SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	*Opinion issued June 12, 2018*
	)	
Respondent,	)	
	)	
v.	)	No. SC96095
	)	
BRYAN M. PIERCE,	)	
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
The Honorable W. Brent Powell, Circuit Judge

Bryan Pierce was found guilty in a court-tried case of one count of possession of child pornography. On appeal, he argues the circuit court erred in overruling his motion to suppress evidence and in sentencing him to 15 years' imprisonment. The circuit court's judgment is affirmed.

Factual and Procedural History

Police officers were dispatched to Pierce's home after he called a suicide hotline and said he was hearing voices, including his cat's, telling him to stab himself. When officers arrived, Pierce told them the same. One officer asked Pierce if he wanted them to check the residence to make sure nobody was inside to give Pierce "a little peace of mind." Pierce agreed. Once inside Pierce's home, officers noticed a screensaver on a

computer in plain view appearing to depict naked underage girls in a sexually suggestive manner. After officers determined the pictures were saved to the computer's hard drive, they removed the computer and secured a warrant to search it. Pierce was subsequently charged with one count of possession of child pornography.

Before his bench trial, Pierce filed a motion to suppress the evidence seized from his home, arguing he was unable to consent to the officers' warrantless search of his home because he was emotionally disturbed at the time. The circuit court agreed Pierce's consent was not voluntary for this reason but concluded the search was lawful pursuant to the exigent-circumstances exception. Pierce again objected to introduction of the evidence at trial, but was overruled. The circuit court found Pierce guilty.

At Pierce's sentencing hearing, the circuit court stated, "[H]aving proven the defendant up as a prior and persistent offender, it's my understanding that the defendant, his range of punishment was, pursuant to statute, extended to ten to 30 years, is that correct, Mr. Horsman?" Mr. Horsman, the prosecutor, did not confirm this was the range but responded, "We had agreed to a lid of 20, Your Honor." Pierce made no objection to the circuit court's statement concerning the range of punishment. In sentencing Pierce, the circuit court discussed several factors in-depth—ability to be rehabilitated, retribution, and likelihood of re-offending—and concluded "those factors, regardless of my views of whether he's a [sic] good or bad, are what drive my sentence in this case so I meant to mention that before." The circuit court then sentenced Pierce to 15 years' imprisonment. Pierce appealed, and after opinion by the court of appeals, this Court sustained transfer. Mo. Const. art. V, § 10.

Analysis

Pierce first argues the circuit court erred in overruling his motion to suppress evidence. Specifically, he argues the State failed to prove by a preponderance of the evidence that his consent was voluntary or that exigent circumstances existed warranting the officers' warrantless entry into his home. "A consent to search is valid only if it is freely and voluntarily given." *State v. Hyland*, 840 S.W.2d 219, 221 (Mo. banc 1992). But even assuming, without holding, that Pierce's consent to the search was not freely and voluntarily given, application of the exclusionary rule is not appropriate in this case.

"It is a question of law whether . . . the exclusionary rule applies to the evidence seized" and "[q]uestions of law are reviewed *de novo*." *State v. Johnson*, 354 S.W.3d 627, 632 (Mo. banc 2011). "Suppression of evidence, however, has always been our last resort, not our first impulse." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006). "Exclusion is 'not a personal constitutional right,' nor is it designed to 'redress the injury' occasioned by an unconstitutional search." *Davis v. United States*, 564 U.S. 229, 236 (2011) (citation omitted). "For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." *Id.* at 237. The "deterrence benefits of exclusion 'var[y] with the culpability of the law enforcement conduct' at issue." *Id.* at 238 (citation omitted). "When the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." *Id.* (citation omitted). "But when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful, or when their conduct involves only simple, 'isolated' negligence, the deterrence rationale

loses much of its force, and exclusion cannot pay its way." *Id.* (internal citations and quotation marks omitted). Accordingly, "[p]olice practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield 'meaningfu[l]' deterrence, and culpable enough to be 'worth the price paid by the justice system.'" *Id.* at 240 (citation omitted).

