2016 IL App (1st) 141546-U

FIRST DIVISION
September 12, 2016
Modified upon denial of rehearing

No. 14-1546

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. DETRICK CULLUM, Petitioner-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. 10 CR 04692 Honorable Noreen Valeria-Love Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion when it resentenced defendant to the same sentences to run consecutively following the vacatur of the concurrent sentences based on determination that consecutive sentences were mandatory. Defendant's sentences imposed on remand were not excessive.

¶ 2 After a bench trial, defendant Detrick Cullum was convicted and sentenced to concurrent terms of 10 years for 3 counts of aggravated criminal sexual assault, 6 years for 2 counts of aggravated kidnapping, 10 years for 2 counts of kidnapping, 5 years for aggravated possession of a stolen motor vehicle, 4 years for possession of a stolen motor vehicle, 3 years for aggravated

battery on a public way, and 2 years for aggravated fleeing or attempting to elude a police officer. Following defendant's direct appeal, we remanded the case to the trial court for a resentencing. *People v. Cullum*, 2013 IL App (1st) 111776-U, ¶ 75. Defendant appeals from the resentencing. For the following reasons we affirm.

¶ 3 BACKGROUND

¶ 4 The factual background underlying defendant's convictions was recounted in our previous decision on direct appeal. *People v. Cullum*, 2013 IL App (1st) 111776-U. We recite only the facts pertinent to the current appeal.

¶ 5 In relevant part, at trial, the State's evidence showed that defendant stole his girlfriend's rental car which she had rented after defendant crashed her actual car while he was supposedly waiting for her at a doctor's office. Defendant met the victim A.B. at a party later that day and, although she agreed to go with him to a gas station, he started driving to other places. He picked up his friend Michael Dorsey and stopped to purchase cigars, and then all three of them went to an abandoned apartment building where defendant indicated that they could get marijuana. A.B. told defendant that she would not have sex with him; defendant insisted on performing oral sex on A.B. She maintained that she would not have intercourse with him. After leaving the building defendant drove Dorsey home. Dorsey asked A.B. if she was ok, but when A.B. tried to get out of the car, defendant sped off.

¶ 6 Defendant drove around erratically and refused A.B.'s repeated requests to let her out of the car or to take her home. He punched her, discarded her phone, side swiped another car and forced her to perform oral sex upon him. A.B. managed to escape but defendant dragged her back in the car.

¶ 7 Eyewitness Adam Silva saw defendant and A.B. fighting and called the police. When the

police arrived, defendant crashed the car in an attempt to hit the police car, and then fled from the scene. Defendant was ultimately apprehended by police on the top of a nearby condominium building.

¶ 8 A.B. identified the photographs showing the injuries she suffered in the altercation with defendant including bruising and scratches on her hands, neck, elbow, wrist, leg, and lower back. A.B. testified that the injuries resulted from defendant hitting her, dragging her toward the vehicle and punching and scratching her to get her back into the vehicle. A.B. also testified that the pictures depicting scratches on defendant's face and neck indicated her efforts to fight off and get away from defendant.

¶ 9 Defendant testified on his behalf contending that he recalled A.B. telling him that she agreed to perform oral sex on him and that she did perform oral sex when defendant pulled over.

¶ 10 At the conclusion of the evidence, the trial court found defendant guilty of all counts. Defendant filed a direct appeal where he argued that: (1) the State failed to prove him guilty of aggravated criminal sexual assault, aggravated kidnapping, kidnapping, aggravated possession of a stolen motor vehicle, possession of a stolen motor vehicle, and aggravated fleeing and eluding beyond a reasonable doubt; (2) the trial court failed to merge various counts and the mittimus must be corrected to comply with the one act-one crime rule; and (3) the trial court failed to conduct an adequate inquiry and hearing into his *pro se* posttrial claims of ineffective assistance of counsel and the case should be remanded pursuant to *People v. Krankel*, 102 Ill. 2d 181, 189 (1984). *People v. Cullum*, 2013 IL App (1st) 111776-U.

¶ 11 We affirmed defendant's convictions for one count of aggravated sexual assault, one count of aggravated kidnapping, and one count of aggravated possession of a stolen motor vehicle. *People v. Cullum*, 2013 IL App (1st) 111776-U, ¶ 75. We vacated the rest of

defendant's convictions and sentences under the principles of one-act one crime and because some of the offenses were lesser included offenses that should have been merged into the greater convictions. *People v. Cullum*, 2013 IL App (1st) 111776-U, ¶ ¶ 75, 76. Notably, we vacated the concurrent sentences imposed for aggravated criminal sexual assault and aggravated kidnapping counts, which were void pursuant to 730 ILCS 5/5-8-4(d)(2) (West 2012) and remanded the case to the trial court for resentencing defendant to mandatory consecutive sentences for the two offenses. *Id*. at ¶ 75.

