2013 IL App (2d) 100013-U
No. 2-10-0013
Order filed July 15, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. PHILLIP E. La POINTE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 78-CF-317 Honorable Perry R. Thompson, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly denied defendant's section 2-1401 petition, which alleged that his life sentence was void to the extent that it was based on a finding of "brutal or heinous" conduct: the supreme court had held that defendant's conduct satisfied that definition, and, despite defendant's arguments to the contrary, that court had not since narrowed the definition so as to exclude defendant's conduct.

¶ 2 Defendant, Phillip E. La Pointe, appeals from a judgment denying his petition for relief under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)) from his sentence of life imprisonment for first-degree murder (Ill. Rev. Stat. 1977, ch. 38, ¶ 9-1(a)(1)). Defendant contends that his sentence is void to the extent that it is based on the finding that his offense was

accompanied by exceptionally brutal or heinous conduct indicative of wanton cruelty (Ill. Rev. Stat. 1977, ch. 38, ¶ 1005-8-1(a)(1) (West Supp. 1978)). We affirm.

¶ 3 On March 7, 1978, defendant, who was 18 years old at the time, shot and killed Peter Moreno, Jr., a cab driver, in Elmhurst. Defendant later entered an open plea of guilty to murder.

¶ 4 At the sentencing hearing, the following evidence was introduced. David Cichelli testified that, on the morning of March 7, 1978, defendant visited him at the gas station where Cichelli worked and told him that he was going to shoot a cab driver. In a washroom at the station, defendant produced a gun and said that it was loaded. An hour or two later, he returned and told Cichelli that he "shot him in the head." Defendant said that he "did it for the money" and that he shot the driver because he could identify defendant. Police investigators testified that, apparently, Moreno had been robbed and that he had been shot twice in the head and neck area from the rear at close range. Three deputy sheriffs who worked at the Du Page County jail testified that, while he was held there, defendant regularly wore a T-shirt reading "Elmhurst Executioner" until another inmate dissuaded him. A juvenile testified that, shortly before March 7, 1978, defendant had asked him to help rob a business and that he and defendant had previously burglarized a home. Also, defendant had phoned the juvenile from jail and asked him to smuggle in drugs. According to the presentencing report, on March 7, 1978, defendant was still on probation for the burglary.

¶ 5 Several mitigation witnesses, including defendant's stepfather, his father, and a clergyman, testified about defendant's drug abuse and his apparent lack of a prior propensity to violence. In allocution, defendant stated that, on March 7, 1978, he had been so heavily under the influence of LSD that he could not remember whether he had killed Moreno. He added, " 'If I did, I am truly sorry.' " *People v. La Pointe*, 88 Ill. 2d 482, 490 (1981).

¶ 6 The trial court sentenced defendant to life imprisonment, based on its finding that "the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty." Ill. Rev. Stat. 1977, ch. 38, ¶ 1005-8-1(a)(1) (West Supp. 1978). The judge explained that defendant had a significant criminal history before the murder; that he had not been suffering extreme emotional or mental disturbance at the time; and that the judge had considered " 'the heinous nature of this crime, its brutality, its cold, calculating, cold-blooded act [*sic*] which is indicative of the wanton cruelty, there was an indication that it was premeditated.' " *La Pointe,* 88 Ill. 2d at 491-92.

¶ 7 On appeal, this court reduced defendant's sentence to 60 years' imprisonment, the maximum nonextended term. *People v. LaPointe*, 85 Ill. App. 3d 215 (1980), *rev'd*, *La Pointe*, 88 Ill. 2d 482. The supreme court reversed, holding that the trial court had not abused its discretion in applying the "brutal or heinous" factor. The court rejected defendant's assertion that the factor applied only to "those murders involving torture or the infliction of unnecessary pain." *La Pointe*, 88 Ill. 2d at 501. The court concluded:

> "The record in this case indicates that the defendant, a young man with a significant history of criminal activity, acted with premeditated, cold-blooded deliberation in deciding to kill a cab driver, a homicide for which the death penalty could have been sought, had the prosecutor elected to do so. Following that murder and while being held in the county jail, he displayed a callous attitude and complete lack of remorse by wearing the tee shirt with the words 'Elmhurst Executioner' appearing thereon. We do not believe that the trial judge can be said to have abused his discretion in sentencing defendant to natural life imprisonment without parole." *Id.*