Pierce argues application of the exclusionary rule is warranted in this case because the officers acted deliberately, recklessly, or with gross negligence in conducting a search based on the consent of a man who was emotionally disturbed and had been hallucinating. But regardless of whether Pierce voluntarily consented, the circumstances do not warrant application of the exclusionary rule because there was no indication the officers had knowledge, or should be charged with knowledge, that the search was unconstitutional—i.e., there is no indication they acted in bad faith. As stated above, this case could fall into the good-faith category or, at worst, the isolated-negligence category. There is no indication this police department (or police, in general, in this State) routinely rely on the consent of those who are emotionally or mentally disturbed in an effort to conduct warrantless searches.

"[I]solated, nonrecurring police negligence . . . lacks the culpability required to justify the harsh sanction of exclusion." *Id.* at 239 (internal quotation marks omitted). The officers' actions in this case were not the type of deliberate police practices that would lead to meaningful deterrence. Accordingly, the circuit court did not err in overruling Pierce's motion to suppress evidence.

Pierce next argues he was sentenced based on the circuit court's "materially false understanding of the possible range of punishment" because the circuit court initially misstated the appropriate range. Pierce is correct the circuit court misstated the range of punishment. Pierce was convicted of a class B felony and found to be a persistent offender. The ordinary range of punishment for a class B felony is five to 15 years, and 10 to 30 years for a class A felony. Sections 558.011.1(1)–(2), RSMo Supp. 2013. At the time of sentencing, only the *maximum* sentence increased for a persistent offender, while the minimum sentence was unaffected—e.g., a persistent offender convicted of a class B felony was subject to a range consisting of the minimum sentence for a class B felony and the maximum sentence for a class A felony. *See* § 558.016.7(2), RSMo Supp. 2013; *see also, e.g., State v. Cowan*, 247 S.W.3d 617, 619 (Mo. App. 2008) (explaining "the statute only extends the maximum sentence but does not alter the minimum sentence"). As such, Pierce was subject to a sentencing range of five to 30 years, not 10 to 30 years.

Pierce concedes this argument is not preserved for review because he failed to object at the sentencing hearing. Nevertheless, he requests this Court review his sentence for plain error. "Any issue that was not preserved at trial can only be reviewed for plain error, which requires a finding that manifest injustice or a miscarriage of justice has resulted from the trial court error." *State v. Letica*, 356 S.W.3d 157, 167 (Mo. banc 2011). "Relief under the plain error rule is granted only when the alleged error so substantially affects the rights of the accused that a manifest injustice or miscarriage of justice inexorably results if left uncorrected." *State v. Hadley*, 815 S.W.2d 422, 423 (Mo.

banc 1991). While the circuit court at sentencing initially misstated the appropriate range of punishment, Pierce, who "bears the burden of establishing manifest injustice," as "determined by the facts and circumstances of the case," has failed to meet his burden. *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. banc 2006).

At sentencing, the circuit court discussed the reasons underlying its imposition of a 15-year sentence at some length, primary among them that Pierce might re-offend and abuse other children. The circuit court explained, in pertinent part:

> If I knew that you went free from this court to abuse another child, it would be very difficult for me to live with myself for that reason. So I always am concerned about that issue, regardless of whose in front of me, but for someone who maybe have [sic] previously committed those type of offenses and arguably has those type of tendencies, **then it is something that sincerely concerns me and will probably drive my decision in this case more so than anything else**.

(Emphasis added). The circuit court called Pierce's recidivism "the most important factor in this case."

"A sentence passed on the basis of a materially false foundation lacks due process of law and entitles the defendant to a reconsideration of the question of punishment in the light of the true facts, regardless of the eventual outcome." *Wraggs v. State*, 549 S.W.2d 881, 884 (Mo. banc 1977). However, this Court has never vacated a sentence and remanded the case to the circuit court for resentencing pursuant to plain-error review simply because the record shows the circuit court was mistaken concerning the acceptable sentencing range. Rather, this Court has vacated a sentence and remanded the case to the circuit court for resentencing when the record shows the circuit court imposed sentence *based* on its mistaken belief.

