

2016 IL App (1st) 133203-U

SIXTH DIVISION  
August 12, 2016

Nos. 1-13-3203 & 1-14-2255 cons.

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	No. 05 CR 1932
v.	)	
	)	
ROBERT STEELE,	)	The Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HALL delivered the judgment of the court.  
Justices Hoffman and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* We vacated the 25-year firearm enhancement to the defendant's sentence for armed robbery with a firearm; the enhancement violated the proportionate penalties clause and was void. We affirmed the denial of the defendant's section 2-1401 petition seeking to vacate the 25-year enhancement penalty to his sentence for attempted first degree murder; the enhancement was not void but was voidable, and the petition was filed more than two years after the defendant was convicted and sentenced.

¶ 2 The defendant, Robert Steele, appeals from orders of the circuit court of Cook County, entered in separate proceedings, denying him leave to file a successive postconviction petition and granting the State's motion to dismiss the defendant's section 2-1401 petition for relief from judgment (735 ILCS 5/2-1401 (West 2012)). The cases have been consolidated for review by this court. In each case, the defendant contends that the court's ruling was erroneous for reasons explained below.

¶ 3 **BACKGROUND**

¶ 4 On January 25, 2005, the grand jury indicted the defendant, *inter alia*, on charges of attempted first degree murder, aggravated battery with a firearm and armed robbery with a firearm. In committing the offense of attempted first degree murder, the defendant was alleged to have shot the victim with a firearm; in committing the offense of aggravated battery with a firearm, the defendant was alleged to have discharged a firearm and to have shot the victim; and in committing the offense of armed robbery with a firearm, the defendant was alleged to have personally discharged a firearm.

¶ 5 At the close of the defendant's trial, the jury was instructed on each charge. Only the armed robbery with a firearm issues instruction required the jury to find that the State had proved beyond a reasonable doubt that the defendant "personally discharged a firearm" in the commission of the offense. The jury found the defendant guilty of attempted first degree murder, aggravated battery with a firearm and armed robbery with a firearm.

¶ 6 In sentencing the defendant, the trial court merged the aggravated battery with a firearm conviction into the attempted first degree murder conviction. The court found the defendant eligible for a 25-year firearm enhancement on both the attempted first degree murder conviction and the armed robbery conviction. The court imposed sentences of 35 years on each conviction. After informing the defendant of his appeal rights, the trial court stated as follows:

“I have to put something else on the record to clarify. The sentence on those two counts are concurrent and the 35 year sentence includes within that the mandatory time that is required under the statute; so it’s not 35 years with an additional 25 years. The 35 years includes the entire sentence. So, in other words, a 10-year sentence plus 35 - - plus 25, rather, to equal the 35. That’s just to clarify that.”

¶ 7 After exhausting his direct appeals, the defendant filed a petition for postconviction relief, which was summarily dismissed. This court affirmed the summary dismissal. *People v. Steele*, No. 1-10-1148 (2012) (unpublished order under supreme court rule 23).

¶ 8 In April 2013, the defendant filed a *pro se* petition for relief from judgment (735 ILCS 5/2-1401 (West 2012)) and a *pro se* successive postconviction petition. On August 23, 2013, the trial court denied the defendant leave to file his successive postconviction petition on the ground that he failed to establish cause why he had not raised the sentencing error either on direct appeal or in his original postconviction petition. On June 20, 2014, the trial court granted the State’s motion to dismiss the defendant’s section 2-1401 petition on the ground that it was untimely, rejecting the defendant’s argument that the enhancement portion of his sentence was void instead finding it voidable.

¶ 9 The defendant appeals from the circuit's orders of August 23, 2013 and June 20, 2014.

¶ 10 ANALYSIS

¶ 11 I. Successive Postconviction Petition

¶ 12 The defendant maintains that the circuit court erred when it denied him leave to file a successive postconviction petition. He contends that the 25-year firearm enhancement to his sentence is void in that it violates the proportionate penalties clause of the Illinois Constitution (Illinois Const., Art. I, § 11). See *People v. Taylor*, 2015 IL 117267, ¶ 15 (enhanced sentence for armed robbery with a firearm violates the proportionate penalties clause). A voidness challenge based on the unconstitutionality of a criminal statute under the proportionate penalties clause may be raised at any time. *People v. Ligon*, 2016 IL 118023, ¶ 9.

¶ 13 The legislature corrected the violation by amending the armed violence statute. *Taylor*, 2015 IL 117267, ¶ 16 (citing Pub. Act 95-688 (eff. Oct. 23, 2007) (amending 720 ILCS 5/33A-2)). Because the defendant committed the armed robbery with a firearm in 2005, the 2007 amendment does not apply to his case. See *Taylor*, 2015 IL 117267, ¶ 17; *People v. Lampkins*, 2015 IL App (1st) 123519, ¶ 14.