¶ 8 Defendant initiated numerous collateral actions against his conviction and sentence. The one that concerns us here is a *pro se* "Petition for Relief from a Void Judgment Pursuant to 735 ILCS 5/2-1401(f)," filed June 3, 2009. As pertinent here, the petition contended that defendant's sentence was void to the extent that it was based on the "brutal or heinous" factor, because, since *La Pointe*, the supreme court had narrowed the construction of the factor so that, as a matter of law, it longer applied to his case. The petition relied primarily on (in chronological order) *People v. Andrews*, 132 Ill. 2d 451 (1989); *People v. Palmer*, 148 Ill. 2d 70 *(*1992); *People v. Pastewski*, 164 Ill. 2d 189 (1995); and *People v. Nielson*, 187 Ill. 2d 271 (1999). According to defendant, the *La Pointe* court had refused to hold that a finding of "wanton cruelty" required proof that the defendant had consciously intended to inflict pain or suffering on the victim, but the *Palmer*, *Pastewski*, and *Nielson* courts had later adopted this requirement. Therefore, the petition reasoned, because there had been no evidence that defendant had intended any such pain or suffering, and the trial court had never so found, the statutory prerequisite to imposing the life sentence had not been satisfied.

¶ 9 The petition contended also that *Andrews*, a murder case in which the supreme court had overturned the trial court's "brutal or heinous" finding, was indistinguishable from his case. Defendant noted that, in *Andrews*, the defendant had entered a car occupied by two strangers, murdered the driver, and robbed the passenger. *Andrews*, 132 Ill. 2d at 454. The supreme court vacated the extension. *Id.* at 466.

¶ 10 The trial court denied defendant's petition and his motion to reconsider. Defendant appealed. On appeal, defendant contends, once again, that, because case law has narrowed the scope of the "brutal or heinous" statutory factor, his conduct no longer satisfies that criterion and, therefore, his sentence is void to the extent that it is based thereon. The State responds that the supreme court has

never overruled, explicitly or implicitly, its holding in *La Pointe* that defendant's life sentence was proper. For the reasons that follow, we agree with the State.

¶ 11 Whether a sentence is void is a question of law that we review *de novo*. *People v. Hauschild*, 226 Ill. 2d 63, 72 (2007). Defendant concedes that, in *La Pointe*, the supreme court specifically affirmed the trial court's finding that defendant's conduct satisfied the "brutal or heinous" criterion. He concedes further, at least implicitly, that the supreme court has never explicitly overruled, or even questioned, that holding. Finally, defendant concedes that, under ordinary circumstances, *La Pointe* would have *res judicata* effect, barring the relitigation of whether defendant's offense was accompanied by exceptionally brutal or heinous conduct indicative of wanton cruelty. See *People v. Burrows*, 172 Ill. 2d 169, 187 (1996); *People v. Morfin*, 2012 IL App (1st) 103568, ¶ 30. However, defendant notes that, if case law that developed after his conviction and sentence were affirmed on direct appeal supports his position, fundamental fairness overrides *res judicata*. See *People v. Cummings*, 375 Ill. App. 3d 513, 519 (2007); *People v. Cowherd*, 114 Ill. App. 3d 894, 898 (1983). Defendant contends that this is such a case. We now examine the basis of his contention.

¶ 12 Defendant starts with the supreme court's opinion in *Andrews*. He contends that the supreme court implicitly narrowed the construction of the "brutal or heinous" provision, to the point where it no longer applies to his case. Defendant argues that the supreme court vacated an extended-term sentence for murder under facts that are indistinguishable from (or even more unfavorable than) the facts in his case. For the reasons that follow, we cannot read *Andrews* so generously.

¶ 13 In *Andrews*, the defendant was convicted of murder, armed robbery, and aggravated battery. *Andrews*, 132 Ill. 2d at 453. The evidence showed that the defendant and another man approached a car that was stopped at a traffic light; that the defendant entered the car and pointed a gun at the

driver and the passenger; that the driver told defendant that he and the passenger would give him whatever he wanted; and that the defendant shot and fatally wounded the driver, then hit the passenger, robbed her, and departed with his accomplice. *Id.* at 454-55. The trial court sentenced the defendant to an extended term of 70 years' imprisonment for murder, based on its finding that his offense was accompanied by exceptionally brutal or heinous conduct indicative of wanton cruelty. *Id.* at 453-54; see Ill. Rev. Stat. 1985, ch. 38, ¶ 1005-5-3.2(b). The trial court explained that the murder had been "senseless and unresisted." *Andrews*, 132 Ill. 2d at 464. The statutory provision was identical to the provision in *La Pointe*. *Id.* at 465.

¶ 14 The supreme court held that the trial court abused its discretion in imposing the extended-term sentence. *Id.* at 466. (The court did not, however, hold that the sentence was "void.") The court cited *La Pointe* repeatedly—both for the general proposition that the extended-term sentence would be affirmed absent an abuse of discretion (*id.* at 464) and, more specifically, as the touchstone for the construction and application of the "brutal or heinous" provision.

