

No. 1-15-0494

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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. 80 C 208
)	
BRAD LIEBERMAN,)	Honorable
)	Gregory Robert Ginex,
Defendant-Appellant.)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Ellis and Justice Howse concurred in the judgment.

O R D E R

¶ 1 *Held:* Circuit court's dismissal of defendant's "Arna" motion alleging void sentence affirmed where his claim is barred by the doctrine of *res judicata* and precluded by the holding in *People v. Castleberry*.

¶ 2 Defendant Brad Lieberman appeals from an order of the circuit court of Cook County striking his " 'Arna' Motion for Emergency Correction of Void Extended Term Sentence and Order Nunc Pro Tunc" based on the court's finding that his claim was barred by the doctrine of

res judicata. On appeal, defendant contends that the circuit court erred in striking his motion because *res judicata* is inapplicable in this case where fundamental fairness demands relitigation. Defendant also contends that the court erred when it found that his conviction in Lake County constituted a previous conviction which made him eligible for an extended-term sentence. In addition, defendant argues that our supreme court's holding in *People v. Castleberry*, 2015 IL 116916, which abolished the void sentence rule, does not apply retroactively to his case. We affirm.

¶ 3 The background relevant to this case was set forth in this court's 2002 opinion affirming the dismissal of defendant's petition filed under section 2-1401 of the Code of Civil Procedure (Code) (730 ILCS 5/2-1401 (West 2000)) wherein he alleged that his extended-term sentence was void. *People v. Lieberman*, 332 Ill. App. 3d 193 (2002). We restate that background here, in pertinent part, as necessary to address the issues raised in this appeal. We note that the facts of the underlying conviction are not relevant here, but may be found in our opinion affirming that judgment on direct appeal. *People v. Lieberman*, 107 Ill. App. 3d 949 (1982).

¶ 4 On September 22, 1980, a jury found defendant guilty of the offense of rape, which was a Class X felony with a determinate sentencing range of 6 to 30 years' imprisonment (Ill. Rev. Stat. 1979, ch. 38, ¶¶ 11-1(c), 1005-8-1(a)(3)). *Lieberman*, 332 Ill. App. 3d at 194. A defendant found guilty of a Class X felony was eligible for an extended-term sentence between 30 and 60 years' imprisonment if the court found either that: (1) the defendant was convicted in Illinois of the same or greater class felony within the previous 10 years, and those charges were separately brought and tried, and arose from a different series of acts; or (2) the offense was accompanied

by exceptionally brutal or heinous behavior indicative of wanton cruelty (Ill. Rev. Stat. 1979, ch. 38, ¶¶ 1005-8-2(a)(2), 1005-5-3.2(b)). *Id.*

¶ 5 On October 3, 1980, prior to being sentenced in the above rape case, defendant was found guilty of rape, robbery and intimidation in a case pending in the circuit court of Lake County. *Id.* On October 14, 1980, prior to being sentenced in the Lake County case, defendant was sentenced in the instant rape case to an extended term of 50 years' imprisonment. *Id.* The trial court cited the guilty finding in the Lake County case as the basis for the imposition of the extended-term sentence. *Id.*

¶ 6 On direct appeal, in an opinion filed June 29, 1982, this court vacated defendant's 50-year extended-term sentence and remanded the case for a new sentencing hearing. *Id.*, citing *Lieberman*, 107 Ill. App. 3d 949. This court reasoned that, because a sentence had not yet been imposed in the Lake County case, defendant did not have a "conviction" in that case, and where no facts supported a finding of exceptionally brutal or heinous behavior, there was no basis for the 50-year extended-term sentence. *Id.* at 194-95, citing *Lieberman*, 107 Ill. App. 3d at 959.