¶ 14 The State agrees that the 25-year enhancement to the defendant's sentence for armed robbery with a firearm violates the proportionate penalties clause and that the defendant's sentence should be the ten-year term imposed by the trial court prior to the addition of the 25-year firearm enhancement. We agree that the 25-year firearm enhancement of the defendant's sentence for armed robbery with a firearm must be vacated as void.

¶ 15 II. Section 2-1401 petition

¶ 16 The defendant contends that the 25-year firearm enhancement to his sentence for attempted first degree murder must be vacated as void because neither the indictment nor the jury instructions required the jury to find that in committing the offense of attempted first degree murder, the defendant personally discharged a firearm.

¶ 17 A. Standard of Review

¶ 18 A section 2-1401 petition dismissed on legal grounds is reviewed *de novo*. *People v. Thompson*, 2015 IL 118151, ¶ 25.

¶ 19 B. Discussion

¶ 20 Section 2-1401 petitions for relief from judgment must be filed within two years of the judgment's entry day, excluding time during which the defendant is under a legal disability or the ground for relief is fraudulently concealed. 735 ILCS 5/2-1401(c) (West 2012). In this case, the defendant was sentenced on May 29, 2007, and filed his section 2-1401 petition on April 15, 2013, almost six years later. The defendant maintains that his petition was timely because it was brought on voidness grounds. 735 ILCS 5/2-1401(f) (West 2012). The State responds that the 25-year enhancement was voidable rather than void and therefore, the defendant's section 2-1401 petition was properly dismissed by the circuit court as untimely.

¶ 21 As our supreme court noted in *People v. Davis*, 156 Ill. 2d 149 (1993):

“Whether a judgment is void or voidable presents a question of jurisdiction.

[Citation.] Jurisdiction is a fundamental prerequisite to a valid prosecution and conviction. Where jurisdiction is lacking, any resulting judgment rendered is void and may be attacked either directly or indirectly at any time. [Citation.] By contrast, a voidable judgment is one entered erroneously by a court having jurisdiction and is not subject to collateral attack.” *Davis*, 156 Ill. 2d at 155-56.

The court in *Davis* recognized three elements of jurisdiction: (1) subject matter jurisdiction; (2) personal jurisdiction; and (3) “the power to render the particular judgment or sentence.”

Without such power the judgment or sentence is void. *Davis*, 156 Ill. 2d at 156.

¶ 22 “[J]urisdiction or power to render a particular judgment does not mean that the judgment rendered must be the one that should have been rendered, for the power to decide carries with it the power to decide wrong as well as to decide right.” *Davis*, 156 Ill. 2d at 156. A court may not lose jurisdiction where it makes a mistake as to either the law or the facts or both. *Davis*, 156 Ill. 2d at 156.

¶ 23 The defendant does not challenge the trial court’s jurisdiction as to subject matter or over his person. The defendant maintains that the trial court lacked the power to add the 25-year firearm enhancement to his 10-year sentence for attempted first degree murder, thereby rendering that portion of his sentence void under *People v. Arna*, 168 Ill. 2d 107 (1995) (a sentence that does not conform to a statutory requirement is void).

¶ 24 The defendant points out that neither the indictment for attempted first degree murder nor the issues instruction for attempted first degree murder included the allegation that the defendant personally discharged a firearm. As a result, the jury never determined that in committing attempted first degree murder, the defendant personally discharged a firearm beyond a reasonable doubt. The defendant maintains that under section 111-3 (c-5) of the Code of Criminal Procedure of 1963, the 25-year firearm enhancement portion of his attempted first degree murder sentence is void. See 725 ILCS 5/111-3(c-5) (West 2012) (failure to prove a fact which is used to extend the range of penalties for the offense beyond a reasonable doubt bars the increase in penalty based on that fact).

¶ 25 The defendant relies on *People v. Edgcombe*, 2011 IL App (1st) 092690. In that case, this court held that where neither the jury instruction nor the verdict form contained any reference to the fact required for the sentencing enhancement, *i.e.*, personal discharge of a firearm, that fact was not submitted to the trier of fact as required by section 111-3(c-5). *Edgcombe*, 2011 IL App (1st) 092690, ¶ 26. We rejected the State's argument that because the jury found the defendant guilty of aggravated battery with a firearm, it must have found that the defendant personally discharged the firearm for purposes of his attempted murder conviction. The court pointed out that section 111-3(c-5) required that the aggravating factor be included for the specific offense. *Edgcombe*, 2011 IL App (1st) 092690, ¶ 27.

