

No. 1-11-1768

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

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 99 CR 28100
)	
HENRY WATSON,)	Honorable
)	Michele M. Simmons,
Defendant-Appellant.)	Judge Presiding.

JUSTICE QUINN delivered the judgment of the court.
Presiding Justice Harris and Justice Connors concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where defendant raised sentencing issue for the first time on appeal from denial of leave to file successive post-conviction petition and offers no authority for consideration of claim at this stage of review, the denial of leave to file successive petition was affirmed.
- ¶ 2 Defendant Henry Watson appeals the circuit court's order denying leave to file a successive post-conviction petition. On appeal, defendant contends for the first time that his case should be remanded for sentencing on his 2002 conviction for aggravated vehicular hijacking because no sentence was ever entered for that offense. Defendant also seeks correction of the mittimus. We affirm as modified.

¶ 3 Following a bench trial in 2002, defendant was convicted of the first degree murder of his estranged wife, Sylvia, and the aggravated vehicular hijacking of Angela Wallace. At trial, the State presented evidence that on November 26, 1999, defendant shot Sylvia in front of their 10-year-old son and several other witnesses at a Alcoholics Anonymous meeting in Harvey and then forced Wallace from her car at gunpoint. Defendant was apprehended by police shortly thereafter.

¶ 4 Defendant waived his right to have a jury determine his eligibility for the death penalty, and the court found defendant eligible for that sentence. On May 1, 2002, the trial court sentenced defendant to death for the murder convictions after finding insufficient mitigating evidence to preclude that punishment. The court did not enter a sentence on the aggravated vehicular hijacking conviction. On direct appeal, defendant argued the State failed to prove beyond a reasonable doubt that the murder was committed in a cold, calculated and premeditated manner. In 2003, while defendant's direct appeal was pending before the Illinois Supreme Court, his death sentence was commuted to life imprisonment by then-Governor George Ryan. The supreme court transferred defendant's appeal to this court, which dismissed the appeal after finding his challenge to his eligibility for the death penalty to be moot. *People v. Watson*, 347 Ill. App. 3d 181, 192 (2004), overruled in *People v. Mata*, 217 Ill. 2d 535, 549 (2005) (defendant's claim regarding lack of proof of aggravating sentencing factor was not moot).

¶ 5 Also while defendant's direct appeal was pending in 2003, he filed a *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2002)). In that petition, defendant raised various claims of violations of due process and the ineffectiveness of his trial counsel. The circuit court summarily dismissed that petition, and this court affirmed. *People v. Watson*, No. 1-04-0892 (2005) (unpublished order under Supreme Court Rule 23).

¶ 6 On February 24, 2011, defendant filed a motion seeking leave to file a successive post-conviction petition under the Act. In that *pro se* petition, defendant asserted he had a brain tumor undetected at the time of his 1999 trial that impeded his ability to conform his conduct to the law and understand the proceedings against him. Defendant asserted that had his condition been known at the time of his original proceedings, it would have raised a *bona fide* doubt as to his fitness to be tried or sentenced. On April 29, 2011, the circuit court denied defendant leave to file the successive petition.

¶ 7 On appeal, defendant first contends, and the State concedes, that the mittimus in this case erroneously reflects convictions on two counts of first degree murder, when only one person (Sylvia) was killed. One of defendant's murder convictions therefore must be vacated under the "one-act, one-crime" rule, which bars multiple convictions based on the same physical act. See *People v. Miller*, 238 Ill. 2d 161, 165 (2010); *People v. King*, 66 Ill. 2d 551, 566 (1977). Defendant was convicted of intentional murder (720 ILCS 5/9-1(a)(1) (West 1998)) and knowing murder (720 ILCS 5/9-1(a)(2) (West 1998)). A conviction only on the most serious offense can be sustained and because intentional murder involves a more culpable mental state, we vacate defendant's conviction for knowing murder. See *People v. Walton*, 378 Ill. App. 3d 580, 590 (2007). Therefore, defendant's conviction for intentional murder is affirmed, and his conviction for knowing murder is vacated.

¶ 8 Defendant further contends that his case should be remanded for sentencing on the aggravated vehicular hijacking conviction because the trial court did not enter a sentence for that offense when the court sentenced defendant to death in 2002. In response, the State asserts that defendant cannot raise this claim for the first time in an appeal from the denial of leave to file a successive post-conviction petition.

¶ 9 It is undisputed that the trial court failed to enter a sentence on defendant's aggravated vehicular hijacking conviction. Defendant has raised this point for the first time in this appeal; the argument was not included in any previous appeal or in his initial or successive post-conviction filing.