¶ 7 At the resentencing hearing on January 6, 1983, the State presented a certified copy of defendant's conviction in the Lake County case which showed that he had since been sentenced to 30 years' imprisonment. *Id.* at 195. Relying on the Lake County conviction, the trial court then sentenced defendant in the instant case to an extended term of 40 years' imprisonment, which ran concurrent with the 30-year sentence in the Lake County case. *Id.* Defendant did not appeal from the resentencing. *Id.*

¶ 8 On January 6, 2000, three days before defendant's scheduled release date from prison, the State filed a petition to have defendant involuntarily committed as a sexually violent person pursuant to the Sexually Violent Persons Commitment Act (725 ILCS 207/1 *et seq.* (West 2000)). *In re Detention of Lieberman*, 201 Ill. 2d 300, 305 (2002). Defendant has been committed to the care and custody of the Department of Human Services (DHS) as a sexually violent person since that time.

¶ 9 On July 19, 2001, defendant filed a petition pursuant to section 2-1401 of the Code entitled "Emergency Petition For Relief From Final Judgment and Correction of Mittimus" requesting that the portion of his sentence in excess of 30 years be declared void and that his mittimus be corrected to a sentence of 30 years. *Lieberman*, 332 Ill. App. 3d at 195. The State moved to dismiss the petition arguing that defendant's sentence was not void and that his petition was untimely, and the circuit court granted the State's motion. *Id.*

¶ 10 On appeal from that judgment, defendant argued that at the time of resentencing, the trial court was not authorized by statute to impose an extended-term sentence based upon a conviction that did not exist at the time of his original sentencing, specifically, the Lake County conviction. *Id.* at 196. This court noted that the date of a conviction is the date of the entry of a sentencing order. *Id.* at 197, citing *People v. Robinson*, 89 Ill. 2d 469, 477 (1982). This court then explained that when we vacated defendant's original sentence, that sentence no longer existed, and thus, when the new sentence was imposed at resentencing on January 6, 1983, that date became the date of conviction in this case, and that date determined defendant's eligibility for imposition of an extended-term sentence. *Id.* We further explained:

"It is undisputed that, by January 6, 1983, the defendant had been 'previously convicted' of rape in the Lake County Case. He was, therefore, eligible for the imposition of an extended-term sentence. We conclude that the 40-year extended term sentence imposed upon the defendant was authorized by statute and is not void as he argues." *Id.*

We also found that defendant's section 2-1401 petition was untimely filed, and affirmed the circuit court's dismissal of his petition. *Id.* at 198.

¶ 11 In January 2003, defendant filed a *pro se* postconviction petition seeking "immediate release from custody." *People v. Lieberman*, No. 1-03-1279, order at 2 (2004) (unpublished order under Supreme Court Rule 23). The circuit court found that postconviction relief was unavailable because defendant had fully served his prison sentence, including his three-year term of mandatory supervised release, and dismissed his petition. *Id.* at 2-3. On appeal, this court granted the State Appellate Defender's motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), noted that defendant was not entitled to postconviction relief where he had completed serving his criminal conviction and his commitment as a sexually violent person was civil in nature, and affirmed the dismissal of his petition. *Id.* at 3-4.

¶ 12 On June 16, 2011, defendant filed a *pro se* complaint for *habeas corpus* relief in the circuit court of Schuyler County against the director of the DHS facility where he was detained again arguing that his 40-year extended-term sentence was void because his conviction in this case was his "first criminal case," and he had no prior convictions upon which to base an extended-term sentence. *Lieberman v. Ashby*, 2013 IL App (4th) 111013-U, ¶ 8. The DHS

director moved to dismiss the complaint arguing that defendant's claim was barred by the doctrine of *res judicata*, and the circuit court granted that motion. *Id.* at ¶ 9.

¶13 On appeal, the Fourth District found that defendant "previously raised this precise issue in connection with his July 2001 section 2-1401 petition." *Id.* at ¶ 15. The court further stated "the record reflects a final judgment on the merits was previously entered involving the same claim. Additionally, both cases involved the same parties or parties in privity." *Id.* Consequently, the court concluded that defendant's claim was barred by the doctrine of *res judicata*. *Id.* In addition, the Fourth District stated:

"[Defendant] argues fundamental fairness requires consideration of his claim and contends *res judicata* should not apply because his section 2-1401 petition was dismissed on jurisdictional grounds. However, the First District's opinion regarding the dismissal of [defendant's] section 2-1401 petition clearly shows it addressed and resolved the merits of [defendant's] claim, the same claim he now raises in his complaint for *habeas corpus* relief. See *Lieberman*, 332 Ill. App. 3d at 197, 772 N.E.2d at 879-80. The cases [defendant] cites on appeal to support his position are factually distinguishable and inapplicable to the present case." *Id.* at ¶ 16.

