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2014 IL App (3d) 130103-U

Order filed December 24, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois.
Plaintiff-Appellee,)	
v.)	Appeal No. 3-13-0103
)	Circuit No. 01-CF-1186
SAMUEL WOODS,)	
Defendant-Appellant.)	The Honorable Stephen Kouri, Judge, presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court held that the extended-term portion of the defendant's sentence for aggravated robbery was void because the State failed to give him the required statutory notice that they intended to seek an extended-term sentence on that charge.
- ¶ 2 The defendant, Samuel Woods, was convicted of home invasion (720 ILCS 5/12-11(a)(2) (West 2002)) and aggravated robbery (720 ILCS 5/18-5(a) (West 2002)), and was sentenced to consecutive prison sentences of 40 years and 20 years, respectively. Both sentences were extended-term sentences, imposed after the circuit court addressed the defendant's criminal

history and found that the offenses resulted from unrelated courses of conduct. On direct appeal, this court affirmed the defendant's convictions and sentences. *People v. Woods*, 373 Ill. App. 3d 171 (2007). Subsequently, the defendant filed a *pro se* petition for postconviction relief, which the court advanced to the second stage of postconviction proceedings. After a hearing, the court granted the State's motion to dismiss the petition. On appeal, the defendant argues that: (1) the extended-term sentence on his aggravated robbery conviction is void because it is based on a fact that was neither pled nor proved; (2) the court erred when it granted the State's motion to dismiss his postconviction petition; (3) postconviction counsel provided unreasonable assistance by failing to amend the defendant's *pro se* petition to include the argument that the extended-term sentence on his aggravated robbery conviction is void; and (4) the court erred when it imposed a \$200 deoxyribonucleic acid (DNA) analysis fee. We affirm in part, vacate in part, and remand the cause with directions.

¶ 3

FACTS

¶ 4

On December 18, 2001, the defendant was charged by indictment with home invasion and aggravated robbery. The former charge alleged:

"[the defendant] not a peace officer acting in the line of duty, knowingly and without authority entered the dwelling of Darrell Sledge located at 311 E. Republic Peoria, Illinois, having reason to know one or more persons were present within that dwelling and intentionally caused bodily harm to Shonda Sledge while she was located within that dwelling."

The latter charge alleged that "[the defendant], took property being United States currency from the person or presence of Linda Beckwith by the use of force or by threatening the imminent use of force, while indicating verbally or by his actions that he was presently armed with a firearm."

The record on appeal reflects that the State did not provide the defendant with notice before trial that it intended to seek an extended-term sentence on the aggravated robbery charge.

¶ 5 On May 27, 2003, the defendant waived his right to a jury trial, and the circuit court held a trial in the case over two days in July 2003 and February 2004. The evidence presented at trial indicated that the defendant committed the aggravated robbery at a gas station in Peoria and later committed the home invasion while fleeing police pursuit.¹ At the close of the bench trial, the court took the matter under advisement.

¶ 6 On March 1, 2004, the circuit court issued its written order in which it found the defendant guilty on both charges. On June 1, 2004, the court sentenced the defendant to 40 years of imprisonment on the Class X felony of home invasion, to be served consecutively to a 20-year sentence on the Class 1 felony of aggravated robbery. Both sentences were extended-term sentences, imposed after the court addressed the defendant's criminal history and found that the two offenses were based on unrelated courses of conduct. The defendant was also assessed a \$200 fee for DNA assessment and testing. After his motion to reconsider sentence was denied, the defendant appealed.

¶ 7 On direct appeal, the defendant argued that the circuit court erred when it failed to remove his shackles during court proceedings and that the State failed to prove him guilty beyond a reasonable doubt. *Woods*, 373 Ill. App. 3d at 172. This court affirmed the defendant's convictions and sentences. *Id.* at 179.