¶ 26 Following the filing of the defendant's opening brief in the present case, the supreme court issued its opinion in *People v. Castleberry*, 2015 IL 116916 in which the court abolished the void sentence rule in *Arna*. *Castleberry*, 2015 IL 116916, ¶ 1. On the basis of the decision in *Castleberry*, the State maintains that the supreme court abolished the jurisdictional challenge raised by the defendant in this case. The defendant responds that *Castleberry* does not apply retroactively and therefore, the void sentence rule applies to his sentence.

¶ 27 The supreme court did not state whether its decision in *Castleberry* applied retroactively. In *People v. Smith*, 2016 IL App (1st) 140887, the second division of this court analyzed the retroactivity issue pursuant to *Teague v. Lane*, 489 U.S. 288 (1989) and determined that *Castleberry* did not announce a new rule but merely abolished the old rule stated in *Arna*. *Smith*, 2016 IL App (1st), 140887, ¶ 29. The court concluded that *Castleberry* only applied prospectively from the date of pronouncement. *Smith*, 2016 IL App (1st), 140887, ¶ 30. Pursuant to *Arna*, the defendant had the right to challenge the unauthorized portion of his

sentence as void for the first time on appeal from the denial of leave to file a successive postconviction petition. *Smith*, 2016 IL App (1st), 140887, ¶ 30.

¶ 28 We need not address the issue of retroactivity since this court rejected the defendant's argument in a pre-*Castleberry* decision. In *People v. Walker*, 2015 IL App (1st) 130500, the defendant argued that the 15-year firearm enhancement to his sentence for first degree murder was void because the jury was not asked to make any findings regarding his possession or discharge of a firearm. *Walker*, 2015 IL App (1st) 130500, ¶ 23. This court agreed that under section 111-3(c-5), the trial court erred in imposing the 15-year firearm enhancement. *Walker*, 2015 IL App (1st) 130500, ¶¶ 25-26 (citing *Edgcombe*, 2011 IL App (1st) 092690, ¶¶ 25-30). Nonetheless, we found the error harmless since the evidence that the defendant possessed a gun during the attempted robbery leading to the victim's death was uncontested and overwhelming. *Walker*, 2015 IL App (1st) 130500, ¶ 27 (citing *People v. Thurow*, 203 Ill. 2d 352, 369 (2003) (failure to instruct the jury on an element is harmless where the evidence in support of the element is uncontested and overwhelming)).

¶ 29 In *Walker*, this court rejected the defendant's argument that because the sentencing enhancement was not authorized it was void. We noted that the court in *Edgcombe* did not address the issue of voidness or the application of harmless-error analysis to violations under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This court distinguished *People v. Thompson*, 209 Ill. 2d 19 (2004), wherein the supreme court held that imposition of an extended-term sentence on a conviction for violating an order of protection was void. The statute authorized the court to impose an extended-term sentence on the most serious felony of which the defendant was convicted, *i.e.* aggravated battery. Because the trial court in *Thompson* lacked statutory authority to impose an extended-term sentence on a conviction that was not the



defendant's most serious, the extended-term sentence was void. *Walker*, 2015 IL App (1st) 130500, ¶ 29; *Thompson*, 209 Ill. 2d at 24-25. We concluded as follows:

“Here, in contrast, the trial court had statutory authority to impose the firearm enhancement, but simply erred in imposing it absent a finding from the jury that defendant possessed a firearm during the commission of the offense. *Thompson* is distinguishable, the 15-year firearm enhancement in the instant case is not void, and harmless-error analysis clearly applies.”

*Walker*, 2015 IL App (1st) 130500, ¶ 29.

¶ 30 *Walker* resolved the same issue the defendant raises in this case. Here, the trial court had statutory authority to impose the 25-year firearm enhancement on the defendant's attempted first degree murder conviction but erred when it imposed it absent a finding by the jury. The defendant distinguishes *Walker* on the ground that it involved an *Apprendi* violation whereas in the present case, the trial court lacked statutory authority when it failed to comply with section 111-3(c-5). However, as the defendant argued in his opening brief, section 111-3(c-5) codified the rule announced in *Apprendi*. See *People v. Washington*, 343 Ill. App. 3d 889, 902 (2003).

¶ 31 We conclude that the addition of the 25-year firearm enhancement to the defendant's sentence for attempted first degree murder was not void but voidable. As a result, the defendant's section 2-1401 petition, which was filed more than two years after his conviction and sentencing, was properly dismissed as untimely.

¶ 32 CONCLUSION

¶ 33 Pursuant to Illinois Supreme Court Rule 615(a) (eff. Aug. 27, 1999), we vacate the 25-year firearm enhancement added to the defendant's 10-year sentence for armed robbery with

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a firearm. We affirm the dismissal of the defendant's section 2-1401 petition for relief from judgment.

¶ 34 Affirmed in part and vacated in part.