

No. 1-10-3757

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 07 CR 4176
)	
)	
CRANDALL WELLS,)	The Honorable
)	Larry G. Axelrood,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justice Fitzgerald Smith and Sterba concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction for his 2007 armed robbery, entered on his negotiated guilty plea, was void because it was based upon a provision in the armed robbery statute that violated the proportionate penalties clause of the Illinois Constitution of 1970. Reversed and remanded.

¶ 2 This appeal comes to us following defendant Crandall (also Crandell) Wells' collateral attack against the judgment and 10-year sentence entered on his negotiated guilty plea to armed robbery. The only relevant issue on appeal is whether the armed robbery provision of the statute

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on which defendant's guilty plea conviction rested is unconstitutional for violating the proportionate penalties clause of the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, § 11).

We reverse and remand.

¶ 3

BACKGROUND

¶ 4 On June 12, 2007, defendant entered into a negotiated guilty plea to armed robbery. In exchange, the State dismissed the remaining charges of aggravated robbery, robbery, aggravated battery of a senior citizen, and aggravated battery, and the court imposed the agreed-upon prison term of 10 years. Defendant subsequently filed a *pro se* postconviction petition arguing he was not admonished, as required, that he must serve a three-year period of mandatory supervised release (MSR). At the hearing on the petition, held January 24, 2008, the circuit court agreed and therefore granted defendant's postconviction petition. The court said, "[t]hat means, Mr. Wells, that you're now in the position that you were in prior to pleading guilty." The court then presented defendant with the option of facing trial or receiving the same plea bargain the court previously "offered," only this time with admonishments of the three-year MSR term. Defendant chose the latter option of entering a guilty plea to armed robbery while armed with a dangerous weapon other than a firearm in exchange for 10 years' imprisonment with 3 years' MSR. Before accepting the plea, the court clarified that although defendant had filed the postconviction petition *pro se*, he was then represented by the same public defender as at his initial guilty plea hearing. The court ordered counsel to "stand in" and remain defendant's attorney. The court also asked both the State and defense counsel whether it was "everyone's understanding that we're going to proceed on count one, which is armed robbery ***?" Both attorneys responded in the

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affirmative, as did defendant. The court admonished defendant of his rights and that the possible sentence was 6 to 30 years in prison and, potentially, an enhanced sentence of 12 to 60 years, in addition to 3 years' MSR. The court queried whether defendant's guilty plea was voluntary, to which defendant said, "yes." The factual basis underlying the guilty plea revealed that on January 25, 2007, defendant stole a purse from a 65-year-old woman and struck her three times with a BB gun when she resisted. Following this, the court accepted defendant's guilty plea to armed robbery with a bludgeon in exchange for 10 years' imprisonment and entered a corrected mittimus reflecting the sentence. Defendant did not file a motion to withdraw his guilty plea or a direct appeal.

¶ 5 Defendant subsequently filed an unsuccessful motion to vacate a void sentence. On August 20, 2010, defendant filed a "Motion for Relief from Judgment, Ineffective Counsel," pursuant to section 2-1401(f) of the Code of Civil Procedure (735 ILCS 5/2-1401(f) (West 2006)). Defendant asserted that his January 24 counsel was ineffective for failing to represent that defendant could have sought specific performance, rather than withdrawn his guilty plea, by reducing his 10-year sentence to seven years in order to approximate the original bargain struck between the parties.

¶ 6 The State concedes that on August 27, 2010, the court recharacterized defendant's section 2-1401 petition as a postconviction petition, absent the necessary admonishments under *People v. Shellstrom*, 216 Ill. 2d 45 (2005), then dismissed the petition as frivolous and patently without merit. Defendant filed a late notice of appeal from that summary dismissal, which this court granted.

¶ 7

ANALYSIS

¶ 8 Defendant contends for the first time that his 10-year sentence for armed robbery violates the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I § 11). Defendant maintains that while armed robbery and armed violence have identical elements, armed robbery carries a more severe penalty.