In *Wraggs*, this Court did just that because the record "clearly and unequivocally" demonstrated the circuit court, at the time of sentencing, sentenced the defendant "on the basis of assumptions concerning his criminal record which were materially untrue," namely, that he had been legally convicted of five prior convictions when in fact he only had been legally convicted of three because two convictions were invalidated, which meant the defendant's sentence "might have been different if the sentencing judge had known that at least two of [the defendant's] previous convictions had been (illegally) obtained." *Id.* at 883–84, 886 (citations omitted).[1]

This Court in *Wraggs* explained that "on this record the conclusion is inescapable that the sentencing judge . . . took into consideration 'the totality' of [the defendant's] prior convictions, including the two 10-year robbery sentences later invalidated." 549 S.W.2d at 884. "The fact remains that it was the sentencing judge who declared at the sentencing that the 10-year sentences [the defendant] was then serving **played a significant part**" in its sentencing decision. *Id*. at 886 (emphasis added).[2] Here, while the record shows the circuit court *held* a mistaken belief concerning the minimum range of punishment, Pierce has failed to demonstrate a manifest injustice or miscarriage of

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[1] "Generally, invalid convictions may not be used to enhance punishment." *McDaris v. State*, 843 S.W.2d 369, 374 (Mo. banc 1992).

[2] Although this Court in *Wraggs* did not conduct plain-error review, it concluded resentencing was an appropriate remedy for the alleged error only because the record "clearly and unequivocally" demonstrated the circuit court, at the time of sentencing, sentenced the defendant on the basis of a mistaken belief. *Id.* at 883. Here, pursuant to plain-error review, Pierce "has shown no specific reason that, considering the facts and circumstances unique to his case, the circuit court's error resulted in manifest injustice. Accordingly, [he] has failed to carry his burden on plain error review." *State v. Johnson*, 524 S.W.3d 505, 515 (Mo. banc 2017).

justice in that the record fails to prove the circuit court imposed sentence *based* on the mistaken range of punishment.[3]

Furthermore, the court of appeals has refused to remand for resentencing—on plain-error review or otherwise—when the record shows the circuit court imposed sentence based on valid considerations unaffected by any mistaken belief. *See, e.g.*, *State v. Elam*, 493 S.W.3d 38, 43–44 (Mo. App. 2016); *State v. Scott*, 348 S.W.3d 788, 799–800 (Mo. App. 2011), *abrogated on other grounds by State v. Sisco*, 458 S.W.3d 304, 312 (Mo. banc 2015); *State v. Seaton*, 815 S.W.2d 90, 91–92 (Mo. App. 1991).[4]

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[3] To the extent the court of appeals' decisions cited in the dissenting opinion are inconsistent with this Court's decision in *Wraggs*, they should no longer be followed. *See, e.g.*, *State v. Summers*, 456 S.W.3d 441, 447 (Mo. App. 2014) (remanding case for resentencing because of "the circuit court's misstatement of the law" pursuant to *State v. Taylor*, 67 S.W.3d 713, 715–16 (Mo. App. 2002), and *State v. Olney*, 954 S.W.2d 698, 700–01 (Mo. App. 1997)); *State v. Powell*, 380 S.W.3d 632, 635 (Mo. App. 2012) (remanding case for resentencing because "the record implies that the trial court believed it was compelled to impose consecutive sentences and [sic] trial court did not express a different reason for imposing the consecutive sentences"); *Cowan*, 247 S.W.3d at 619 ("[T]he trial court never acknowledged that a mistake was made nor did the trial court state that Mr. Cowan's sentence was based on the correct range of punishment.").

[4] The dissenting opinion concludes these cases are distinguishable from the case sub judice because they involved misstatements communicated by one of the parties with no indication in the record that the circuit court relied on such misstatements when imposing its sentence, whereas this case involves a misstatement made by the circuit court. Certainly, a circuit court relying on a misstatement made by a party is a factor in determining whether that reliance affected the sentence imposed. However, such a factor is not the sole factor a reviewing court would look at in making such a determination. Indeed, in *Elam*, in concluding the defendant failed to show the circuit court plainly erred, the court of appeals explained the "record shows that the sentences were **based on valid considerations**; there is no indication that the trial court's sentences were **based on a misapprehension of the applicable law**, or that the trial court **relied on the prosecutor's misstatement of the law**." 493 S.W.3d at 44 (emphasis added) (citing *Scott*, 348 S.W.3d at 799–800, and *Seaton*, 815 S.W.2d at 91–92). Accordingly, these cases recognize that a defendant must demonstrate that the circuit court imposed sentence *based* on a mistaken belief, which Pierce has failed to do.