¶ 8 On May 27, 2008, the defendant filed a *pro se* petition for postconviction relief in which he raised numerous arguments, two of which were that trial counsel and appellate counsel rendered ineffective assistance. The defendant alleged that trial counsel was ineffective, *inter*

¹ For more factual details from the trial, see *Woods*, 373 Ill. App. 3d at 172-75.

alia, for failing "to object to the unauthorized imposition of extended term and consecutive sentences." The defendant also alleged that appellate counsel was ineffective, *inter alia*, for failing to raise a void-sentence claim that because the defendant had been sentenced to an extended term on the class of the most serious of his offenses (home invasion), he could not also be sentenced to an extended term on his aggravated robbery conviction. Postconviction counsel was assigned, who later filed certificates pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) in which he stated that he had consulted with the defendant about the case, examined the record, and made "any amendments" necessary to the defendant's postconviction petition. The record does not reflect that any amended postconviction petition was ever filed.

¶ 9 The defendant's postconviction petition was advanced to the second stage of postconviction proceedings, and the State filed a motion to dismiss the petition. On November 19, 2012, the circuit court held a hearing on the State's motion. Postconviction counsel stood on the defendant's petition, and no arguments were made. At the close of the hearing, the court agreed with the State that all of the claims in the petition were either barred by *res judicata* or waived. After finding that the State's motion was "well taken," the court granted the State's motion to dismiss. The defendant appealed.

¶ 10 ANALYSIS

¶ 11 On appeal, the defendant argues that: (1) the extended-term sentence on his aggravated robbery conviction is void because it is based on a fact that was neither pled nor proved; (2) the court erred when it granted the State's motion to dismiss his postconviction petition; (3) postconviction counsel provided unreasonable assistance by failing to amend the defendant's *pro se* petition to include the argument that the extended-term sentence on his aggravated robbery conviction is void; and (4) the court erred when it imposed a \$200 DNA analysis fee.

¶ 12 The defendant's first argument on appeal is that his extended-term sentence on his aggravated robbery conviction is void because it is based on a fact that was neither pled nor proved. Specifically, the defendant contends that section 111-3(c-5) of the Code of Criminal Procedure of 1963 (725 ILCS 5/111-3(c-5) (West 2002)) required the State to include in the indictment the "fact" that the conduct constituting the aggravated robbery was unrelated to the conduct constituting the home invasion.

¶ 13 A sentence that fails to conform to statutory requirements is void and may be attacked at any time and in any court. *People v. Thompson*, 209 Ill. 2d 19, 27 (2004). Whether a sentence is void is a question of law that we review *de novo*. *Id.* at 22.

¶ 14 At the time of the defendant's offenses, section 5-8-2 of the Unified Code of Corrections provided that "[a] judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by Section 5-8-1 for the class of the most serious offense of which the offender was convicted unless the factors in aggravation set forth in paragraph (b) of Section 5-5-3.2 were found to be present." 730 ILCS 5/5-8-2(a) (West 2002). Section 5-8-2 further provided, in relevant part, that if the trier of fact found beyond a reasonable doubt that the relevant aggravating factors were present, then the extended-term sentencing range for a Class X felony was 30 to 60 years and for a Class 1 felony was 15 to 30 years. 730 ILCS 5/5-8-2(a)(2), (3) (West 2002). Our supreme court has long emphasized that if a defendant has been convicted of multiple offenses of differing classes, then the sentencing court can impose an extended-term sentence only on the conviction within the most serious class. *People v. Jordan*, 103 Ill. 2d 192, 206-07 (1984). Our supreme court also carved out an exception to this general rule in 1995, holding that section 5-8-2(a) permits "the imposition of extended terms on separately charged, differing class offenses that arise from unrelated courses of conduct regardless of whether the

cases are separately prosecuted or consolidated." *People v. Coleman*, 166 Ill. 2d 247, 257 (1995). In 2001, our supreme court clarified that "in determining whether a defendant's multiple offenses are part of an 'unrelated course of conduct' for the purpose of his eligibility for an extended-term sentence under section 5-8-2(a), courts must consider whether there was a substantial change in the nature of the defendant's criminal objective." *People v. Bell*, 196 Ill. 2d 343, 354 (2001).