¶ 12 On remand, the trial court held a new sentencing hearing after which it resentenced defendant to 10 years in prison for aggravated criminal sexual assault conviction to run consecutively with a 6-year sentence for the aggravated kidnapping count. The trial court also held that the sentences remaining for the other offenses were to run concurrent to these sentences. Defendant now appeals from the resentencing, contending that: (1) his original concurrent sentence of 10 and 6 years were not void and are, therefore, neither subject to increase nor appealable by the State [1]; (2) the resentencing court erred in increasing his "aggregate sentence" by 6 years on remand; and (3) defendant did not receive a fair sentencing hearing.

¶ 13 ANALYSIS

¶ 14 On appeal, we first consider defendant's contention raised in the supplemental briefs that his original sentences were not void and thus not subject to increase by this court or appealable by the State. Defendant agrees that his original concurrent sentences were improper and that he

[1] The briefs in this appeal were filed before our supreme court issued its opinion in *People v. Castleberry*, 2015 IL 116916, while this case was pending on appeal. We allowed both the State Appellate Defender's Office and the State's Attorney's Office to file supplemental briefs with regard to the effect of *Castleberry* on this cause.

should have been sentenced to consecutive sentences. However, relying on *People v. Castleberry*, 2015 IL 116916, which abrogated *People v. Arna* 168 Ill. 2d 107, 113 (1995) and its holding that a void sentence can be challenged at any time, defendant urges this court to recognize that the original sentence should never have been addressed in our 2013 decision *People v. Cullum*, 2013 IL App (1st) 111776-U. Defendant asks this court to reinstate his admittedly improper concurrent sentences.

¶ 15 The State responds that this court's 2013 remand for the imposition of consecutive sentences, with which the trial court complied, is the law of the case and that is too late for defendant to now contest that finding. " '[T]he law of the case doctrine bars relitigation of an issue already decided in the same case.' " *People v. Cole*, 2016 IL App (1st) 141664, ¶ 27 quoting *People v. Tenner*, 206 Ill. 2d 381, 395 (2002); *People v. Patterson*, 154 Ill. 2d 414, 468 (1992) (“generally, a rule established as controlling in a particular case will continue to be the law of the case, as long as the facts remain the same”). Under the law of the case doctrine, an "issue of law decided on a previous appeal is binding on the circuit court on remand as well as the appellate court on a subsequent appeal." *People v. McDonald*, 366 Ill. App. 3d 243, 247 (2006). The purpose of the doctrine is to "protect settled expectations of the parties, ensure uniformity of decisions, maintain consistency during the course of a single case, effectuate proper administration of justice, and bring litigation to an end." *Id*. at 247; *Bond Drug Co. of Illinois v. Amoco Oil Co.*, 323 Ill. App. 3d 190, 197 (2001) (" 'The rule of the law of the case is a rule of practice, based on sound policy that, where an issue is once litigated and decided, that should be the end of the matter and the unreserved decision of a question of law or fact made during the course of litigation settles that question for all subsequent stages of the suit.' ") (quoting *Continental Ins. Co. v. Skidmore, Owings & Merrill*, 271 Ill. App. 3d 692, 696-97

(1995)).

¶ 16 A party seeking review of a decision of the appellate court has only two avenues for relief: (1) file a petition for rehearing or (2) seek leave to appeal to the supreme court. *People v. Cole*, 2016 IL App (1st) 141664, ¶ 28. **When, as in this case, a party exercises both such options and both petitions are denied, our decision becomes the law of the case, and binds the parties and the courts in any subsequent proceedings. See *Harris Trust & Sav. Bank v. Otis Elevator Co.*, 297 Ill. App. 3d 383, 388 (1998).** Therefore, our 2013 decision, *People v. Cullum*, 2013 IL App (1st) 111776-U, in which we found the trial court erred in imposing concurrent sentences and remanded for resentencing is the law of the case.