Additionally, the dissenting opinion takes *Elam* out of context. Although *Elam* acknowledged there is plain error entitling the defendant to resentencing "[w]hen the record demonstrates that the trial court **imposed**" one type of sentence instead of another "**based** on a

The record in this case does not support a conclusion that the circuit court imposed sentence based on its mistaken belief.[5] In fact, this record expressly demonstrates the opposite conclusion. The record shows the circuit court considered and discussed several factors when determining sentencing length, and the circuit court even expressed that it was imposing sentence based on those factors. In other words, the "record shows that the sentence[] w[as] based on valid considerations" and "there is no indication that the trial court's sentence[] w[as] based on a misapprehension of the applicable law." *Elam*, 493 S.W.3d at 44; *see also Scott*, 348 S.W.3d at 800 ("Where . . . the record demonstrates that the judge's decision to impose consecutive sentences was based on valid considerations, such as independent consideration of the severity of the crimes, no error will be found."); *Seaton*, 815 S.W.2d at 91–92.

Pierce has the burden to establish the circuit court based its sentence on a mistaken belief, not merely that it held such a belief. Anything short of that does not rise to the level of manifest injustice. Here, Pierce has failed to make a case-specific showing that

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misunderstanding of the law," it stated the caveat that "when the record indicates that the trial court's sentence was a product of the trial court's own valid considerations and not a mistaken apprehension of what was required under the law," Missouri appellate courts "**have refused to reverse for new sentencing**." 493 S.W.3d at 43 (emphasis added). The dissenting opinion's piecemeal reading of *Elam* is not a fair reading of the court of appeals' holding in that case.

Furthermore, the dissenting opinion's conclusion—that the circuit court's considerations of valid factors at sentencing "do not dispel that the sentencing judge is using those factors to sentence the defendant within the context of the mistaken range"—is at odds with Pierce's burden under plain-error review. Pierce has to establish the circuit court *based* its sentence on the mistaken belief, not merely that it *held* a mistaken belief.

[5] Unlike in *State v. Williams*, 465 S.W.3d 516, 520–21 (Mo. App. 2015), and *State v. Troya*, 407 S.W.3d 695, 700–01 (Mo. App. 2013), which are cited favorably by the dissenting opinion, the circuit court did not sentence Pierce to the misstated minimum sentence; instead, it sentenced Pierce to a sentence well above the minimum sentence for the expressly relevant reasons discussed above.

he was sentenced based on the circuit court's mistaken belief. *See Baxter*, 204 S.W.3d at 652. Accordingly, the circuit court did not err in sentencing Pierce to 15 years' imprisonment.

Conclusion

The circuit court's judgment is affirmed.

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Zel M. Fischer, Chief Justice

Wilson and Russell, JJ., and Lynch, Sp.J., concur;
Breckenridge, J., concurs in part and dissents in part in separate opinion filed;
Draper and Stith, JJ., concur in opinion of Breckenridge,
J. Powell, J., not participating.

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OPINION CONCURRING IN PART AND DISSENTING IN PART

I concur in the principal opinion's holding that the circuit court did not err in overruling Bryan Pierce's motion to suppress evidence. I respectfully dissent, however, from the principal opinion's holding that the circuit did not err in sentencing Mr. Pierce based on a mistaken belief as to the applicable enhanced range of punishment.

The principal opinion acknowledges the circuit court misstated the range of punishment on the record at the sentencing hearing when it stated expressly, on the record, that the sentencing range was 10 to 30 years. Pursuant to section 558.011.1(1),[1] Mr. Pierce's enhanced range of punishment as a prior and persistent offender was five to 30 years, or life in prison. Yet the principal opinion concludes Mr. Pierce failed to establish

[1] Unless otherwise noted, all statutory citations are to RSMo Supp. 2013.

error resulted from the misstated range of punishment simply because the circuit court articulated other valid sentencing considerations during the sentencing hearing. Such a conclusion misconstrues Missouri case law on the subject and ignores the manifest injustice that inevitably results when a judge sentences a defendant with a mistaken belief as to the applicable range of punishment.

