, ¶ 33; *In re Greene*, 76 Ill. 2d 204, 212 (1979). And, as this Court has explained,

> Age is not an element which must be proved beyond a reasonable doubt in order to support an adjudication of delinquency. Delinquency is not a crime codified under our criminal laws. Rather, it is the commission of an otherwise unlawful act by one under 17 that triggers the application of the Juvenile Court Act. Age therefore is merely the factor which authorizes the application of the juvenile system. . . . The burden then lies on the State to prove the respondent's guilt of the underlying offense beyond a reasonable doubt.

Greene, 76 Ill. 2d at 212. The appellate court's premise that the amendment to the juvenile courts' jurisdiction made the "age of the defendant" an "element" for "most offenses," cannot be squared with the text of the Juvenile Court Act or this Court's precedent.

The appellate court's assertion that age is now an element for most offenses would also lead to absurd results, even in cases not involving AHC

charges. For example, assume that the prosecution proved at trial that a man assaulted and battered a woman by striking her several times; under the appellate court's reasoning that the "age of the defendant" is now an "element" for "most offenses," the man could raise (and win) a sufficiency claim on appeal by arguing that the prosecution did not introduce evidence regarding his date of birth and, thus, failed to prove he was 18 or older at the time of the assault as is necessary to proceed in adult court.

The appellate court also misunderstood the Juvenile Court Act in another fundamental way: the Juvenile Court Act expressly provides that the 2014 amendment expanding the jurisdiction of juvenile courts to 17-year-olds is not retroactive. *See* 705 ILCS 405/5-120 (amendment applies only to offenses committed on or after the effective date, Jan. 1, 2014); *People v. Richardson*, 2015 IL 118255, ¶ 10 (legislature had rational bases for not making the amendment retroactive). Because defendant is 38 years old now, his argument relies on a sleight of hand: he is asking the courts to treat him as if he were the same age now as he was at the time of his 2002 conviction — 17 years old — even though he provides no basis for doing so. And that is no different than reclassifying his 2002 felony conviction as a juvenile adjudication, which indisputably requires retroactive application of the 2014 amendment to the Juvenile Court Act. Put another way, defendant's argument requires this Court to either (1) pretend that defendant is a juvenile now (even though he is actually 38 years old), or (2) deem his 2002

felony drug conviction in adult court a juvenile delinquency adjudication (even though the amendment to the Juvenile Court Act does not apply retroactively). Both options are untenable, and, for this additional reason, the appellate court's ruling should be reversed.

D. The Appellate Court's Interpretation Is Unworkable and Will Lead to Unjust Results.

The appellate court's interpretation of the AHC Act is also contrary to the settled rules that courts should consider "the consequences of construing the law one way or another" and that the legislature does not intend to create unworkable and "inconvenient" laws, or laws that lead to "unjust results." *People v. Gutman*, 2011 IL 110338, ¶ 12; *see also People v. Brown*, 2020 IL 124100, ¶ 30 (same). The appellate court's holding that the prosecution must prove that a defendant would have been transferred to adult court for his prior offense (if, hypothetically, the amended Juvenile Court Act had been in place at the time) is plainly unworkable, inconvenient, and will lead to unjust results.

Under the amended version of the Juvenile Court Act, a small number of offenses committed by 17-year-old (or younger) offenders must be tried in adult court, such as first degree murder. *See* 705 ILCS 405/5-130(1)(a). However, for the majority of offenses, prosecutors must petition to transfer juvenile offenders to adult court. *See* 705 ILCS 405/5-805. In determining whether to exercise their discretionary authority to transfer a case to adult court, juvenile courts must consider numerous factors, as of the time the

transfer petition is filed, that relate to issues such as (1) the facts of the underlying offense; (2) the offender's personal characteristics; and (3) the services available in the juvenile system as compared to the adult system. *Id.*

For example, the juvenile court must consider whether the offense was committed in an "aggressive" manner, whether it was premediated, the degree of harm caused, and the overall "circumstances" and "seriousness" of the offense. *Id.* The juvenile court also must consider, among other personal characteristics, the offender's mental and physical health, his "willingness to participate meaningfully in available services," and the "reasonable likelihood that the minor can be rehabilitated" in the juvenile system. *Id.* And the juvenile court must consider the "advantages of treatment within the juvenile system," including "whether there are facilities or programs, or both, particularly available in the juvenile system" that would benefit the offender, and the overall "adequacy" of services that are available. *Id.* It is plainly unworkable to ask the People to prove, and trier of fact to determine, whether a case would have been transferred years ago based on a retroactive analysis of these factors as they existed at the time a petition would have been filed.