Based on these findings, the Fourth District affirmed the dismissal of defendant's *habeas corpus* complaint. *Id.* at ¶ 19.

¶ 14 On September 9, 2014, defendant, through counsel, filed the instant "'Arna' Motion for Emergency Correction of Void Extended Term Sentence and Order Nunc Pro Tunc." Therein, defendant stated "pursuant to the Illinois Supreme Court's well decided opinion in *People v.*

Arna, 168 Ill. 2d 107 (1995), he seeks a correction of a void, illegal and excessive extended term of imprisonment[.] Defendant based his motion on the void sentence rule announced in *Arna*, which provides that "[a] sentence that does not conform to a statutory requirement is void," and the appellate court has the authority to correct a void sentence at any time. *Arna*, 168 Ill. 2d at 113. Defendant again asserted that prior to his conviction in this case, he had no other convictions in any court, and his Cook County conviction was his first conviction for any crime, followed by his conviction in the Lake County case. Defendant argued that, at resentencing, the trial court erroneously found that his Lake County conviction was a "prior conviction" and imposed an illegal extended-term sentence of 40 years' imprisonment. He alleged that, in order to be eligible for an extended-term sentence, the commission and conviction dates of the prior offenses must have occurred in chronological order, and that the offense in this case must have been committed after he was previously convicted of the same or greater class felony. Consequently, defendant argued that the extended-term sentence was not authorized by statute, and therefore, was void, and imposition of that sentence violated his right to due process.

Defendant asked the court to correct his sentence to a non-extended term between 6 and 30 years' imprisonment, and to issue a new mittimus reflecting a non-extended term of imprisonment.

¶ 15 The State moved to strike defendant's motion arguing that his extended-term sentence was not void, that his claims were barred by the doctrine of *res judicata*, and that the trial court lacked jurisdiction to modify a 31-year-old sentence. The State pointed out that this was at least defendant's third attempt to have the courts declare the extended-term portion of his Cook County sentence void based on the same argument – that the Lake County conviction was not a

prior conviction, and therefore, could not serve as the basis for his extended-term sentence. The State asserted that defendant's claim was barred by *res judicata* because it was previously considered and rejected by the courts twice.

¶ 16 The State further argued that there was no merit to defendant's claim that the commission and conviction dates of the prior offenses must have occurred in chronological order, and noted that the cases relied on by defendant were inapplicable because those defendants were sentenced under different sections of the sentencing statute. The State also asserted that defendant misinterpreted the holding of *People v. Hooker*, 96 Ill. App. 3d 202 (1981), which found that section 5-5-3.2(b)(1) (Ill. Rev. Stat. 1979, ch. 38, ¶ 1005-5-3.2(b)(1)), the same section under which defendant had been sentenced, merely provides that a defendant may be sentenced to an extended term where he has been previously convicted of the same or greater class felony. The State quoted the court's finding that "[n]owhere does it state that the conviction must occur prior to the date the instant offense is committed, and we see no reason to interpret the statute so as to limit it in such a fashion." *Hooker*, 96 Ill. App. 3d at 206-07.

¶ 17 Defendant filed a reply to the State's motion to strike his "Arna" motion, maintaining that his conviction in this case was his first conviction, and that he was erroneously sentenced to an illegal and unconstitutional extended-term sentence. Defendant argued that *res judicata* should not apply in this case because fundamental fairness required relitigation of his claim. He further argued that when this court vacated his 50-year sentence on direct appeal (*Lieberman*, 107 Ill. App. 3d 949), his conviction was not reversed, and therefore, remained as his first conviction, and the Lake County conviction occurred subsequently. Defendant also argued that at

resentencing, the trial court could only impose a sentence that was available at the time of his original sentence, and that he was not eligible for an extended term when originally sentenced.