¶ 10 The legal authority on which defendant relies does not provide support for remand. Defendant fails to supply any support for the proposition that this matter can be addressed for the first time in a post-conviction proceeding. He cites Illinois Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), which sets out the powers of this reviewing court to "set aside, affirm, or modify any or all of the proceedings subsequent to or dependent upon the judgment or order from which the appeal is taken." However, defendant fails to provide any case law, either based on Rule 615(b) or otherwise, that allows for remandment for sentencing based on the situation present here.

¶ 11 Defendant cites cases including *People v. Dixon*, 91 Ill. 2d 346 (1982), *People v. Scott*, 69 Ill. 2d 85 (1977), and *People v. Perry*, 292 Ill. App. 3d 705 (1997). Those proceedings all involved remandment for a previously omitted sentence in the context of a direct appeal, not in a post-conviction action. In *Dixon*, the supreme court relied on Rule 615(b)(2) in a direct appeal where the defendant had been convicted of four crimes but the court only imposed sentences on the two greater offenses (armed violence and aggravated battery) and did not impose sentences on the two lesser offenses (mob action and disorderly conduct). *Dixon*, 91 Ill. 2d at 349. The armed violence conviction was vacated on direct appeal. *Id.* The supreme court held that because the greater offense (armed violence) had been vacated, a remand for sentencing on the unappealed and unsentenced lesser offenses was necessary. *Id.* at 353-54.

¶ 12 Cases involving direct appeals are inapposite because they can consider voidable judgments that cannot be considered on collateral review, which is the posture of this case.

Although defendant maintains that this is a distinction without a difference, he does not submit, nor has our research revealed, any case beyond direct appeal that supports a remand for sentencing on a previously unsentenced and unappealed conviction.

¶ 13 Rather, the reasoning of *Dixon* illustrates that the outcome of that case does not fit a collateral proceeding. Here, unlike in *Dixon*, no conviction has been vacated; instead, the murder conviction with its sentence of natural life in prison stands unchallenged. We find no reason to extend the reach of *Dixon* and similar cases involving direct appeals to the situation presented here.

¶ 14 Defendant argues that his judgment of conviction on the aggravated vehicular hijacking is not complete because no sentence has been imposed, thus making the State's contentions on appeal regarding a void/voidable judgment "premature." Defendant is correct that a "judgment" consists of both an adjudication of guilt and the sentence issued by the court. See 730 ILCS 5/5-1-12 (West 2010) (" 'Judgment' means an adjudication by the court that the defendant is guilty or not guilty, and if the adjudication is that the defendant is guilty, it includes the sentence pronounced by the court.")

¶ 15 Here, the trial court found defendant guilty of murder and aggravated vehicular hijacking, and the court imposed sentence on the murder count. Defendant does not argue that the May 1, 2002, court ruling sentencing him to death did not constitute a final judgment. Indeed, defendant has completed a direct appeal of that judgment. See *People v. Watson*, 347 Ill. App. 3d 181 (2004).

¶ 16 Defendant's only hope for the review of his claim in this procedural posture is for this court to conclude that the judgment of his aggravated vehicular hijacking was void, since a void judgment, or one entered by a court lacking jurisdiction in a case, can be attacked directly or

indirectly at any time. See *People v. Moran*, 2012 IL App (1st) 111165, ¶ 16, citing *People v. Davis*, 156 Ill. 2d 149, 155-56 (1993).

¶ 17 The State addresses the question of a void or voidable order and asserts that the trial court's judgment on the aggravated vehicular hijacking conviction was, at most, voidable, as opposed to void. See *Davis*, 156 Ill. 2d at 155-56 (voidable judgment is one entered erroneously by a court having jurisdiction over a case and is not subject to collateral attack). The State posits that the trial court's failure to impose a separate sentence on the aggravated vehicular hijacking count resulted from the court's erroneous belief that the aggravated vehicular hijacking count would merge into defendant's death sentence. As the State points out, a court does not lose jurisdiction over a matter by making a mistake in determining the facts or the law, or both. *Id.* Therefore, the judgment from which defendant now seeks relief was voidable, not void, and cannot be considered in this proceeding.

¶ 18 Accordingly, the circuit court's order denying defendant leave to file a successive petition under the Act is affirmed. Defendant's conviction of intentional murder is affirmed. Pursuant to Rule 615(b), we vacate defendant's conviction for knowing murder, and order that the mittimus be corrected to reflect defendant's single murder conviction for intentional murder and his conviction for aggravated vehicular hijacking.

¶ 19 Affirmed as modified.