This case illustrates the point. Here, as in most every case to which the appellate court's interpretation of the AHC Act would apply, there was no need to collect or present evidence during defendant's 2002 felony drug case regarding whether he should be transferred to adult court because under the law that existed at that time, he was too old to be adjudicated in juvenile

court. Therefore, evidence of the factors that determine whether a case should be transferred to adult court (such as, an offender's willingness to use rehabilitation services in the juvenile system) was not collected and presented in 2002, and could not be reliably recreated now.

In addition, even if such evidence were somehow available years (even decades) later when a defendant is charged with AHC, the appellate court's interpretation would still be unworkable. For example, what does it mean to prove beyond a reasonable doubt — as is surely necessary for any element of the AHC offense — that an offender would have been transferred to adult court for his past offense? Would the prosecution be required to call the assistant state's attorney who prosecuted the prior offense to testify that they would have filed a transfer petition? Would the prosecution be required to call a juvenile court judge, or an expert on juvenile court law, to testify that such a petition would be granted? And would the appellate court's interpretation require the jury, which is generally composed of laypersons with no legal training, to analyze and apply the provisions of the Juvenile Court Act (which contains complicated rules with numerous factors and subparagraphs) and make a legal judgment of whether the defendant would have been transferred to adult court?

Indeed, the appellate court's interpretation would turn AHC trials into trials about the *prior* offense (including the "circumstances" of that offense, and whether it was committed in an "aggressive" manner), the defendant's

characteristics at that prior time (such as whether he was amenable to rehabilitation), and the services available back then in the juvenile system.

Finally, the appellate court's interpretation produces unjust and absurd results. Again, this case demonstrates the point: defendant's 2002 conviction for manufacturing and delivering cocaine (an indisputably serious, Class 1 felony) is not considered a qualifying conviction because in 2002 no evidence was gathered regarding whether he should be transferred to adult court, because under then-existing law his case was automatically in adult court.

It cannot credibly be argued that this is the process, requirements, and results the legislature intended when it stated in subparagraph 3 of the AHC Act that qualifying convictions include "any violation of the Illinois Controlled Substances Act or the Cannabis Control Act that is punishable as a Class 3 felony or higher." Instead, as discussed, the more reasonable interpretation — indeed, the correct interpretation — is that the legislature intended to make clear that only those offenses that might be prosecuted as Class 3 or higher felonies today are qualifying offenses, and Class 4 felonies, misdemeanors and petty offenses are not.

E. *Stewart* Does Not Support the Appellate Court's Decision

To the extent defendant argues that this Court's decision in *People v. Stewart*, 2022 IL 126116, supports the appellate court's decision below, he is incorrect. *Stewart* addressed a different statute with different language: it addressed a prior version of the Class X recidivist sentencing provision,

which provided that a defendant convicted of a Class 2 or higher felony is subject to Class X sentencing if they have certain prior convictions. *Id.* ¶¶ 5, 11-14 (citing 730 ILCS 5/5-4.5-95 (2017)). The defendant in *Stewart* argued that one of his prior convictions was not a qualifying prior conviction because it occurred when he was 17 years old, and if he were retried for that offense now, the case would be adjudicated in juvenile court. *Id.* ¶¶ 1, 11. The Court held that the language of the old version of the Class X sentencing provision was "silent" on whether a conviction of a 17-year-old offender could serve as a predicate offense. *Id.* ¶ 16. The Court, however, noted that the Class X sentencing provision had recently been amended to provide that prior convictions were qualifying convictions only if they occurred after the defendant turned 21. *Id.* ¶¶ 18-20. The Court found that the amendment "clarif[ied]" that convictions of juveniles were not qualifying convictions under the Class X sentencing provision. *Id.* ¶¶ 20-22.

