

2012 IL App (2d) 100798-U  
Nos. 2-10-0798 & 2-10-0799 cons.  
Order filed June 29, 2012  
Modified upon denial of rehearing August 27, 2012

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

---

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

---

THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Lake County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 07-CF-1441
	)	07-CF-1835
	)	
JAMES T. LEZINE,	)	Honorable
	)	John T. Phillips,
Defendant-Appellant.	)	Judge, Presiding.

---

JUSTICE BIRKETT delivered the judgment of the court.  
Justices McLaren and Hutchinson concurred in the judgment.

**ORDER**

*Held:* The trial court erred by failing to explain the reasons for its discretionary consecutive sentencing of defendant for two aggravated criminal sexual abuse sentences resulting in the modification of defendant's sentences on appeal so that the three aggravated criminal sexual abuse convictions were concurrent with each other and consecutive to the two consecutive predatory criminal sexual assault convictions.

¶1 Defendant, James T. Lezine, was convicted of two counts of predatory criminal sexual assault (720 ILCS 5/12-14.1(a)(1) (West 2006)) (case No. 07-CF-1835) and three counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(b) (West 2006)) (case Nos. 07-CF-1441 and 07-CF-1835),

for which he received an aggregate 27-year prison sentence (15- and 12-year consecutive sentences for the two predatory criminal sexual assault counts concurrent with the three 8-year sentences for the aggravated criminal sexual abuse counts which were also concurrent with each other). Defendant appealed and this court affirmed defendant's convictions, modified his sentencing credit, and vacated the sentences because the trial court erroneously did not make the three aggravated criminal sexual abuse counts consecutive to the predatory criminal sexual assault counts, pursuant to section 5-8-4 of the Unified Code of Corrections (730 ILCS 5/5-8-4 (West 2006)). *People v. Lezine*, Nos. 2-08-0482 & 2-08-0483 cons. (February 25, 2010) (*Lezine I*). On remand, the circuit court of Lake County sentenced defendant to consecutive sentences of 13 years (count 9 predatory criminal sexual assault, case No. 07-CF-1835), 11 years (count 10 predatory criminal sexual assault, case No. 07-CF-1835), 7 years (count 1 aggravated criminal sexual abuse, case No. 07-1835), and 7 years (count 3 aggravated criminal sexual abuse, case No. 07-CF-1835), all of which were concurrent with a 9-year sentence for the remaining aggravated criminal sexual abuse count (count 6, case No. 07-CF-1441), for an aggregate 38-year sentence. Defendant timely appeals from the remanded sentencing hearing, contending that the 38-year term is excessive and that the discretionary consecutive sentences for two of the three aggravated criminal sexual assault counts were not sufficiently justified and were not necessary to protect the public from further criminal conduct by defendant. We affirm as modified.

¶ 2 We briefly summarize the facts necessary to an understanding of the issues in this case. Defendant was married to Shaleshea who had three daughters: D.H., D.B., and D.S. Defendant was accused and convicted of five counts of sexually abusing his stepdaughters (two counts of predatory criminal sexual assault and one count of aggravated criminal sexual abuse against D.H., and one

count each of aggravated criminal sexual abuse against D.B. and D.S.). With D.S., defendant would barter sexual contacts (touching her breast or buttocks) in exchange for privileges like going out or getting a ride somewhere. Defendant made D.B. touch him sexually, and defendant committed several acts of sexual penetration against D.H.

¶ 3 At the original sentencing hearing, the trial court sentenced defendant to consecutive 15- and 12-year sentences for the predatory criminal sexual assault convictions along with three concurrent 8-year sentences for the aggravated criminal sexual abuse convictions (which, due to defendant's criminal history, were sentenced as class X felonies). Defendant appealed, arguing to keep the 27-year aggregate sentence while the State argued that the 8-year sentences for the three aggravated criminal sexual abuse convictions should be made consecutive to the predatory criminal sexual assault convictions while remaining concurrent to each other (for a 35-year aggregate sentence). We vacated defendant's sentences, holding that section 5-8-4 of the Unified Code of Corrections required that the aggravated criminal sexual abuse convictions were required to be consecutive to the predatory criminal sexual assault convictions and explaining, pertinently, that the trial court would be allowed "to determine the appropriate sentences to be imposed consecutively." By this statement, we did not "limit the trial court to imposing an aggregate sentence of 27 years," and we did not "foreclose the trial court from imposing an aggregate sentence of 27 years on remand." *Lezine I*, Nos. 2-08-0482 & 2-08-0483 cons., slip op. at 42.

