2017 IL App (4th) 150128-U

NO. 4-15-0128

FILED
April 10, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from |
| Plaintiff-Appellee, | ) | Circuit Court of |
| v. | ) | Sangamon County |
| TONY E. SHOULTZ, | ) | No. 94CF319 |
| Defendant-Appellant. | ) | |
| | ) | Honorable |
| | ) | Rudolph M. Braud, |
| | ) | Judge Presiding. |

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Turner and Justice Pope concurred in the judgment.

**ORDER**

¶ 1 *Held*: The appellate court granted the office of the State Appellate Defender's motion to withdraw as appellate counsel and affirmed the trial court's denial of defendant's petition for relief from judgment as it was without merit.

¶ 2 The office of the State Appellate Defender (OSAD) moves to withdraw as counsel on defendant Tony E. Shoultz's appeal of the trial court's denial of a petition for relief from judgment (735 ILCS 5/2-1401(West 2014)). In March 1996, the trial court sentenced defendant to two concurrent sentences of natural life imprisonment after a jury found him guilty of first degree murder and intentional homicide of an unborn child. His petition for relief from judgment contested the sentences as void for being in violation of the "single-subject" rule of the Illinois Constitution (Ill. Const. 1970, art. IV, § 8(d)). He also alleged defects in the charging instrument and jury instructions, and he contested the general verdict rendered by the jury.

OSAD claims no colorable argument can be made on appeal to challenge the trial court's denial of defendant's section 2-1401 petition. We grant OSAD's motion to withdraw as counsel on appeal and affirm the trial court's denial of defendant's petition for relief from judgment.

¶ 3 I. BACKGROUND

¶ 4 In January 1996, defendant was found guilty of first degree murder (720 ILCS 5/9-1 (West 1994)) and intentional homicide of an unborn child (720 ILCS 5/9-1.2 (West 1994)) based on a shooting on June 9, 1994, which caused the deaths of Jennifer Florence and her unborn child. In March 1996, the trial court sentenced him to two concurrent life sentences pursuant to section 5-8-1 of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 1994)). This court affirmed defendant's conviction and sentence on appeal. *People v. Shoultz*, 289 Ill. App. 3d 392, 682 N.E.2d 446 (1997).

¶ 5 In December 2003, defendant filed an amended petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-8 (West 2002)). In January 2004, the trial court dismissed defendant's postconviction petition as frivolous and patently without merit (725 ILCS 5/122-2.1 (West 2002)). This court affirmed the trial court's first-stage dismissal of defendant's postconviction petition. *People v. Shoultz*, No. 4-04-0126 (Apr. 27, 2006) (unpublished order under Supreme Court Rule 23).

¶ 6 In July 2014, defendant again sought relief by filing a "Motion to Vacate A Void Judgment and Void Sentence." The trial court construed defendant's motion as a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)). Defendant alleged section 5-8-1(a)(1)(c)(ii) of the Unified Code "was enacted as part of Public Act 89-203, whose provisions did not have a natural, logical connection to a single

subject, and thus violated [the] single subject rule of [the Illinois Constitution]." (Emphasis omitted.)

¶ 7 The petition further complained of various defects in the information and in the general guilty verdict issued by the jury. Defendant argued the language of counts IV, V, and VI fail to include the statute for intentional homicide of an unborn child (720 ILCS 5/9-1.2 (West 1994)) by citing "9.12(a)(1)" and section 9-2 of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/9-2 (West 1994)) for second degree murder. He also claimed counts IV, V, and VI did not explicitly state, "he knew that the woman was pregnant." He also alleged counts I, II, and III failed to correctly use the statutory language for first degree murder. Defendant argued the jury was not provided with jury instructions as to second degree murder. He claimed the jury improperly rendered a general verdict without specifying any of the mental states for first degree murder referenced in section 9-1 of the Criminal Code (720 ILCS 5/9.1 (West 1994)).