First, neither the principal opinion nor the state cite a single case in which the reviewing court has not found reversible error – plain or otherwise – when a sentence has been imposed by a ***circuit court*** that ***expressly misstated*** the range of punishment or the law regarding consecutive sentencing on the record. More specifically, Missouri courts have found plain error and remanded for resentencing in every case in which the trial court stated an incorrect range of punishment or incorrectly stated the law required consecutive sentencing and the error was not properly preserved for appellate review. *See, e.g.*, *State v. Williams*, 465 S.W.3d 516, 520-21 (Mo. App. 2015); *State v. Summers*, 456 S.W.3d 441, 445-47 (Mo. App. 2014); *State v. Troya*, 407 S.W.3d 695, 700 (Mo. App. 2013); *State v. Powell*, 380 S.W.3d 632, 635 (Mo. App. 2012); *State v. Taylor*, 67 S.W.3d 713, 715-16 (Mo. App. 2002); *State v. Olney*, 954 S.W.2d 698, 701 (Mo. App. 1997). Accordingly, Missouri courts have repeatedly found plain error results when a sentence is imposed by a circuit court that has expressly misstated the range of punishment on the record.

The principal opinion reasons this body of case law can be ignored because the circuit court considered and discussed several factors when it imposed Mr. Pierce's sentence. In doing so, the principal opinion relies on cases in which Missouri courts have held a defendant is not entitled to resentencing "when the record indicates that the trial

court's sentence was a product of the trial court's own valid considerations and not a mistaken apprehension of what was required under the law." *State v. Elam*, 493 S.W.3d 38, 43 (Mo. App. 2016); *see also State v. Scott*, 348 S.W.3d 788, 800 (Mo. App. 2011), *abrogated on other grounds by State v. Sisco*, 458 S.W.3d 304, 311 (Mo. banc 2015); *State v. Seaton*, 815 S.W.2d 90, 92 (Mo. App. 1991). But these cases relied upon by the principal opinion are readily distinguishable from the present case in that none involved a misstatement of the law during sentencing by the circuit court. Instead, these cases involve ***misstatements by a prosecutor*** with no indication in the record that the circuit court relied on such misstatements when imposing its sentence. *See Elam*, 493 S.W.3d at 44 (finding no plain error when the prosecutor misstated that the defendant's sentences must run consecutively because there was no indication the circuit court relied on the prosecutor's misstatement of the law); *Scott*, 348 S.W.3d at 800 (finding no plain error when the record indicated the circuit court "did not simply rely on the prosecutor's incorrect interpretation of the statute"); *Seaton*, 815 S.W.2d at 92 (finding no error occurred when the prosecutor's recommendation implied consecutive sentencing was required in that the circuit court's comments during sentencing established the court did not believe the state's recommendation was mandatory as a matter of law).

Elam, *Scott*, and *Seaton*, therefore, are inapposite to the present situation in which the circuit court – not the prosecutor – expressly stated a mistaken understanding of the law – the incorrect range of punishment – on the record during the sentencing hearing. Accordingly, this is not a case in which "the record indicates that the trial court's sentence was a product of the trial court's own valid considerations ***and not a mistaken***

apprehension of what was required under the law." *Elam*, 493 S.W.3d at 43 (emphasis added).[2]

Furthermore, the principal opinion draws a distinction between the circuit court ***holding*** a mistaken belief as to the range of punishment and the circuit court ***basing*** its sentence on an incorrect sentencing range. In doing so, the principal opinion relies on *Wraggs v. State*, 549 S.W.2d 881 (Mo. banc 1977). But this Court in *Wraggs* made no such distinction. In fact, this Court implemented a different standard in vacating the defendant's sentence in *Wraggs* than what the principal opinion's analysis suggests.