¶ 18 At the hearing, defense counsel expanded on the arguments raised in his motion, and maintained that this court's 2002 opinion (*Lieberman*, 332 Ill. App. 3d 193) erroneously found that the action of vacating defendant's original sentence changed his conviction date to the date of resentencing, January 6, 1983, which switched the order of his convictions. Counsel argued that defendant's conviction was never vacated, that the original sentencing date should have remained, and that switching the order of his convictions was fundamentally unfair.

¶ 19 The State responded that the 2002 opinion was not erroneous because a "conviction" consists of a guilty finding and a sentence, and without the sentence, there is no conviction. The State pointed out that defendant raised the exact same issue before the Fourth District, which found his claim barred by *res judicata*. The State also asserted that fundamental fairness does not allow a defendant to relitigate the same issue over and over by repeatedly claiming that it is void.

¶ 20 As a threshold matter, the circuit court stated that it would not recharacterize defendant's "Arna" motion as a section 2-1401 petition. The court then pointed out that in this court's 2002 opinion (*Lieberman*, 332 Ill. App. 3d 193), we addressed the same issue defendant raised in his "Arna" motion and found that at the time of resentencing in this case, defendant had been previously convicted in the Lake County case. The court also noted that defendant attacked his extended-term sentence a second time in his 2011 *habeas corpus* petition, and the Fourth District affirmed the dismissal of that claim (*Lieberman*, 2013 IL App (4th) 111013-U). The court then found that because defendant had raised the same issue, involving the same parties, at least twice

previously, it was barred by *res judicata*. The court further stated that it understood defendant's argument and his disagreement with this court's 2002 opinion, but found that the prior ruling was "exactly right," and that at the time of resentencing, defendant had a prior conviction in the Lake County case, which rendered him eligible for the extended-term sentence. The court also stated that the 2002 opinion, coupled with the *Hooker* opinion, controlled the ruling in this case, and consequently, struck defendant's "Arna" motion on the basis of *res judicata*.

¶ 21 On appeal, defendant first contends that the doctrine of *res judicata* is not applicable to this case because fundamental fairness demands relitigation of the issue where his extended-term sentence does not conform to the statutory requirements, and therefore, is void. Defendant maintains that the circuit court erroneously considered his subsequent Lake County conviction as a prior conviction, and thereby violated his right to due process by imposing the extended-term sentence.

¶ 22 The State responds that defendant's claim is barred by *res judicata* where the same claim was previously rejected on its merits by this court in its 2002 opinion affirming the dismissal of his section 2-1401 petition (*Lieberman*, 332 Ill. App. 3d 193), and by the Fourth District when it affirmed the dismissal of his *habeas corpus* petition (*Lieberman*, 2013 IL App (4th) 111013-U). The State also argues that defendant's claim is barred by waiver where he failed to directly appeal the imposition of his 40-year sentence, he did not raise the claim in his previous postconviction petition, and he did not appeal this court's 2002 opinion to the Illinois Supreme Court. The State further argues that this court's holding in its 2002 opinion was correct, and that defendant's extended-term sentence is not void.

¶ 23 "Under the doctrine of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent cause of action between the parties or their privies on the same cause of action." *Cooney v. Rossiter*, 2012 IL 113227, ¶ 18. *Res judicata* applies not only to all matters that were actually decided in the original action, but also to any matters that could have been decided. *Id.* In order for the doctrine of *res judicata* to apply, the following three requirements must be met: "(1) there was a final judgment on the merits rendered by a court of competent jurisdiction; (2) there was an identity of cause of action; and (3) there was an identity of parties or their privies." *Id.*, quoting *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998). Whether a claim is barred under the doctrine of *res judicata* is a question of law which we review *de novo*. *Lutkauskas v. Ricker*, 2015 IL 117090, ¶ 43.