¶ 15 The supreme court cited *La Pointe* to hold that the provision under which the defendant had been sentenced was not limited to "those murders involving torture or the infliction of unnecessary pain." *Id.* at 464-65. After all, *La Pointe* had expressly rejected that limitation. *Id.* Nonetheless, the court held that the facts did not support the extended-term sentence. *Id.* at 465. The State argued that the "brutal or heinous" factor applied because the defendant had shot a defenseless victim, with no need to do so to achieve his goal, and that his conduct immediately afterward showed a callous disregard for the victim's life. *Id.* The supreme court disagreed. It noted that "[a]ll murders are brutal and heinous to a certain degree" and that many victims are defenseless. *Id.* at 466.

Nonetheless, to qualify as exceptionally brutal or heinous, *and* indicative of wanton cruelty, more was required:

> "In upholding [the] defendant's life sentence in *La Pointe*, the court focused on [the] defendant's significant history of criminal activity, callous attitude and complete lack of remorse (indicated by the fact that in jail following the shooting, [the] defendant wore a T-shirt that said, 'Elmhurst Executioner'), and premeditation (evidenced by [the] defendant's statement to a friend prior to the murder that he was going to shoot a cab driver). *La Pointe*, 88 Ill. 2d at 487-90, 501.
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> In the case at bar, defendant's criminal history contained no crimes of violence, consisting instead of convictions [of] theft and burglary. There is no evidence in the record that defendant indicated prior to the crime that he intended to kill the victim or that he exhibited a callous attitude and complete lack of remorse following the murder, like the defendant in *La Pointe*. Defendant indicated his remorse at the sentencing hearing, and the trial judge accepted the defendant's expression as sincere, stating that one of the reasons he was not imposing a natural life sentence was defendant's expression of sorrow. For all these reasons, we find that the trial court abused its discretion in sentencing defendant to an extended term of 70 years' imprisonment, based on defendant's murder conviction." *Id.*

¶ 16 We do not see how *Andrews* retreated from the holding in *La Pointe*. Far from repudiating its earlier opinion, the supreme court repeatedly invoked it, implying that it adhered to all that it had said in 1981. Although defendant asserts that the facts in *Andrews* are indistinguishable from those in his case, the *Andrews* court plainly said otherwise. It stated at length that the two cases were

distinguishable on their facts, *i.e.*, (1) the defendants' respective criminal histories; (2) the presence or absence of premeditation; and (3) the presence or absence of remorse.

¶ 17 Defendant acknowledges that the *Andrews* court distinguished the case before it from his case, but he contends that these distinctions were unsound, so that *Andrews* "effectively overruled" *La Pointe.* Whatever the strength of his premise (which relies heavily on both speculation and a version of the facts that the trial court rejected), it misses the point. Whether the *Andrews* court's reasoning was persuasive is not pertinent here. The crucial consideration is that, in *Andrews*, the court in no way repudiated or undermined its opinion in *La Pointe*. Therefore, *Andrews* cannot reasonably be read as effecting the change in the law that defendant must show to overcome the *res judicata* effect of *La Pointe* on his case. We are bound by the supreme court's holdings, whether or not we find them well-reasoned. In *Andrews*, the court did not overrule *La Pointe*, "effectively" or otherwise. That opinion does not support defendant—quite the opposite.

¶ 18 Defendant does not rely solely on *Andrews* to argue that the supreme court restricted the scope of the "brutal or heinous" provision after it issued *La Pointe*. He also cites *Nielson* and a number of opinions of our appellate court. We disagree with defendant that these opinions free him from the holding of *La Pointe*.

¶ 19 In *Nielson*, the defendant received extended-term sentences for concealing two homicidal deaths, based on the "brutal or heinous" aggravating factor. The supreme court held that the extended-term sentences were error. The court cited *La Pointe*'s definitions of "brutal" and "heinous" (which it applied in the paragraph that we quote next) and stated, " *'[W]anton cruelty' requires 'proof that the defendant consciously sought to inflict pain and suffering on the victim of*

the offense.' People v. Pastewski, 164 Ill. 2d 189, 194 (1995)." (Emphasis added.) *Nielson*, 187 Ill. 2d at 299. The court continued:

> "Certainly, the trial court did not err in concluding that defendant acted brutally and heinously when he burned the Marshels' bodies, stuffed them into a duffle bag, and sank them in a pond. Such behavior is undoubtedly hateful and evil, evincing a complete lack of compassion and mercy. However, to justify an extended-term sentence, defendant must also have demonstrated wanton cruelty, which, as we define it, cannot be perpetrated on a corpse. One simply cannot consciously seek to inflict pain and suffering on a dead body, as a dead body feels nothing." *Id.*

¶ 20 We note that nowhere in *Nielson* did the supreme court explicitly overrule or even question anything that it had said in *La Pointe*. Indeed, the court cited *La Pointe* to define "brutal" and "heinous." Defendant's argument that the court implicitly overruled *La Pointe* must rest on some sort of implication, especially as defendant's case involved a live victim, not a corpse, and thus he cannot claim that *Nielson* is factually on point. Defendant attempts to overcome these difficulties by relying on the language that we have emphasized. That language was taken from *Pastewski*, which, in turn, took the language from *Palmer*. Therefore, we examine *Palmer*.