¶ 4 At the remanded sentencing hearing, defendant presented the mitigation testimony of six family members, all of whom testified that defendant was a good and loving person. There was a dispute as to whether Shaleshea sent defendant a letter in which she and the children forgave defendant; the trial court accepted defendant's representation that he had such a letter and stated it

would give it the appropriate weight. In allocution, defendant apologized and took responsibility for his criminal actions.

¶ 5 The trial court heard the parties' arguments. Passing sentence, the trial court emphasized that it had carefully reviewed this court's order in *Lezine I* and stated that it "treated this sentencing in these cases as if we were doing this for the first time again," and noted that it could "sentence [defendant] to whatever the bounds of the law would permit." The trial court then sentenced defendant to consecutive 13- and 11-year terms of imprisonment for the predatory criminal sexual assault convictions to be served consecutively with two 7-year terms of imprisonment for two of the aggravated criminal sexual abuse convictions, and the four sentences to be served concurrently with the remaining 9-year term of imprisonment for aggravated criminal sexual abuse, for an aggregate term of 38 years. Defendant moved to reconsider the sentences and the trial court denied the motion. Defendant timely appeals.

¶ 6 On appeal, defendant challenges the increase of his aggregate sentence by 11 years as being arbitrary, excessive, and an abuse of discretion. Defendant's arguments focus on the asserted arbitrariness of the increase, contending that there was no reason appearing in the record that supported the 11-year increase to the aggregate sentence. Additionally, defendant condemns the trial court's decision to make two of the aggravated criminal sexual abuse sentences consecutive: first, because of the general prohibition to increasing a defendant's punishment following a successful challenge to the initial sentence and particularly where the reasons for any increased punishment are not evident in the record, and second, because the trial court did not justify its decision, making two of the aggravated criminal sexual abuse sentences consecutive, as necessary to protect the public from defendant's further criminal conduct. We agree with defendant's final contention.

¶ 7 The State, for its part, contends that the original sentences were void. According to the State, “void” means as if it never existed, and thus, at the remanded sentencing hearing, the trial court had *carte blanche* to sentence defendant to any lawful sentences. According to the State, because the original sentence was void (as if it had never been), it does not serve as a basis with which defendant may compare the sentences after remand in order to determine if they were excessive or represented an impermissible increase in punishment.

¶ 8 While the State may be on the right track, its voidness argument is simply incorrect. Our supreme court held that a sentence not conforming to the statutory requirements was void, such as when concurrent sentences are imposed but consecutive sentences are required. *People v. Arna*, 168 Ill. 2d 107, 112-13 (1995). However, the “voidness” in this context is not the same as if a statute were declared unconstitutional. See *People v. Ramsey*, 192 Ill. 2d 154, 156-67 (2000) (a statute declared unconstitutional is void *ab initio*, meaning it is deemed never to have existed). The supreme court has consistently viewed whether a judgment is void depends on whether the court had jurisdiction. *People v. Davis*, 156 Ill. 2d 149, 156 (1993). Thus, if a court has jurisdiction but enters an unauthorized sentence, the judgment is voidable, not void. *Davis*, 156 Ill. 2d at 155-56; *accord*, *People v. Hubbard*, 2012 IL App (2d) 101158, ¶ 22 (the court had both personal and subject matter jurisdiction as well as the authority to accept a guilty plea and impose sentence; the judgment was voidable, not void).

¶ 9 Nevertheless, the fact that a sentencing judgment is voidable rather than void does not mean that the original, erroneous sentence can be considered in a subsequent sentencing hearing. Instead, the original sentence simply cannot serve as a baseline against which the subsequent sentence may be measured to determine if the defendant’s punishment has been increased improperly. *People v.*

*Barnes*, 364 Ill. App. 3d 888, 898 (2006). Effectively, then, defendant's arguments regarding excessiveness and improper enhancement of punishment are foreclosed. See *People v. Hill*, 2012 IL App (5th) 100536, ¶ 26 (if the sentence imposed is within statutory limits, it will be disturbed only if it varies greatly from the spirit and purpose of the law); *Barnes*, 364 Ill. App. 3d at 898 (improper original sentence cannot be considered as a baseline in determining if the new sentence represents an improper increase in punishment). Here, there is no question that the sentences imposed at the remanded sentencing hearing were within statutory limits, and there is no issue raised that the sentences departed from the spirit and purpose of the law. Likewise, the original sentences cannot be used as a baseline for purposes of determining whether the sentences on remand improperly increased defendant's punishment. (In addition, we note that the increase of an aggregate sentence on remand to impose a mandatory consecutive sentence is not deemed to be an improper increase of the defendant's punishment. *People v. Garcia*, 179 Ill. 2d 55, 73 (1997); *Arna*, 168 Ill. 2d at 113.) Thus, we reject defendant's first two arguments.