¶ 9 Although defendant did not raise this claim below, as the State acknowledges, a defendant may argue that a criminal statute is unconstitutional, and thus void *ab initio*, at any time even when raised for the first time on collateral appeal. See *People v. Guevara*, 216 Ill. 2d 533, 542 (2005); see also *People v. Wright*, 194 Ill. 2d 1, 23 (2000) (noting case considering constitutionality of statute raised for the first time in appellate briefs); *People v. Thompson*, 209 Ill. 2d 19, 25 (2004) (a void sentence may be attacked at any time or in any court, either directly or collaterally). We thus proceed in our *de novo* review of defendant's claim. *People v. Clemons*, 2012 IL 107821, ¶ 8.

¶ 10 The proportionate penalties clause of the Illinois Constitution provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. In analyzing whether a statute violates the proportionate penalties clause, our ultimate inquiry is whether the legislature has set the sentence in accord with the seriousness of the offense. *Guevara*, 216 Ill.2d at 543; *People v. Harris*, 2012 IL App (1 st) 092251, ¶ 13. A statute violates the proportionate penalties clause where two offenses have identical elements but one carries a greater sentencing range than the other. *Harris*, 2012 IL App (1 st) 092251, ¶ 13.

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¶ 11 In this case, defendant pleaded guilty to armed robbery while armed with a dangerous weapon, in so far as he used the BB gun as a bludgeon, then was sentenced to 10 years' imprisonment for that offense. The Criminal Code of 1961, in effect at that time defendant committed his crime, defines armed robbery as the taking of property from the person or presence of another by the use of force or threat of force while armed with a dangerous weapon other than a firearm (720 ILCS 5/18-1(a), 18-2(a)(1) (West 2006)). Armed violence is the commission of a felony, including robbery, while armed with a category I, II, or III weapon. 720 ILCS 5/33A-1(c), 33A-2(a) (West 2006). A category III weapon includes a bludgeon like the type used in this case. See 720 ILCS 5/33A-1(c)(3) (West 2006). As our supreme court recognized in *People v. Hauschild*, 226 Ill. 2d 63, 86 (2007), when the offense of armed violence is predicated on robbery pursuant to section 33A-1 (720 ILCS 5/33A-1(c)(1) (West 2006)), it contains the same elements as armed robbery while armed with a firearm. *Harris*, 2012 IL App (1st) 092251, ¶ 14; see also *Clemons*, 2012 IL 107821, ¶¶ 17, 19 (stating that *Hauschild* remains the law as to the meaning of the armed violence statute prior to its amendment by Public Act 95-688, effective October 23, 2007, which eradicated simple robbery as a predicate offense for armed violence). By extension and as the statutory provisions demonstrate, armed violence predicated on robbery with a category III weapon, such as a bludgeon, contains the same elements as armed robbery while armed with a bludgeon. See *People v. Span*, 2011 IL App (1st) 083037, ¶ 105 (concluding attempted armed robbery with a bludgeon and attempted armed violence predicated on robbery while armed with a bludgeon have identical elements). As the foregoing discussion reveals, under the proportionate penalties clause, the sentences for these

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two offenses should not be different. See *Harris*, 2012 IL App (1 st) 092251, ¶ 14.

¶ 12 Nevertheless, the sentencing ranges *are* different. Armed robbery while armed with a bludgeon constitutes a Class X felony carrying a term of 6 to 30 years' imprisonment. 720 ILCS 5/18-2(b); 730 ILCS 5/5-8-1(a)(3) (West 2006). Armed violence predicated on robbery while armed with a bludgeon constitutes a Class 2 felony carrying a term of 3 to 7 years' imprisonment. 720 ILCS 5/33A-3(b); 730 ILCS 5/5-8-1(a)(5) (West 2006). Because the penalties provided for armed robbery while armed with a bludgeon are harsher than the penalties provided for armed violence predicated on robbery while armed with a bludgeon, defendant's sentence for armed robbery in this case violates the proportionate penalties clause. See *Hauschild*, 226 Ill. 2d at 86-87. A conviction based on a statute that is later declared unconstitutional is a nullity and is void. *People v. Wagner*, 89 Ill. 2d 308, 311 (1982); *People v. Scales*, 307 Ill. App. 3d 356, 361 (1999); see also *People v. Brown*, 225 Ill. 2d 188, 199 (2007) (a provision that is void *ab initio* has no force or effect; it is as though it had never been passed). Defendant's armed robbery conviction therefore is void.