By contrast, here neither the parties nor the appellate court contend that the AHC Act is "silent" regarding whether a felony conviction of a 17-year-old offender in adult court can be a qualifying prior conviction. But even if the AHC Act were silent on this issue, the appellate court's judgment still should be rejected. Unlike the statute at issue in *Stewart*, the General Assembly has not amended the AHC Act to clarify that it includes an age minimum for qualifying offenses. And if, as *Stewart* held, the legislature's amendment of the Class X sentencing provision clarified that the legislature's

intended that juvenile convictions were not qualifying prior convictions under that sentencing provision, then the lack of a similar amendment to the AHC Act suggests that the legislature did *not* intend to exclude prior convictions of juvenile offenders in adult court for the offense of AHC.

Indeed, the legislative history of the AHC Act demonstrates that the General Assembly did not intend to impose an age limit on qualifying offenses. *See, e.g., People v. Eppinger*, 2013 IL 114121, ¶ 32 (where a statute is silent or ambiguous, courts may rely on statute's legislative history). When enacting the AHC Act, the legislature expressly looked to federal law, including the Armed Career Criminal Act (ACCA). *See* Illinois House Trans., 2005 Reg. Sess. No. 37 (Apr. 11, 2005) (discussing the AHC Act: "we're trying to make the state penalties for illegal possession of a firearm commensurate with the federal penalties which are usually a lot more severe"). Under the subsection of the ACCA that correlates to subparagraph 3 of the AHC Act, a person is guilty of violating the ACCA if they possess a gun after having been convicted of three qualifying prior convictions, including "serious drug offenses," which are drug offenses for which the maximum punishment prescribed by law is 10 years or more in prison. *See* 18 U.S.C. § 924(e).

It is settled that under the ACCA, courts must look "only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions," to determine if they are qualifying offenses. *Taylor v. United States*, 495 U.S. 575, 600 (1990); *see also id.* at 599-603

(noting that the practical difficulties of holding mini-trials on a defendant's prior convictions counsels in favor of looking only at the statutory classification of a prior offense). Indeed, under the ACCA, *prior adjudications in juvenile court* for a drug offense can be a qualifying prior conviction, if the statutory definition of the offense the juvenile was charged with shows that it is a serious drug offense. *See, e.g., Coleman*, 656 F.3d at 1092-93 (the question of whether a prior drug conviction is a qualifying conviction "is crime-centered, rather than defendant-centered," so courts must focus on the statutory definition of the prior offense, rather than defendant's individual characteristics).

That the General Assembly relied on federal law when enacting the AHC Act thus rebuts the appellate court's holding that the People must prove beyond a reasonable doubt that, due to defendant's past offense, and his personal characteristics at the time of that offense, if he were retried today, he would be transferred to adult court.

IV. If the Evidence Is Insufficient to Support an Armed Habitual Criminal Conviction, Then the Correct Remedy Is to Reduce Defendant's Conviction to Unlawful Use of a Weapon by a Felon.

Lastly, if defendant's sufficiency argument is not barred, and has merit, then the correct remedy is to reduce his conviction to unlawful use of a weapon by a felon (UUWF) and remand for re-sentencing. This Court has held that if a reviewing court finds the evidence at trial was insufficient to sustain a conviction for a particular offense, Supreme Court Rule 615(b) gives

the court "broad authority to reduce the degree of a defendant's conviction" to a lesser-included offense, even when "the State did not request an instruction on the lesser offense at trial." *People v. Kennebrew*, 2013 IL 113998, ¶ 25.

The People initially charged defendant with UUWF but dismissed that count nolle prosequi before trial. R204. In such circumstances, the charging instrument approach is used to determine whether UUWF is a lesser-included offense. *See, e.g., People v. Henson*, 2017 Ill App 2d 150594, ¶ 18. Under the charging instrument approach, the count of the indictment charging the greater offense need only contain a "broad foundation" or "main outline" of the lesser offense. *Kennebrew*, 2013 IL 113998, ¶ 30.