¶ 10 Turning to the remaining issue, we hold that the trial court erred in the remanded sentencing hearing by making two of the aggravated criminal sexual abuse convictions consecutive without the required factual finding or even the necessary factual support in the record. Section 5-8-4(b) of the Unified Code of Corrections (730 ILCS 5/5-8-4(b) (West 2006)) states that:

“Except in cases where consecutive sentences are mandated, the court shall impose concurrent sentences unless, having regard to the nature and circumstances of the offense and the history and character of the defendant, it is of the opinion that consecutive sentences are required to protect the public from further criminal conduct by the defendant, the basis for which the court shall set forth in the record.”

The trial court did not give a specific rationale to support making two of the aggravated criminal sexual abuse sentences consecutive. Rather, the court noted that it considered the record, the updated PSI report, along with the evidence presented during the second hearing (namely, that defendant was deemed a good and loving person and that Shaleshea and the children had forgiven him) in passing judgment. In *People v. Span*, 337 Ill. App. 3d 239, 241 (2003), the court held that the general statement that the evidence was considered was inadequate to support discretionary consecutive sentencing under section 5-8-4 of the Unified Code of Corrections. We believe the same rationale should apply here. The trial court did not expressly or impliedly note in either sentencing hearing that consecutive sentences were necessary to protect the public from defendant's future criminal conduct. Moreover, the additional evidence in the record demonstrates that defendant had not caused problems while incarcerated, was taking medication, attending anger management classes, and availing himself of other services designed to make him a better parent and deal with his addictions. Thus, there was nothing evident in the record that would support making defendant's sentences for aggravated criminal sexual abuse consecutive. Accordingly, we follow *Span* and modify defendant's sentences on the two aggravated criminal sexual abuse convictions to remain consecutive with the predatory criminal sexual assault convictions but to be concurrent with each other. Section 5-8-4 and *People v. Curry*, 178 Ill. 2d 509, 539 (1997), require that the sentences on the predatory criminal sexual assault convictions be served before the sentences on the aggravated criminal sexual abuse convictions can be started. Accordingly, our modification will result in a 33-year aggregate sentence (a 13-year sentence consecutive to an 11-year sentence served to completion before beginning the three concurrent sentences of 9, 7, and 7 years, or 13- + 11- + 9-year terms comprising the 33-year aggregate sentence).

¶ 11 We note that section 5-8-4(b) of the Unified Code of Corrections is a permissive rather than a mandatory provision and the trial court need not recite the statutory language in order to pass a valid sentence. *People v. Carter*, 272 Ill. App. 3d 809, 813 (1995). We further note, that, if the defendant does not timely object to the trial court's failure to provide the necessary justification to impose discretionary consecutive sentences, the defendant will have waived or forfeited the contention for review. *People v. Moore*, 263 Ill. App. 3d 1, 10 (1994). The State urges us to deem the issue forfeited. Waiver, or forfeiture, however, is a limitation on the parties and not on the reviewing court. *In re Bobby F.*, 2012 IL App (5th) 110214, ¶ 25. Here, because the only evidence admitted at the sentencing hearing after remand was positively addressing defendant's character, and because the trial court generally reduced defendant's sentences, along with the fact that there is nothing in the record to suggest that, upon completion of his incarceration, defendant will remain such a threat to reoffend that the public needs protection from him, we choose to address the issue.

¶ 12 For the foregoing reasons, we affirm the judgment of the circuit court of Lake County and modify it to make the sentences for aggravated criminal sexual abuse concurrent with each other, while leaving them consecutive to the sentences for predatory criminal sexual assault. In addition we order that the mittimus be corrected to reflect the modified sentences herein. (The reviewing court may correct the mittimus without remanding the matter to the trial court. *People v. Lee*, 2012 IL App (1st) 101851, ¶ 55.)

¶ 13 Affirmed as modified; mittimus corrected.