¶ 24 Here, in his "'Arna' Motion for Emergency Correction of Void Extended Term Sentence and Order Nunc Pro Tunc" defendant again asserts that his 40-year extended-term sentence is void because he had no prior convictions that would have rendered him eligible for an extended-term sentence. Defendant again argues that his Lake County conviction occurred subsequent to his conviction in this case, and that the trial court erred at resentencing when it found that the Lake County conviction was a previous conviction. Defendant raised this precise issue in at least two of his prior proceedings. He first raised this issue in his section 2-1401 petition filed in July 2001, which was dismissed by the circuit court. In affirming the dismissal, this court specifically addressed the merits of defendant's claim, found that he was eligible for an extended-term sentence because he had been "previously convicted" of rape in Lake County, and concluded that his 40-year extended-term sentence was authorized by statute and not void. *Lieberman*, 332 Ill.

App. 3d at 197. The record thus shows that a final judgment on the merits was previously entered involving the same claim and the same parties.

¶ 25 In addition, defendant raised the same issue a second time in his *habeas corpus* complaint filed in June 2011, which was dismissed by the circuit court of Schuyler County on the basis of *res judicata*. In affirming that dismissal, the Fourth District found that the doctrine of *res judicata* barred defendant's claim. *Lieberman*, 2013 IL App (4th) 111013-U, ¶ 15. The record therefore shows that defendant's claim has been previously considered and rejected twice, and consequently, is barred by *res judicata*.

¶ 26 We find no merit in defendant's assertion that *res judicata* does not apply in this case because fundamental fairness requires relitigation of the issue. The record shows that defendant previously raised this precise argument in his appeal before the Fourth District. In rejecting that argument, the Fourth District found that this court's 2002 opinion clearly showed that we had addressed and resolved the merits of defendant's claim, and that the cases he cited on appeal in support of his position were factually distinguishable and inapplicable to his case. *Lieberman*, 2013 IL App (4th) 111013-U, ¶ 16. We agree with the Fourth District's conclusion and find that the doctrine of *res judicata* is applicable here and bars defendant's claim.

¶ 27 While this appeal was pending, our supreme court issued its opinion in *People v. Castleberry*, 2015 IL 116916, which abolished the void sentence rule upon which defendant's "Arna" motion is based. Defendant now argues that *Castleberry* cannot apply retroactively to his case and urges this court to follow the holding of *People v. Smith*, 2016 IL App (1st) 140887, where the second division of this court held that *Castleberry* does not apply retroactively.

Accordingly, defendant argues that *Castleberry* does not preclude consideration of his claim where his "*Arna*" motion was filed in September 2014, and his notice of appeal was filed December 10, 2014, 11 months before the *Castleberry* decision was filed on November 15, 2015.

¶ 28 The State responds that *Castleberry* should be applied retroactively to cases on collateral review because it announced a new substantive constitutional rule that deals broadly with the circuit court's jurisdiction, and retroactive application will not harm finality of judgments, but rather, will preserve it. The State asserts that *Smith* was wrongly decided and should not be followed because it first held that the rule announced in *Castleberry* is not a new rule, but then held that it did not apply retroactively, which conflicts with retroactivity principles that provide that rules that are not new must be applied to all cases, including retroactive application. The State therefore argues that in light of *Castleberry*, defendant's claim of a void judgment is no longer tenable.

¶ 29 The "void sentence rule" announced in *Arna* (168 Ill. 2d at 113), which states that "[a] sentence which does not conform to a statutory requirement is void," was abolished by our supreme court in *Castleberry*, 2015 IL 116916, ¶ 19. The court explained that "'[w]hether a judgment is void or voidable presents a question of jurisdiction.'" *Castleberry*, 2015 IL 116916, ¶ 11, quoting *People v. Davis*, 156 Ill. 2d 149, 155 (1993). Where the court lacks jurisdiction, any resulting judgment is void and may be attacked at any time. *Id.* However, where the court has jurisdiction and enters an erroneous judgment, that judgment is voidable and not subject to collateral attack. *Id.* The supreme court further explained that "'the failure to comply with a statutory requirement or prerequisite does not negate the circuit court's subject matter jurisdiction

or constitute a nonwaivable condition precedent to the circuit court's jurisdiction.' " *Id.* at ¶ 15, quoting *LVNV Funding, LLC v. Trice*, 2015 IL 116129, ¶ 37. Consequently, only the most fundamental defects, such as a lack of personal or subject matter jurisdiction, render a judgment void. *Id.*, citing *LVNV Funding, LLC*, 2015 IL 116129, ¶ 38.