¶ 17 There are two exceptions to the doctrine of the law of the case: (1) where the supreme court makes a contrary ruling on the precise issue of law on which the appellate court had based its prior decision; and (2) where the appellate court finds its prior decision was erroneous, but only when the court remanded the case for a new trial of all the issues. *People v. Cole*, 2016 IL App (1st) 141664, ¶ 27; *Martin v. Federal Life Insurance Co.*, 164 Ill. App. 3d 820, 824. Neither of these exceptions applies here. The second exception, that of the appellate court finding its prior decision erroneous and the cause being remanded for a new trial on all issues, is clearly inapplicable because we do not find this court's prior decision was erroneous and we did not remand for a new trial on all of the issues.

¶ 18 The first exception, that of the supreme court making a contrary ruling on the precise issue of law, is inapplicable here because *Castleberry* abolished the void sentence rule in the context of a sentence being *increased*, while the sentence here, involved the imposition of the same sentences to run consecutively versus concurrently rather than a sentence increase. (Emphasis added.) See *People v. Cole*, 2016 IL App (1st) 141664, ¶ 27 (holding that the

imposition of consecutive sentences does not increase a defendant's original concurrent sentence when each consecutive sentence constitutes a distinct sentence for a particular offense and consecutive sentences may not be lumped together as one). In other words, it is the term of years a defendant is required to serve, rather than the manner in which those years are to be served, that is relevant to our evaluation of whether the trial court imposed a more severe sentence on remand. Here, the trial court did not increase defendant's sentence on remand but simply imposed the same sentences to be served consecutively. Because the precise issue in *Castleberry* was the abolishment of the void sentence rule, which is necessary only when the sentence is being increased, it is not the same issue in the case at hand where consecutive sentences do not increase a defendant's sentence but merely determines the manner in which the sentence is served. See *People v. Cole*, 2016 IL App (1st) 141664, ¶ 27. Therefore, the first exception to the "law of the case" does not apply in the instant case. Our judgment in *People v. Cullum*, 2013 IL App (1st) 111776-U is the law of the case where defendant failed to file a petition for rehearing or seek leave to appeal to the supreme court at the time the judgment was issued.

¶ 19 Regardless of the doctrine of the law of the case, however, we would still find that *Castleberry* is distinguishable from the case here and does not require this court to reinstate defendant's unauthorized previous sentences. In *Castleberry*, our supreme court abolished the void sentence rule, which stated " '[a] sentence which does not conform to a statutory requirement is void,' " abrogating *Arna*, 168 Ill. 2d 107. *Castleberry*, 2015 IL 116916, ¶¶ 13, 19, (quoting *Arna*, 168 Ill. 2d at 113). Our supreme court held that only the most fundamental defects, such as the lack of personal jurisdiction or the lack of subject matter jurisdiction, merit declaring a judgment void. *Castleberry*, 2015 IL 116916, ¶ 15.

¶ 20 Here, defendant does not contest that the trial court had jurisdiction over the defendant as well as over the subject matter. The trial court, therefore, had authority to enter convictions and sentences on the charged offenses, and its order sentencing defendant to concurrent terms of 10 years for aggravated sexual assault and 6 years for aggravated kidnapping when it should have ordered the sentences to be served consecutively was merely an error. See *People v. Davis*, 156 Ill. 2d 149, 156 (1993) (“jurisdiction or power to render a particular judgment * * * carries with it the power to decide wrong as well as to decide right”). This error did not divest the court of its jurisdiction. See *id*. at 156 (once jurisdiction is acquired, "no subsequent error or irregularity will oust the jurisdiction thus acquired," and "a court may not lose jurisdiction because it makes a mistake in determining either the facts, the law or both"). Therefore, the order was voidable and not void. For this reason, it falls outside the strictures of *Castleberry*, which abolished the void sentence rule. Unlike *Castleberry*, the case at bar deals with a voidable sentence that was remanded to the trial court for resentencing and which, upon resentencing, was not increased. See *People v. Cole*, 2016 IL App (1st) 141664, ¶ 32. Accordingly, because *Castleberry* does not apply to the instant case, defendant's request to have this court reinstate his concurrent sentences imposed in violation of 730 ILCS 5/5-8-4(d)(2) is denied.

¶ 21 We will now address the original claims raised by defendant in this appeal.

¶ 22 Defendant argues that the court abused its discretion in resentencing him to consecutive sentences of 10 years for aggravated criminal sexual assault and 6 years for aggravated kidnapping. Defendant contends that the new aggregate sentence was excessive and vindictive and that the trial court abused its discretion in declining to consider his post-sentencing mitigation and his expressions of remorse.

