

No. 1-13-0931

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. 03 CR 4835
)	
JOEL MARTINEZ,)	Honorable
)	Matthew E. Coghlan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Simon and Justice Pierce concurred in the judgment.

O R D E R

- ¶ 1 **Held:** Order of circuit court of Cook County denying defendant leave to file successive post-conviction petition affirmed over his contention that his guilty plea was void where the agreed sentence was below the statutory minimum.
- ¶ 2 Joel Martinez, the defendant, appeals from an order of the circuit court of Cook County denying him leave to file a successive *pro se* petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)). He contends, for the first time on appeal, that his guilty plea to first degree murder should be vacated because the negotiated sentence imposed thereon was 10 years below the statutory minimum and therefore void.

¶ 3 On July 28, 2005, defendant entered a negotiated plea of guilty to first degree murder in exchange for a sentence of 25 years' imprisonment. The factual basis for the plea showed that at 3 a.m. on January 9, 2003, defendant and two other men, Juan Cruz and Jesus Castillo, decided to rob someone for drugs and money. Armed with a gun, they drove to 3354 North Koster Avenue in Chicago where they broke into the house. Castillo hit the two brothers who lived there with the gun, and the trio then took one of the brothers and shot him to death. The circuit court accepted the plea and entered judgment thereon. Defendant subsequently filed a motion to withdraw the guilty plea, but later withdrew it.

¶ 4 In March 2008, defendant filed a *pro se* post-conviction petition, alleging ineffective assistance of trial counsel, and actual innocence. He also claimed that the plea court failed to advise him of the mandatory supervised release (MSR) term, and that his confession was the result of abuse and coercion from police. The circuit court dismissed defendant's petition, finding it frivolous and patently without merit, and subsequently denied defendant's motion to reconsider.

¶ 5 On September 21, 2012, defendant filed a *pro se* successive post-conviction petition, alleging that his guilty plea was involuntary, and that he was denied effective assistance of trial and appellate counsel. He also alleged that he was actually innocent, that the State withheld exonerating evidence, and that he was not properly admonished regarding the MSR term. The circuit court denied defendant leave to file this successive petition, finding that he failed to satisfy the cause and prejudice test, and that his petition was frivolous and patently without merit.

¶ 6 On appeal, defendant does not contest the court's ruling on his petition, but contends that his negotiated guilty plea was void, and should be vacated because the sentence imposed was 10 years below the statutory minimum. He thus requests that his cause be remanded to provide him an opportunity to withdraw his plea.

¶ 7 We initially observe that defendant's challenge to the validity of his negotiated sentence is made for the first time on appeal from the denial of his request for leave to file a successive post-conviction petition. Although allegations that are not raised in a defendant's post-conviction petition cannot be raised for the first time on appeal (*People v. Jones*, 213 Ill. 2d 498, 508 (2004)), a void sentence can be corrected at any time and is not subject to waiver or forfeiture (*People v. Donelson*, 2013 IL 113603, ¶ 5). We thus consider the merits of defendant's claim.

¶ 8 As noted, defendant entered a negotiated plea of guilty on July 28, 2005, in exchange for a sentence of 25 years' imprisonment. At the time he entered the plea, the sentencing range for the offense of first degree murder was 20 to 60 years' imprisonment with a 15-year enhancement for committing the offense while armed with a firearm. 730 ILCS 5/5-8-1 (West 2012). The 25-year sentence defendant agreed to fell below the statutorily authorized minimum sentence of 35 years' imprisonment. Citing *People v. White*, 2011 IL 109616, defendant asserts that his plea must be vacated and the cause remanded for an opportunity to withdraw his plea.

¶ 9 In *White*, a negotiated plea case, defendant was sentenced to 28 years' imprisonment for first degree murder and a consecutive sentence of 4 years' imprisonment for possession of contraband while in a penal institution. *White*, 2011 IL 109616, ¶¶4, 7. Shortly thereafter, defendant filed a motion to vacate his guilty plea alleging that he was subject to the 15-year

mandatory firearm enhancement provision (730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2010)), making the actual sentencing range 35 to 75 years. *White*, 2011 IL 109616, ¶9. The circuit court denied the motion, but the appellate court found that where the sentence was void and invalidated the entire plea agreement, it must remand the cause to the circuit court to provide defendant an opportunity to withdraw his plea, if he chooses to do so. *White*, 2011 IL 109616, ¶¶11, 14. The supreme court affirmed that judgment, finding that the firearm enhancement applied where the factual basis provided that defendant was armed with a firearm, and because defendant's sentence did not conform to the statutory requirements it was void. *White*, 2011 IL 109616, ¶¶19, 21. In addition, because defendant was not properly admonished, the entire plea agreement was also void. *White*, 2011 IL 109616, ¶¶19, 21.

¶ 10 Following *White*, reviewing courts were divided as to whether the rule announced in *White* was retroactive to cases, as here, that were final when it was decided. See *eg. People v. Smith*, 2013 IL App (3d) 110738; *People v. Young*, 2013 IL App (1st) 111733, *People v. Cortez*, 2012 IL App (1st) 102184, and *People v. Avery*, 2012 IL App (1st) 110298. That issue has now been resolved.

¶ 11 In *People v. Smith*, 2015 IL 116572, the supreme court addressed the conflict and concluded that the decision in *White* established a new rule which did not apply retroactively to convictions that were final at the time *White* was decided. *Smith*, 2015 IL 116572, ¶34. The supreme court explained that *White* announced a new rule where it did not simply hold that a sentence which does not conform to statutory requirements is void, but that a circuit court may

not disregard a fact that requires imposition of a statutory sentencing enhancement if that fact is included in the factual basis accepted by the court. *Smith*, 2015 IL 116572, ¶27.

¶ 12 The supreme court observed that under *Teague v. Lane*, 489 U.S. 288 (1989), a new rule does not apply retroactively to convictions that were final at the time the rule was announced except in two situations: 1) the new rule places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, and 2) the new rule requires the observance of those procedures that are implicit in the concept of ordered liberty. *Smith*, 2015 IL 116572, ¶31. The supreme court found that neither *Teague* exception applied, explaining that the *White* decision does not legalize primary, private individual conduct, and that *White* did not present a "watershed" rule of criminal procedure as the decision does not impact the accuracy of defendant's conviction. *Smith*, 2015 IL 116572, ¶32. The supreme court thus concluded that the decision in *White* established a new rule within the meaning of *Teague* which does not fall within either of the *Teague* exceptions, and, therefore, does not apply retroactively to convictions that were final at the time *White* was decided. *Smith*, 2015 IL 116572, ¶34.

¶ 13 *Smith* is therefore dispositive of this case, and we likewise conclude that *White* does not apply to defendant, whose conviction was final in 2005, long before *White* was decided in 2011. Accordingly, there is no basis for remand, and we affirm the order of the circuit court of Cook County denying defendant leave to file a successive post-conviction petition.

¶ 14 Affirmed.