¶ 13 The State nonetheless argues that armed violence predicated on robbery with a category III weapon "was not available to prosecutors" at the time defendant was charged and, thus, there can be no proportionate penalties violation in this case. In support, the State points to *People v. Lewis*, 175 Ill. 2d 412, 418 (1997), wherein the supreme court held armed violence predicated on robbery while armed with a category I weapon violated the proportionate penalties clause because the offense reflected the same elements but with a greater sentence than armed robbery. The State essentially hangs its hat on *Hauschild's dicta* that, following *Lewis*, the offense of

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armed violence " 'ceased to exist' " and was therefore unavailable to prosecutors. *Hauschild*, 226 Ill. 2d at 84. The State acknowledges *Hauschild's* express holding that the *Lewis* "prohibition was eradicated by the legislature's enactment of Public Act 91-404[.]" which " 'revived' the offense of armed violence predicated on robbery when it amended the sentence for certain armed robberies to add the 15/20/25-to-life provisions, creating more severe penalties for those offenses than for armed violence predicated on robbery." *Hauschild*, 226 Ill. 2d at 84. The State maintains, however, that Public Act 91-404 only "revived" the offense of armed violence when predicated on robbery while armed with a *category I weapon* like a handgun and, as such, the armed violence offense at issue in this case involving a category III remained defunct after *Lewis*.

¶ 14 While seemingly clever, this argument has no merit. *Lewis* did not hold the *entire* armed violence statute unconstitutional. At that time, the armed violence statute applied to the commission of *any felony* while armed with a dangerous weapon. See, e.g., 720 ILCS 5/33A-2 (West 1998); *People v. Espinoza*, 184 Ill. 2d 252, 259 (1998) (a post-*Lewis* case upholding charges of armed violence predicated on aggravated battery (public way) with a category II or III weapon and aggravated battery because elements were *not* identical). Rather, the *Lewis* court specifically addressed the armed violence statute predicated on robbery with a category I and, by implication, category II weapon in so far as the penalties for those offenses were greater than the penalty for the identical-elements offense of armed robbery. A careful reading of *Hauschild* and its express holding with respect to *Lewis* supports this conclusion. As a result, *Lewis* did not eradicate the offense of armed violence predicated on robbery with a category III weapon, and there was nothing for Public Act 91-404 to revive in that specific regard. Indeed, as is the case

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now, at the time *Lewis* was decided, armed violence predicated on robbery with a category III weapon was a Class 2 felony, and armed robbery while armed with a bludgeon was a Class X felony. Under *Lewis*, then, it was not armed violence that would have suffered a proportionate penalties attack but, rather, armed robbery. We thus conclude armed violence was available as a prosecutable offense at the time defendant was charged and is valid for the proportionate penalties analysis here.

¶ 15 The State also argues that the legislature did not intend to replace or undermine the armed robbery statute with the passage of the armed violence statute. As in *Hauschild*, we decline to depart from the 2006 armed violence statute's unambiguous language excluding only armed robbery, but *not* simple robbery, from the meaning of the armed violence statute. See *Hauschild*, 226 Ill. 2d at 85. Because the armed violence statute in effect when defendant committed his crime unambiguously allows robbery to serve as a predicate offense, and those robberies are inherently committed while armed, we must enforce the statute as enacted and cannot depart from the language by creating exceptions, limitations, or conditions not expressed by the legislature. See *Hauschild*, 226 Ill. 2d at 85; see also *Clemons*, 2012 IL 107821, ¶ 19, 52 (affirming *Hauschild* and noting it is the legislature's job to engage in more careful drafting). Given the identical elements between the statutes at issue here, the penalties must be proportionate, but they are not. Based on the foregoing, we conclude the State's arguments must fail.

¶ 16 The remaining issue for us now is to determine the appropriate remedy. Defendant asks that this court simply impose the maximum sentence for armed violence predicated on robbery

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while armed with a bludgeon, which is seven years, or in the alternative, to vacate his sentence and remand the matter for resentencing on the armed violence offense. Because defendant entered into a negotiated guilty plea and for the reasons to follow, we find neither of the proposed remedies is appropriate.