¶ 23 Defendant, relying on *North Carolina v. Pearce*, 395 U.S. 711 (1969), adopted by our

supreme court in *People v. Baze*, 43 Ill. 2d 298 (1969), and codified in section 5-5-4(a) of the Code (730 ILCS 5/5-5-4(a) (West 2012)), contends that when his original sentence was vacated on direct review, the trial court was prohibited from imposing a more severe sentence on remand and that in doing so, the trial court displayed vindictiveness. *Pearce* created the following requirement:

> "[W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." *Pearce*, 395 U.S. at 726.

¶ 24 This rule was later limited by *Alabama v. Smith*, 490 U.S. 794, 799 (1989), such that whenever a court imposes a more severe sentence upon a defendant after a new trial in which the circumstances are such that there is a reasonable likelihood that an increase in sentence is the product of actual judicial vindictiveness to affirmatively state the reasons for the increase. *Id*. at 799.

¶ 25 Defendant's argument fails because it relies on the contention that his sentence was increased upon remand for resentencing. As discussed above, his sentence was not increased because each consecutive sentence constitutes a distinct sentence for each offense, and consecutive sentences may not be lumped together but merely determine the manner in which defendant will serve his sentences. See *People v. Cole*, 2016 IL App (1st) 141664, ¶ 52; see also *People v. Phelps*, 211 Ill. 2d at 14; *People v. Carney*, 196 Ill. 2d 518, 532 (2001); *People v.*

Moore, 177 Ill. 2d 421, 436 (1997). Defendant urges us to reduce his sentence for aggravated criminal sexual assault to 6 years as it would be closest to the trial court's initial intention to sentence him to serve 10 years in prison. However, his argument is unavailing, as his original sentence, though unauthorized, was not a sentence of 10 years. Instead, after merging all the offenses, it was a total sentence of 16 years of incarceration comprised of one sentence of 10 years for the aggravated sexual assault counts and one sentence of 6 years for aggravated kidnapping counts that were erroneously ordered to be served concurrently. See, *e.g.*, *People v. Phelps*, 211 Ill.2d 1, 14 (2004) (" '[e]ach conviction results in a discrete sentence that must be treated individually' " (emphasis omitted))

¶ 26 Defendant argues that his sentence was excessive and that his good behavior while incarcerated and his expressions of remorse should have merited a lesser sentence upon resentencing. We disagree.

¶ 27 A trial court has broad discretionary powers in imposing a sentence, and its sentencing decisions are entitled to great deference. *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). The trial judge, having observed the defendant and the proceedings, is in a much better position to consider factors such as the defendant's credibility, demeanor, moral character, mentality, environment, habits, and age than the reviewing court, which must rely on the cold record on appeal. *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010); *People v. Fern*, 189 Ill. 2d 48, 53 (1999). Where the sentence chosen by the trial court is within the statutory range permissible for the pertinent criminal offense for which the defendant has been tried and charged, a reviewing court may only disturb the sentence if the trial court abused its discretion in the sentence it imposed. *People v. Jones*, 168 Ill. 2d 367, 374 (1995). A sentence that falls within the statutory range is presumptively proper and does not constitute an abuse of discretion unless it is

manifestly disproportionate to the nature of the offense. *People v. Hauschild*, 226 Ill. 2d 63, 90 (2007).

¶ 28 Aggravated criminal sexual assault and aggravated kidnapping are both sentenced as Class X felonies. See 720 ILCS 5/11-1.30 (West 2012); 720 ILCS 5/10-2 (West 2012). The sentencing range for a Class X felony is 6 to 30 years in prison. See 730 ILCS 5/5-8-1(a)(3) (West 2012). Since defendant's sentences were required to run consecutively, he faced a minimum of 12 years and a maximum of 60 years in prison. The court resentenced defendant to 10 years consecutive with a 6 years which is in the low end of the possible sentences for two Class X offenses. Furthermore, the record reflects that defendant's crimes were egregious. Defendant stole his live-in girlfriend's rental car and later met A.B. at a party. Although she agreed to leave with him to run a brief errand, he started driving, around picking up other people and going to different places not agreed upon. Defendant refused A.B's repeated requests to let her out of the car or take her home. Defendant punched A.B., discarded her phone, side-swiped another car and forced her to perform oral sex upon him. When A.B. finally escaped, he repeatedly beat and dragged her back to the car until an eyewitness called the police. When the police arrived, defendant crashed the car in an attempt to hit the police car, and then fled from the scene. Defendant was ultimately apprehended by police on the top of a nearby condominium building.