In *Wraggs*, the defendant appealed from an order overruling his motion for postconviction relief in which he asserted his sentence should be vacated because it resulted from the sentencing court's consideration of two prior convictions that had been unconstitutionally obtained and were later deemed invalid. *Id.* at 883. The judge who adjudicated the defendant's postconviction motion was the same judge who had imposed the defendant's 13-year sentence. *Id.* at 883. The judge overruled the defendant's postconviction motion, finding "the sentence imposed 'was within the court's sound discretion and was not based on any prior conviction which was unconstitutional'" and

[2] Despite the principal opinion's assertion to the contrary, this reading of *Elam* is anything but piecemeal. Rather, it is the principal opinion that refuses to acknowledge *Elam*, *Scott*, and *Seaton* turn not just on the consideration of other factors but also the complete absence in the record of any indication that ***the circuit court*** misunderstood the law while imposing sentence. The records in *Elam*, *Scott*, and *Seaton* do not reflect the court sentenced the defendant while misunderstanding the law because no misstatement of the law was made by the circuit court in those cases. The principal opinion points to no case in which the circuit court misstated the law regarding sentencing and no plain error was found simply because the circuit court stated other valid sentencing factors in the course of sentencing the defendant.

"the 13-year sentence was 'justified * * * by the severity of the crime * * * and the previous conviction for burglary.'" *Id.* (alterations in the original).

Relying on *United States v. Tucker*, 404 U.S. 443, 448 (1972), this Court explained: "The pertinent question is whether the sentence was predicated on misinformation; whether the sentence ***might have been different*** if the sentencing judge had known that at least two of appellant's previous convictions had been illegally obtained." *Wraggs*, 549 S.W.2d at 884 (emphasis added). This Court then held that due process required the sentence to be vacated and the cause remanded for resentencing, stating:

> It is not for us to say that this change [in the prior convictions] would not influence, although not compel, a sentencing judge to render a lesser sentence. This is true even though, as [the sentencing judge] has stated, the 13-year sentence was within legal limits and his discretion; it was not based upon prior convictions which were unconstitutional and was justified and supported by the severity of the crime of assault with intent to main with malice.

Id. at 886.

Applying this Court's analysis in *Wraggs*, the proper standard in this case is whether Mr. Pierce's sentence ***might have been different*** had the circuit court's sentence not been predicated on the mistaken sentencing range. Even when, as here, a sentencing court makes statements regarding valid factors it considered in imposing sentencing, such statements do not negate that the sentencing court used those factors to sentence the defendant within the context of an incorrect range of punishment.

To reason, as the principal opinion does, that the circuit court based its sentence wholly on the factor of recidivism overlooks the requirement that a defendant must be sentenced within the statutorily approved range of punishments. *See State v. Hart*, 404

S.W.3d 232, 234 n.2 (Mo. banc 2013). The correct range of punishment, therefore, is an essential predicate to imposing any sentence, and sentencing a defendant when mistaken as to that applicable range inherently affects the sentencing process and might lead to a different sentence.

The precedent set by the principal opinion will place on a defendant the nearly impossible burden of proving the sentence would be different if the circuit court had not been mistaken as to a foundational fact. In effect, under the principal opinion, a defendant will be entitled to relief only when the circuit court expressly states on the record its mistaken belief was the reason it imposed a particular sentence.

Due process prohibits a sentencing court from imposing a sentence based on a materially false foundation – such as the applicable range of punishment, *see State v. Cowan*, 247 S.W.3d 617, 619 (Mo. App. 2008), whether a sentence is required by law to be consecutive, *see Powell*, 380 S.W.3d at 635, or whether prior convictions are constitutionally invalid, *see Wraggs*, 549 S.W.2d at 884 – and entitles a defendant to "reconsideration of the question of punishment in light of the true facts, regardless of the eventual outcome." *Id.* It follows that the possibility that a sentence might have been different had the circuit court understood the correct range of punishment is the proper legal standard to establish error and require resentencing, even though the sentence was imposed after consideration of valid sentencing factors or was otherwise within the permissible sentencing range.

Here, the circuit court imposed a sentence of 15 years when the court believed the sentencing range was 10 to 30 years in prison. The decision to impose a 15-year sentence

was inherently influenced by the mistaken range of punishment expressed by the court. It is possible, therefore, the sentence might have been different had the circuit court understood the proper minimum punishment was five years in prison.

Consequently, I would hold Mr. Pierce's sentence was based on a materially false foundation in that the circuit court was wrong as to the correct enhanced range of punishment. Imposing sentence upon a mistaken belief as to the range of punishment is manifestly unjust and results in plain error. I, therefore, would vacate Mr. Pierce's sentence and remand the case for resentencing.

PATRICIA BRECKENRIDGE, JUDGE