The crime of UUWF requires evidence that the defendant possessed a gun after one prior felony conviction. *See* 720 ILCS 5/24-1.1 (UUWF statute). Count 1 of the indictment, charging AHC, contains all those elements, as it alleges, among other things, that defendant possessed a firearm after previously being convicted of a felony gun charge in 2008. Sec33. Defendant does not dispute that the evidence establishes that he possessed a gun and that he was convicted of a felony gun charge in 2008 when he was 24. *Gray*, 2021 IL App (1st) 191086, ¶ 9. Accordingly, if this Court reaches defendant's sufficiency claim, and finds the evidence is insufficient to sustain an AHC conviction, then it should reduce defendant's conviction to UUWF and remand for re-sentencing.

CONCLUSION

This Court should reverse the appellate court's judgment and remand for that court to consider defendant's remaining claims.

May 19, 2023

Respectfully submitted,

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RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service and those matters to be appended to the brief under Rule 342(a), is 36 pages.

/s/ Michael L. Cebula
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KeyCite Yellow Flag - Negative Treatment
Appeal Allowed by People v. Gray, Ill., November 30, 2022

2021 IL App (1st) 191086
Appellate Court of Illinois, First District,
First Division.

The PEOPLE of the State of Illinois,
Plaintiff-Appellee,
v.
Demetrius GRAY, Defendant-Appellant.

No. 1-19-1086
|
Filed October 12, 2021

Synopsis
Background: Defendant was convicted in the Circuit Court, Cook County, Mary M. Brosnahan, J., of being an armed habitual criminal. Defendant appealed.

[Holding:] The Appellate Court, Walker, J., held that defendant's prior conviction for delivery of narcotics, committed when he was 17 years old, did not qualify as predicate offense to support armed habitual criminal conviction.

Reversed.

Procedural Posture(s): Appellate Review.

West Headnotes (3)

[1] **Sentencing and Punishment** Juvenile or youthful offender adjudications

Prior conviction for delivery of narcotics, committed when defendant was 17 years old, did not qualify as predicate offense to support armed habitual criminal conviction; under statutes in effect at time of armed habitual criminal charge, if a 17-year-old minor delivered one to 15 grams of narcotics, as defendant did when he was 17 years old, the juvenile courts would have retained jurisdiction over the case, and the conduct would have resulted in a juvenile adjudication, such that the delivery of narcotics conviction was for conduct that was not punishable as a felony as of the date of the firearm possession. 720 Ill. Comp. Stat. Ann. 5/24-1.7.

4 Cases that cite this headnote

[2] **Infants** Construction, operation, and effect

Juvenile adjudications do not constitute convictions.

2 Cases that cite this headnote

[3] **Sentencing and Punishment** Juvenile or youthful offender adjudications

A conviction of a juvenile, following a transfer to criminal court, counts as a prior conviction for purposes of determining whether an offender is a habitual criminal.

4 Cases that cite this headnote

****504** Appeal from the Circuit Court of Cook County, Illinois. No. 16 CR 10202, Honorable Mary Margaret Brosnahan, Judge Presiding.

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OPINION

JUSTICE WALKER delivered the judgment of the court, with opinion.

**15 ¶ 1 A jury found Demetrius Gray guilty of violating the armed habitual criminal provision of the Criminal Code of 2012 (Criminal Code) (720 ILCS 5/24-1.7 (West 2016)). Gray argues on appeal that the trial court should have accepted his guilty plea, he did not get a fair trial, and the State failed to prove that his prior convictions met the requirements of the statute. We hold that the conviction of a juvenile for the delivery of narcotics does not qualify as the kind of conviction that can support a finding of a violation of the armed habitual criminal provision. Because the State failed to prove the requisite prior criminal convictions, we reverse the trial court's judgment.

¶ 2 I. BACKGROUND

¶ 3 On June 10, 2016, a woman flagged down a police car as it rolled through her neighborhood. She directed Officer Fernando Moctezuma's attention to a car parked nearby. Moctezuma saw Gray in the car's passenger seat, reaching toward the car's glove compartment. When Moctezuma approached the car, he saw a gun in the glove compartment. Police arrested Gray.