¶ 29 Defendant maintains that his improved attitude exemplified by his desire to apologize to the victim and new mitigation evidence should have led to the minimum sentence on upon resentencing. But the trial court, having observed defendant and the proceeding had a far better opportunity to consider such factors as defendant's credibility, demeanor, general moral character, mentality, social environment, habits and age. *People v. Fern*, 189 Ill. 2d at 53.

Considering the totality of the circumstance, we cannot say that the trial court abused its discretion in fashioning defendant's sentence on remand.

¶ 30 Defendant also argues that the trial court did not afford him a full new sentencing hearing as required on remand, and instead, the trial court merely conducted a "*pro forma* proceeding" depriving him of a fair sentencing hearing. Specifically, defendant maintains that the court abused its discretion in failing to consider post-sentencing mitigating evidence. We disagree.

¶ 31 The record reflects that, following a hearing that lasted about one hour, the trial court, in its discretion, declined to consider post-sentencing mitigation and imposed its sentence: 10 years of imprisonment on the aggravated criminal sexual assault, with additional counts to merge into it, and 6 years on the aggravated kidnapping, with additional counts to merge in, to run consecutively. The State did not offer additional aggravation. Furthermore, defendant exercised his right of allocution and spoke about his recent steps toward rehabilitation. For instance, defendant stated the following:

> "I just wish, to, um, to give - I mean I will try to give mitigation of what - how I have been occupying my time.
>
> I have been in substance abuse programs. I have been maintaining a B average in school. I have the transcript right here with college. I have been creating inventions, your honor, that I think are very good, and I have elaborate business ventures, your honor. I have been studying the law.
>
> I am trying to get some kind of way for myself. I also wish - over that time, I also had time to reflect upon my actions within this situation, your honor, and I wish to—I wish that young lady was here so that I could formally apologize to her for my conduct of that evening, your honor, because I have learned during

drug treatment program to be empathetic toward [sic] another.

And I remember specifically you telling me during the last time it's always someone else's fault, and that's been playing in my head a lot, and I have to look at me and see what were my actions in those situations, your honor.

And I have seen like – I mean I brought a lot of things upon myself, you know, and I told myself time and time again I am not actually mad that I was incarcerated, but I was upset that it took me to become incarcerated to have this mindset that I have now to make me want to be a better me."

¶ 32 Contrary to defendant's contention, the trial court afforded defendant the opportunity to address the court extensively and directly regarding a myriad of issues and patiently attempted to direct defendant's attention toward the purpose of the hearing which was to resentence defendant. The court listened intently to defendant's arguments and entered the sentence it found appropriate. The hearing lasted nearly an hour with the trial court already being intimately familiar with defendant and the circumstances of the case. Accordingly, we cannot say that defendant was not afforded a fair resentencing hearing or that the trial court abused its discretion in fashioning defendant's sentence on remand.

¶ 33 Similarly, we reject defendant's argument that his counsel was ineffective for failing to object to the trial court's errors at sentencing. To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, "a defendant must prove that defense counsel's performance fell below an objective standard of reasonableness and that this substandard performance created a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *People v. Graham*, 206 Ill. 2d 465, 476 (2003). Courts may resolve ineffectiveness

claims under the two-part *Strickland* test by reaching only the prejudice component, for lack of prejudice renders irrelevant the issue of counsel's performance. *People v. Coleman*, 183 Ill. 2d 366, 397-98 (1998); *Graham*, 206 Ill. 2d at 476 ("[I]f an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient."); *People v. Hale*, 2013 IL 113140, ¶ 17.

¶ 34 Here, defendant's ineffective assistance of trial counsel claim fails because he cannot show that he was prejudiced by counsel's alleged deficient performance at resentencing. In order to establish the prejudice prong, a petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Graham*, 206 Ill. 2d at 476. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. *People v. Enis*, 194 Ill. 2d 361, 376 (2000). Here, based on the totality of the circumstances and the egregious nature of defendant's actions, defendant cannot establish that there is a reasonable probability that the resentencing would have resulted in more lenient sentences for him. Accordingly, defendant's claim of ineffective assistance of counsel fails.

¶ 35 CONCLUSION

¶ 36 Based on the foregoing, we affirm.

¶ 37 Affirmed.