¶ 30 A few weeks after deciding *Castleberry*, the supreme court considered a voidness challenge that had been raised in a section 2-1401 petition. *People v. Thompson*, 2015 IL 118151. While discussing various types of voidness challenges, the court noted that one such challenge occurs where a defendant claims that a sentence is void because it does not conform to the applicable sentencing statute. *Id.* at ¶ 33. The supreme court stated that this type of challenge is based on the "void sentence rule" from *Arna*, then pointed out that it recently abolished that rule in *Castleberry*. *Id.* The court then stated "[c]onsequently, that type of challenge is no longer valid." *Id.*

¶ 31 On December 30, 2016, after briefing in this appeal was complete, our supreme court issued its opinion in *People v. Price*, 2016 IL 118613, where it considered whether *Castleberry* applies to cases pending in the court at the time *Castleberry* was decided. In *Price*, the defendant filed a petition under section 2-1401 of the Code asserting that his natural life sentence for first degree murder was void. *Price*, 2016 IL 118613, ¶ 1. The defendant's petition was pending in the appellate court at the time *Castleberry* was announced. *Id.* at ¶ 27. The supreme court explained that pursuant to *Castleberry*, a sentence that does not conform with a statute is not void, but instead, merely voidable and subject to procedural rules and restraints, including forfeiture. *Price*, 2016 IL 118613, ¶ 17. The court expressly stated that after *Castleberry*, "a defendant may

no longer rely on the void sentence rule to overcome forfeiture of a claimed sentencing error or to challenge a statutorily nonconforming sentence in perpetuity." *Id.*

¶ 32 The court further stated that the retroactivity analysis set forth by the United States Supreme Court in *Teague v. Lane*, 489 U.S. 288 (1989), and adopted by our supreme court in *People v. Flowers*, 138 Ill. 2d 218 (1990), did not control the retroactivity question presented by *Castleberry*. *Id.* at ¶ 18. The court explained that because *Castleberry* did not change any rule that affected the conduct of criminal prosecutions, and comes into play, if at all, only after judgment is rendered in a criminal trial, the *Teague* analysis is not triggered. *Id.* at ¶ 22. Instead, the court applied its general rule of retroactivity, which provides that our supreme court's "decisions apply to 'all cases that are pending when the decision is announced, unless this court directs otherwise.'" *Id.* at ¶ 27 (quoting *People v. Granados*, 172 Ill. 2d 358, 365 (1996)).

¶ 33 After noting that the court did not limit the reach of *Castleberry*, and that Price offered no reason why *Castleberry* should not apply to his pending section 2-1401 petition, the court found that "not applying *Castleberry* would thwart the very policy espoused in that decision—preserving the finality of judgments—by permitting defendants to continue to argue that a statutorily nonconforming sentence is void." *Id.* at ¶ 28. Accordingly, the court held that *Castleberry* applied to Price's section 2-1401 petition that was pending in court at the time *Castleberry* was decided, and therefore, the defendant could not rely on the void sentence rule, which was eliminated by *Castleberry*, to overcome the untimely filing of his petition. *Id.* at ¶ 35.

¶ 34 Similar to *Price*, in this case, defendant's "Arna" motion was pending in this court when the *Castleberry* decision was issued on November 15, 2015. We therefore find that *Castleberry*

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applies retroactively to this case, and thus, defendant's "*Arna*" motion alleging that his extended-term sentence is void, is no longer tenable.

¶ 35 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 36 Affirmed.