¶ 15 Also in 2001, in response to the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the legislature enacted section 111-3(c-5) of the Code of Criminal Procedure of 1963:

"Notwithstanding any other provision of law, in all cases in which the imposition of the death penalty is not a possibility, if an alleged fact (other than the fact of a prior conviction) is not an element of an offense but is sought to be used to increase the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for the offense, the alleged fact must be included in the charging instrument or otherwise provided to the defendant through a written notification before trial, submitted to a trier of fact as an aggravating factor, and proved beyond a reasonable doubt. Failure to prove the fact beyond a reasonable doubt is not a bar to a conviction for commission of the offense, but is a bar to increasing, based on that fact, the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for that offense. Nothing in this subsection (c-5) requires the imposition of a sentence that increases the range of penalties for the offense beyond the statutory maximum that could otherwise be

imposed for the offense if the imposition of that sentence is not required by law."
725 ILCS 5/111-3(c-5) (West 2002).

¶ 16 In this case, the record reflects that the State did not comply with section 111-3(c-5)'s requirement that a defendant receive notice prior to trial of the State's intent to seek an extended-term sentence on the aggravated robbery charge. Here, the basis for the extended-term sentence on the aggravated robbery conviction was the fact that the course of conduct resulting in that offense was unrelated to the course of conduct resulting in the home invasion offense. The State neither included that fact in the indictment nor provided written notice to the defendant before trial of that fact, which contravened section 111-3(c-5)'s requirements. See 725 ILCS 5/111-3(c-5) (West 2002). Accordingly, the circuit court lacked the authority to sentence the defendant to an extended-term sentence on his aggravated robbery conviction and the extended-term portion of that sentence is in fact void. *Thompson*, 209 Ill. 2d at 24-25.

¶ 17 Pursuant to our authority under Supreme Court Rule 615(b)(4) (eff. Jan. 1, 1967), we vacate the extended-term portion of the defendant's sentence for aggravated robbery and reduce that sentence to the maximum non-extended term of 15 years. See *Thompson*, 209 Ill. 2d at 29; 720 ILCS 5/18-5(b) (West 2002) (providing that aggravated robbery was a Class 1 felony); 730 ILCS 5/5-8-1(a)(4) (West 2002) (providing that the sentencing range for a Class 1 felony was 4 to 15 years). We remand the case for the circuit court to enter an amended sentencing order consistent with our decision.

¶ 18 Due to the relief we have granted with regard to the defendant's first argument, there is no need to address his second and third arguments on appeal, which are related to whether his postconviction petition was erroneously dismissed and which are premised on his first argument. However, we must still address his fourth argument; namely, that the circuit court erred when it

imposed a \$200 DNA analysis fee. The defendant specifically contends that his DNA was already on file in the DNA database. The State agrees that the court erred in imposing the \$200 DNA analysis fee, although we note that we are not bound by a party's concession (*People v. Lewis*, 234 Ill. 2d 32, 43 (2009)).

¶ 19 Section 5-4-3 of the Unified Code of Corrections (730 ILCS 5/5-4-3 (West 2004)) authorizes a circuit court to order the taking, analysis, and indexing of an offender's DNA only if the defendant's DNA is not already registered with the DNA database. *People v. Marshall*, 242 Ill. App. 3d 285, 303 (2011). The defendant appended to his brief on appeal a fax from the Illinois State Police Division of Forensic Services that indicates the defendant's DNA was collected and indexed in September 2004. We take judicial notice of this document (see *People v. Hill*, 2014 IL App (3d) 120472, ¶ 18), but we note that this collection and indexing was done in conjunction with the defendant's convictions from this case. The document provided by the defendant does not show that his DNA was already registered with the DNA database when the circuit court ordered the taking and indexing of the defendant's DNA in June 2004 in conjunction with this case, and, as such, we decline to grant the defendant the relief he requests on this issue.

¶ 20 CONCLUSION

¶ 21 For the foregoing reasons, we vacate the extended-term portion of the defendant's 20-year sentence for aggravated robbery, and we reduce that sentence to the statutory maximum non-extended term of 15 years. We remand the cause with directions for the court to enter an amended sentencing order consistent with our decision. In all other respects, we affirm the judgment of the circuit court of Peoria County.

¶ 22 Affirmed in part and vacated in part; cause remanded with directions.