¶ 8 In October 2014, the trial court held a telephonic hearing, and later issued its order denying defendant's section 2-1401 petition. The order stated, "The Defendant-Petitioner was convicted of the murder of two individuals and pursuant to a statu[t]e prior to the enactment of Public Act 89-203 was sentenced to mandatory Life without the possibility of parole." The trial court explained, "Public Act 89-203 with its amendments to 730 ILCS 5/5-8-1(a)[1](c)(ii) became law on July 21, 1995. The section of 5-8-1 requiring the life imprisonment for anyone guilty of murdering more than one victim was enacted in 1981." In January 2015, the trial court denied defendant's motion to reconsider the denial of his section 2-1401 petition. A notice of appeal was filed with this court on February 24, 2015. OSAD filed its motion to withdraw as counsel on appeal. On its own motion, this court granted defendant leave to file additional points and authorities, which he did. The State has also responded.

¶ 9 II. ANALYSIS

¶ 10 OSAD concludes no colorable argument can be raised on appeal of the trial court's denial of defendant's section 2-1401 petition. Relief from judgment under section 2-1401 is available to a petitioner showing, by a preponderance of the evidence, "a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition." *People v. Vincent*, 226 Ill. 2d 1, 7-8, 871 N.E.2d 17, 22 (2007). The trial court held a hearing and considered the pleadings and arguments of each party. That decision is reviewed *de novo*. *People v. Burrows*, 172 Ill. 2d 169, 190, 665 N.E.2d 1319, 1324 (1996); see also *Vincent*, 226 Ill. 2d at 18, 871 N.E.2d at 28 (*de novo* standard of review is required where the court enters a judgment on the pleadings or a dismissal of a section 2-1401 claim).

¶ 11 Defendant argued his sentence is void because the Illinois Supreme Court found Public Act 89-203 unconstitutional for violating the single subject clause of the Illinois Constitution. *People v. Wooters*, 188 Ill. 2d 500, 520, 722 N.E.2d 1102, 1113-14 (1999) (citing Ill. Const. 1970, art. IV, § 8). Section 5-8-1 of the Unified Code provides for a sentence of natural life imprisonment where the defendant "is found guilty of murdering more than one victim." 730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 1994). Public Act 89-203 took effect on July 21, 1995, prior to defendant's sentencing on March 29, 1996 (but after the June 9, 1994, shooting), and amended section 5-8-1 to state:

> "[T]he court may sentence the defendant to a term of natural life imprisonment *** if the defendant,
>
> *** is a person who, at the time of the commission of the murder, had attained the age of 17 or more and is found guilty of murdering an individual

under 12 years of age; or, irrespective of the defendant's age at the time of the commission of the offense, is found guilty of murdering more than one victim[.]" 730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 1996).

¶ 12 The trial court properly found defendant would have been convicted under section 5-8-1 prior to passage of Public Act 89-203. A statute violating the single subject clause "is void in its entirety," and an amendment serving as the basis of a sentence is void *ab initio*, or as if it had never been enacted into law. *People v. Crutchfield*, 2015 IL App (5th) 120371, ¶ 63, 35 N.E.3d 218 (citing *People v. Quevedo*, 403 Ill. App. 3d 282, 298, 932 N.E.2d 642, 656 (2010). A statute found void *ab initio* does not automatically invalidate a sentence. The Illinois Supreme Court recognizes "[t]he effect of enacting an unconstitutional amendment to a statute is to leave the law in force as it was before the adoption of the amendment." *People v. Gersch*, 135 Ill. 2d 384, 390, 553 N.E.2d 281, 283 (1990). Section 5-8-1 of the Unified Code provided for sentencing to natural life imprisonment where the defendant murdered more than one victim before the passage of Public Act 89-203. 730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 1994). The trial court sentenced defendant under section 5-8-1 because defendant "ha[d] been found guilty of murdering more than one victim as a result of such convictions." Public Act 89-203 did not alter or affect defendant's sentence under section 5-8-1. OSAD correctly notes Public Act 89-203 was inapplicable to defendant's sentence because it took effect on July 21, 1995, after the shooting on June 9, 1994.