¶ 17 According to *Hauschild*, when an amended statute violates the proportionate penalties clause, the proper remedy is to remand for resentencing in accordance with the statute as it existed prior to the amendment. *Hauschild*, 226 Ill. 2d at 88-89. That remedy does not apply in this case because the violation of the proportionate penalties clause was not the result of an amendment to the statute. In such an instance, courts have vacated the constitutionally-infirm conviction and sentence carrying the greater penalty and remanded for resentencing on the identical-elements statute carrying the more lenient penalty. See, e.g., *Span*, 2011 IL App (1st) 083037, relying on *People v. Christy*, 139 Ill. 2d 172, 174, 181 (1990). In this case, however, defendant's illegal sentence is the result of a negotiated guilty plea, thus presenting a distinct scenario.

¶ 18 Our supreme court has declared that plea agreements, and in particular agreements for fully negotiated pleas where the parties have agreed on the appropriate sentence, are generally governed by contract law. *People v. Absher*, 242 Ill. 2d 77, 87 (2011); *People v. Donelson*, 2011 IL App (1st) 092594, ¶ 14, *appeal allowed by People v. Donelson*, No. 113603 (March 28, 2012). A plea agreement is between the State and the defendant, and the circuit court is not a party to the agreement. *Id.* While an illegal contract is generally void *ab initio*, a plea agreement is void when an essential part of the agreed exchange is unenforceable or illegal under the relevant

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statutes. *People v. Gregory*, 379 Ill. App. 3d 414, 419-20 (2008), relying on *People v. Hare*, 315 Ill. App. 3d 606, 610 (2000).

¶ 19 In this case, defendant pleaded guilty to an offense that has been declared a legal nullity as a result of the proportionate penalties clause violation. The charge of armed robbery and accompanying 10-year sentence were essential parts of the agreed exchange. We thus conclude that both the plea and sentence are void. While defendant essentially asks that we amend the guilty plea to reflect the different charge of armed violence predicated on robbery with a category III weapon, we do not believe such a remedy comports with the contract principles underlying guilty plea proceedings. While facile, such a remedy would bind the State to perform according to an agreement it did not make. See *Absher*, 242 Ill. 2d at 87 (defendant cannot unilaterally modify terms of the plea agreement).

¶ 20 In reaching this conclusion, we distinguish the recently decided *People v. Hudson*, 2012 IL App (2d) 100484. In *Hudson*, the defendant pled guilty to aggravated driving under the influence (DUI) in exchange for a 5-year sentence, with a range between 1 and 12 years, and the dismissal of other charges. The defendant subsequently challenged his conviction as void in a postjudgment motion, and the State conceded that the version of the statute upon which the defendant's guilty plea rested violated the single subject rule of the Illinois Constitution of 1970. The State acknowledged the prior version of the aggravated DUI statute controlled and, as such, the defendant was really subject to a Class 4 felony sentence between 1 to 3 years in prison. The matter eventually reached the appellate court, where the defendant argued this rendered not just his sentence void, but his plea agreement as well. The *Hudson* court disagreed. *Hudson* cited the

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supreme court case, *People v. Brown*, 225 Ill. 2d 188, 205 (2007), as authority for the proposition that while a sentence or portion thereof not authorized by statute is void, it is void only to the extent that it exceeds what the law permits. Based on that principle, *Hudson* concluded that the legally authorized portion of the sentence remained valid, and the court corrected the defendant's sentence to three years' imprisonment. The court reasoned that the defendant was getting a better bargain than the one he entered into.

¶ 21 In this case, unlike *Hudson*, the State made no concession with regard to the applicability of the armed violence statute. Moreover, as the following discussion makes more clear, we find *Hudson's* adherence to *Brown* questionable given that the guilty plea in *Hudson*, itself, rested on an unconstitutional statute and the five-year sentence originally imposed in *Hudson*, unlike that in *Brown*, was not within the permissible range of the applicable statute.

¶ 22 This leads us then, to *Brown*, where the 16-year-old defendant was transferred from juvenile custody to criminal court and then entered a negotiated guilty plea to attempted murder of a peace officer in exchange for 28 years' imprisonment and the dismissal of other charges. The statute pursuant to which the defendant was transferred was later declared unconstitutional and thus void *ab initio*, and the defendant filed an unsuccessful collateral attack on that basis. The appellate court reversed the circuit court's denial of the petition, holding the defendant's transfer, plea, and conviction were void as a result of the unconstitutional statute. The supreme court agreed in part, determining that the defendant was entitled to a new transfer hearing under the previous provision of the statute. The court determined that if the transfer was improper, the defendant's conviction of course would be void, but if not, the defendant would lack grounds to