¶ 4 Prosecutors charged Gray with violating the armed habitual criminal section of the Criminal Code. See 720 ILCS 5/24-1.7 (West 2016). Before trial the prosecutor offered to recommend a sentence of eight years, with no more than 15% reduction for good behavior, in exchange for a guilty plea. Gray rejected the offer. The ***505 **16** prosecutor reduced the offer to six years, still at 85%. Gray countered with an offer to plead guilty in exchange for a sentence of six years with day-for-day good time credit. When the prosecutor rejected the counteroffer, Gray hesitated, but decided to accept the prosecutor's offer to recommend a six-year sentence, with no more than a 15% reduction for good behavior, in exchange for a guilty plea.

¶ 5 The trial court agreed to accept the plea and asked the prosecutor for a factual basis. Gray questioned some details of the factual basis and asked the court whether he could have a different attorney. The court rejected the plea offer, finding that Gray might not be pleading guilty voluntarily. Gray asked again before trial started for permission to plead guilty in exchange for a sentence of six years to be served at 85%. The court rejected the request.

¶ 6 At the trial, Moctezuma testified that, after he arrested Gray and reminded Gray of his constitutional rights, Gray told him that he had found the gun and he intended to turn it in to authorities in exchange for a cash reward. The parties stipulated that Gray had two prior convictions that qualified as a basis for the charge of armed habitual criminal: unlawful use of a weapon by a felon, from 2007, and manufacture or delivery of 1 to 15 grams of narcotics from 2002, when Gray was 17 years old. The jury found Gray guilty of being an armed habitual criminal. The court sentenced Gray to nine years in prison, with no more than a 15% reduction for good behavior. Gray now appeals.

¶ 7 II. ANALYSIS

[1]¶ 8 On appeal, Gray argues that the trial court should have accepted his guilty plea, several errors deprived him of a fair trial, and the evidence did not prove him guilty beyond a reasonable doubt. We first address the sufficiency of the evidence.

¶ 9 Gray does not contest the sufficiency of the evidence that he possessed a firearm. He admits that his criminal record includes two prior felony convictions, one for unlawful use of a weapon by a felon and a Class 1 felony conviction for delivery of narcotics. He contends that the narcotics conviction cannot support the armed habitual criminal charge because he was a juvenile at the time of the narcotics offense and, under statutes now in effect, his offense would not subject him to the jurisdiction of the criminal courts.

¶ 10 The Criminal Code provides:

> "A person commits the offense of being an armed habitual criminal if he *** possesses *** any firearm after having been convicted a total of 2 or more times of any combination of the following offenses:
>
> ***

> *** unlawful use of a weapon by a felon ***
>
> *** [and] any violation of the Illinois Controlled Substances Act *** that is punishable as a Class 3 felony or higher." 720 ILCS 5/24-1.7 (West 2016).

[2]¶ 11 Gray's argument centers on the tense of the Criminal Code's verb. The Criminal Code requires a conviction for conduct that "*is* punishable as a Class 3 felony or higher." (Emphasis added.) 720 ILCS 5/24-1.7(a)(3) (West 2016). If, in 2016, a 17-year-old minor delivered 1 to 15 grams of narcotics, as Gray did in 2002, the juvenile courts would retain jurisdiction over the case, and the conduct would result in a juvenile adjudication. "Illinois courts have consistently held that juvenile adjudications do not constitute convictions." *People v. Taylor*, 221 Ill. 2d 157, 176, 302 Ill.Dec. 697, 850 N.E.2d 134 (2006).

***506 **17** [3]¶ 12 The State points out that a conviction of a juvenile, following a transfer to criminal court, counts as a prior conviction for purposes of determining whether an offender is a habitual criminal. See *Fitzsimmons v. Norgle*, 104 Ill. 2d 369, 84 Ill.Dec. 665, 472 N.E.2d 802 (1984). Gray concedes that he was convicted and punished for a felony, but that is not what the Criminal Code requires. The plain language of the Criminal Code requires the State to prove that the defendant was convicted for conduct that "is punishable" as a felony.