¶ 13 OSAD concludes, and we agree, no meritorious argument is available to defendant to challenge defects in the charging instruments and the general verdict. "Ordinarily, a petition seeking relief under section 2-1401 must be filed more than 30 days from entry of the final order but not more than 2 years after that entry." *People v. Thompson*, 2015 IL 118151, ¶

28, 43 N.E.3d 984 (citing 735 ILCS 5/2-1401(a), (c) (West 2010)). An untimely section 2-1401 petition can only challenge a judgment as void for lack of personal or subject matter jurisdiction, or where a judgment is based on an unconstitutional statute. *Thompson*, 2015 IL 118151, ¶¶ 31-33, 43 N.E.3d 984. Defects in the charging instruments and whether a general verdict was proper do not fall under either exception allowing for an untimely section 2-1401 petition. Defendant cannot colorably argue his sentence was void for not conforming to an applicable sentencing statute. *People v. Castleberry*, 2015 IL 116916, ¶ 19, 43 N.E.3d 932 (void sentence rule abolished); *People v. Stafford*, 2016 IL App (4th) 140309, ¶ 33, 61 N.E.3d 1058 (abolishment of the void sentence rule in *Castleberry* applies retroactively).

¶ 14 No colorable argument can be made on appeal as to formal defects challenging the sufficiency of the information. Formal defects do not provide a basis for challenging a judgment as void. *People v. Hindson*, 319 Ill. App. 3d 1, 5, 747 N.E.2d 908, 911 (2001) (citing *People v. Williams*, 161 Ill. App. 3d 613, 619, 515 N.E.2d 266, 270 (1987)). "A formal defect is one that does not alter the nature and elements of the charged offense." *Hindson*, 319 Ill. App. 3d at 5, 747 N.E.2d at 911 (citing *People v. Patterson*, 267 Ill. App. 3d 933, 938, 642 N.E.2d 866, 869 (1994)). The incorrect statutory citations alleged by defendant are merely ministerial errors. These errors did not alter the nature and elements of the offenses charged in light of reading the contents of the information.

¶ 15 The trial court reviews a posttrial motion challenging the sufficiency of a charging instrument under a prejudice standard of review. *People v. Cuadrado*, 214 Ill. 2d 79, 86, 824 N.E.2d 214, 219 (2005). A charging instrument is sufficient where it "apprised the accused of the precise offense charged with sufficient specificity to prepare his defense and allow pleading a resulting conviction as a bar to future prosecutions arising out of the same

conduct." (Internal quotation marks omitted.) *Cuadrado*, 214 Ill. 2d at 86-87, 824 N.E.2d at 219. The information clearly stated defendant was being charged with first degree murder and intentional homicide of an unborn child. Defendant is incorrect in alleging counts IV, V, and VI failed to state, "he knew that the woman was pregnant." The information states, "knowing that Jennifer L. Florence was pregnant."

¶ 16 Defendant is barred from disputing jury instructions and the general verdict on appeal. See *People v. Enis*, 194 Ill. 2d 361, 375, 743 N.E.2d 1, 10 (2000) ("Issues that were decided on direct appeal are barred by the doctrine of *res judicata*, and issues that could have been raised on direct appeal, but were not, are deemed [forfeited]."). Defendant is incorrect in characterizing the jury's general verdict as improper. The "one-good-count" rule recognizes a general verdict of guilty as a finding of guilt on each count. *People v. Moore*, 397 Ill. App. 3d 555, 564, 922 N.E.2d 435, 443 (2009) (citing *People v. Lymore*, 25 Ill. 2d 305, 307-08, 185 N.E.2d 158, 159 (1962)). A general verdict for first degree murder issued by a jury which received instructions on intentional, knowing, and felony murder is presumed as a finding of guilt for the most culpable mental state under the one-good-count rule. *Moore*, 397 Ill. App. 3d at 564, 922 N.E.2d at 443 (citing *People v. Cardona*, 158 Ill. 2d 403, 411, 634 N.E.2d 720, 723 (1994); *People v. Thompkins*, 121 Ill. 2d 401, 455-56, 521 N.E.2d 38, 62 (1988)). The jury properly rendered a general guilty verdict for first degree murder and intentional homicide of an unborn child without having to specify a mental state.

¶ 17 We agree with the assessments by OSAD and the State. The record from the trial court's denial of defendant's section 2-1401 petition presents no meritorious issues for review. We find no error in the trial court's denial of defendant's section 2-1401 petition.

¶ 18 III. CONCLUSION

¶ 19 We grant OSAD's motion to withdraw as counsel on appeal and affirm the trial court's judgment. We award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2014).

¶ 20 Affirmed.