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challenge his guilty plea conviction as void because the "the substantive offenses remain unchanged, and their validity remains unquestioned." *Brown*, 225 Ill. 2d at 203. The court, moreover, determined that although the defendant was not sentenced according to the 15-to-60-year range of the applicable statute, his 28-year sentence still *fell within* that range and was therefor proper. The court noted: "[W]hile a sentence, or portion thereof, not authorized by statute is void ***, it is void only to the extent that it exceeds what the law permits. The legally authorized portion of the sentence remains valid." *Brown*, 225 Ill. 2d at 205. The court continued, noting there was nothing in the transcript of the hearing on the plea and sentence to suggest that there was any actual misunderstanding with regard to sentencing or that any misunderstanding affected the plea.

¶ 23 In the case *sub judice*, defendant's guilty plea itself rested on a statutory provision that was unconstitutional and thus null and void, resulting in a void plea. See *Scales*, 307 Ill. App. 3d at 360-61; see also *People v. Zeisler*, 125 Ill. 2d 42, 48 (1988) (the doctrine of void *ab initio* declares a statute unconstitutional, null and void, which results in the court's vacating a conviction based on such a statute). Moreover, unlike in *Brown*, were we to uphold defendant's guilty plea, as stated, it would be based *not* upon a prior version of the offense of armed robbery, but on the completely different offense of armed violence. While we have concluded the armed violence offense at issue in this case has identical elements, we do not believe it is the role of this court to amend the substance of a guilty plea, the negotiations to which we were not privy. It is the role of the State to bring the charges and, should it so choose, to plea bargain with a defendant. *People v. White*, 2011 IL 109616, ¶ 25. Here, the State did not even charge defendant

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with armed violence. A further distinction must be noted regarding defendant's sentence. As noted above, in *Brown*, the defendant's 28-year sentence fell within the sentencing range which the court ultimately found applicable. Contrarily, the sentence here does not. Although defendant is subject to armed violence, a Class 2 felony with a potential sentence of 3 to 7 years, the sentence negotiated pursuant to the armed robbery statute was for 10 years. While *Hudson* read *Brown* to mean that a court can simply lop off the excess portion of the void sentence, the facts in *Brown* do not actually demonstrate that is the correct result when addressing a negotiated guilty plea.

¶ 24 In that sense, this case is more analogous to *People v. Johnson*, 338 Ill. App. 3d 213, 215-16 (2003), wherein the defendant pleaded guilty to a sentence of probation for which he simply was ineligible. The court held the defendant's probation order and the revocation of probation order were void, and because the defendant had pleaded guilty upon representation that he would receive probation, the defendant and the State necessarily lacked an agreement. The court determined that the proper remedy was to permit the defendant to withdraw his guilty plea and face trial should he so choose. See also *White*, 2011 IL 109616, ¶¶ 21, 31 (defendant's guilty plea sentence below mandatory minimum resulted in a void plea and sentence requiring withdrawal of guilty plea).

¶ 25 We find withdrawal of the guilty plea especially appropriate here, where there *was* confusion and misunderstanding with regard to the maximum allowable sentence from the get-go of plea negotiations. It is undisputed that when defendant first entered his guilty plea, he was not admonished of the MSR term. Although he was admonished at the second plea hearing, we

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observe it is unclear whether it was the State bargaining with defendant or the court and whether defendant was in fact properly represented by counsel. Under the facts of this case, we conclude defendant's guilty plea and sentence are void, and his conviction must be remanded for withdrawal of the guilty plea.

¶ 26 Lastly, we recognize that we could have remanded this case for *Shellstrom* warnings after defendant raised the issue on appeal and the State conceded the circuit court's impropriety. However, to have done so would have been an exercise in futility given that defendant's plea and sentence are void. As *White* noted, even when a defendant, prosecutor, and court agree on a sentence, the court cannot give the sentence effect if it is not authorized by law. *White*, 2011 IL 109616, ¶ 23. Because our disposition renders defendant's remaining contentions moot, we need not address them.

¶ 27

CONCLUSION

¶ 28 We reverse the judgment of the circuit court of Cook County and remand the case for further proceedings consistent with this opinion.

¶ 29 Reversed and remanded.