¶ 13 We find this case similar to *People v. Miles*, 2020 IL App (1st) 180736, 446 Ill.Dec. 458, 170 N.E.3d 984, and *People v. Williams*, 2020 IL App (1st) 190414, 449 Ill.Dec. 141, 178 N.E.3d 748. In *Miles*, this court interpreted section 5-4.5-95(b) of the Unified Code of Corrections (730 ILCS 5/5-4.5-95(b) (West 2016)), which authorizes Class X sentencing for offenders found guilty of a Class 1 or Class 2 felony "after having 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." Miles's record included a felony conviction for aggravated vehicular hijacking committed when Miles was 15. The *Miles* court held that, based on the 2016 amendment to section 5-130 of the Juvenile Court Act of 1987, the juvenile court acquired exclusive jurisdiction over minors charged with armed robbery and aggravated vehicular hijacking. Both crimes previously disqualified minors from juvenile court jurisdiction. Hence, the legislature intended that minors who commit armed robbery and aggravated vehicular hijacking are to be treated differently from adults charged with those same crimes. The *Miles* court also found that had Miles committed his 2005 offense under the laws in effect on June 9, 2016, the juvenile court would have had exclusive jurisdiction, and Miles would not have received a Class 2 conviction. Instead, he would have received a juvenile court adjudication. Therefore, the court held that the 2005 conviction should not have been considered a qualifying offense for Miles to be sentenced as a Class X offender. *Miles*, 2020 IL App (1st) 180736, ¶¶ 21-22, 446 Ill.Dec. 458, 170 N.E.3d 984.

¶ 14 The *Williams* court followed *Miles*, holding:

> "Defendant here was properly convicted of burglary in criminal court when he was 17 years old, but a[n] *** amendment to the Juvenile Court Act has since given the juvenile court exclusive jurisdiction over 17-year-old defendants charged with burglary. As *Miles* instructs, we look at the elements of his prior conviction as of the date defendant committed his current offense. [Citation.] On the date he committed the present offense, June 7, 2018, defendant's 2013 burglary conviction would have been resolved in delinquency proceedings rather than criminal court proceedings, and his predicate offense would have been a juvenile adjudication instead of a Class 2 or greater Class felony conviction. *** Following *Miles*, we find that defendant's prior burglary conviction 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." (Internal quotation marks omitted.) *Williams*, 2020 IL App (1st) 190414, ¶ 21, 449 Ill.Dec. 141, 178 N.E.3d 748.

¶ 15 We note that one panel of the Fourth District Appellate Court of Illinois disagreed with *Miles* and *Williams*. In *People v. Reed*, 2020 IL App (4th) 180533, 448 Ill.Dec. 48, 175 N.E.3d 717, the court held that convictions of a juvenile transferred ***507 **18** to criminal court qualify as convictions for all purposes because the defendant's age was not an element of the qualifying offense. We find *Miles* and *Williams* persuasive. To obtain a conviction for aggravated vehicular hijacking (*Miles*), burglary (*Williams*), or delivery of narcotics (here), the prosecution would need to prove that the defendant was at least 18 years old at the time of the offense, or that the defendant merited transfer to the criminal courts under the restrictive provisions for such transfer. See 705 ILCS 405/5-120 (West 2016). In view of the changes to the Juvenile Court Act of 1987,

for most offenses age of the defendant operates as an element of the offense.

¶ 16 Here, the prosecution showed that Gray had two prior felony convictions on his record, but for the conviction for delivery of narcotics, the prosecution did not show that the conviction was for conduct that "is punishable" as a felony as of the date of the firearm possession in 2016. Because the prosecution failed to prove the two prior convictions of the kind required to show a violation of the armed habitual criminal provision of the Criminal Code, we reverse the conviction for violation of the armed habitual criminal provision of the Criminal Code. The State has not asked this court to remand for trial on the offense of unlawful use of a weapon by a felon, and therefore we do not consider the possibility of proceedings on that charge.

¶ 17 III. CONCLUSION

¶ 18 Gray's prior conviction for delivery of narcotics, committed when he was 17, does not qualify as the kind of conviction that can support a later conviction on a charge of being an armed habitual criminal. Accordingly, we reverse the armed habitual criminal conviction.

¶ 19 Reversed.

Presiding Justice Hyman and Justice Coghlan concurred in the judgment and opinion.

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PROOF OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On May 19, 2023, the foregoing **Brief and Appendix of Plaintiff-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided notice to the following registered email address:

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

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