¶ 21 *Palmer* addressed the construction of a statute providing that, when a criminal defendant is acquitted by reason of insanity, his maximum period of involuntary commitment shall not exceed the maximum length of time that he would have been required to serve had he been convicted of and received the maximum sentence for the most serious crime of which he has been acquitted by reason of insanity. *Palmer,* 148 Ill. 2d at 83; see Ill. Rev. Stat. 1987, ch. 38, ¶ 1005-2-4(b). The issue in

Palmer was whether the maximum sentence for murder would have been an extended term of life imprisonment based on a "brutal or heinous" finding. *Palmer*, 148 Ill. 2d at 82-83.

¶ 22 The supreme court said no. The court first observed that, to commit an insanity acquittee under the extended-term statute, the trial court would first have to find that his offense was accompanied by exceptionally brutal or heinous conduct indicative of wanton cruelty. *Id.* at 86-87. However, the court concluded, this finding would be impermissible, given the definition of insanity and the policy reasons for the insanity defense. The court cited *La Pointe*'s definitions of "brutal" and "heinous" and earlier courts' definitions of "cruelty" and "wanton." *Id.* at 87 ("cruelty" implies the infliction of pain and suffering (see *People v. Jones*, 73 Ill. App. 3d 99, 103 (1979)), and a "wanton" act implies that the actor is conscious, from his knowledge of the surrounding circumstances, that his conduct will naturally and probably result in injury (see *id.* (citing *Bartolucci v. Falletti*, 382 Ill. 2d 168, 174 (1943))).

¶ 23 The supreme court explained that an acquittal based on insanity means that the defendant's volition was so impaired that he was unable to control his conduct and, thus, should not be held criminally responsible for it. *Palmer*, 148 Ill. 2d at 88. The court concluded:

> "Defendant contends that, given the nature of the insanity defense, an insanity acquittee's conduct may not be evaluated in terms of wanton cruelty. Defendant argues that an insanity acquittee cannot be considered to have consciously chosen to inflict pain or suffering, or to have been capable of consciously realizing that such infliction was wrong. We agree." *Id.*

¶ 24 We cannot say that *Palmer*, on which defendant's *Nielson* argument ultimately rests, supports his claim that the supreme court has implicitly overruled *La Pointe*'s construction of the "brutal or

heinous" criterion. Obviously, *Palmer* is not factually similar to defendant's case and does not apply directly. Defendant was not acquitted by reason of insanity; he was convicted based on a guilty plea, by which he admitted that he had possessed the criminal intent necessary to commit first-degree murder. The basis of *Palmer* is that a person who cannot control his volition or consciously realize that his act is wrong cannot be said to act with wanton cruelty. That reasoning simply does not apply to defendant. On March 7, 1978, he was able to control his volition and to realize consciously that his act was wrong. He admitted that much by pleading guilty, and both the trial court and the supreme court fully agreed with him on that matter.

¶ 25 Defendant does not actually contend that *Nielson*, *Pastewski*, and *Palmer* apply directly to his case. He does not discuss these opinions in depth (or in context), but instead isolates the statement that " 'wanton cruelty' requires 'proof that the defendant consciously sought to inflict pain and suffering on the victim of the offense.' " *Nielson*,187 Ill. 2d at 299 (quoting *Pastewski*, 164 Ill. 2d at 194). Defendant's use of this passage is unpersuasive, and not only because (1) it takes this language out of context and ignores the narrow scope of the holding in *Palmer*; and (2) it ultimately asserts that *Palmer* implicitly overruled *La Pointe* on a matter for which *Palmer* cited *La Pointe* in support. A third flaw is that defendant's argument depends on a verbal confusion.

¶ 26 Defendant contends that *Nielson*'s statement, " '[W]anton cruelty' requires 'proof that the defendant consciously sought to inflict pain and suffering on the victim' " (*Nielson*, 187 Ill. 2d at 299 (quoting *Pastewski*, 164 Ill. 2d at 194) "implicitly revers[ed] the [s]upreme [c]ourt's finding [*sic*] in *La Pointe*." By the supreme court's "finding," defendant apparently means *La Pointe*'s statement that the "brutal or heinous" factor "does not limit the imposition of a sentence of natural life to only those murders involving torture or the infliction of unnecessary pain." *La Pointe*, 88 Ill. 2d at 501.

However, we see nothing inconsistent in these two statements. "Pain and suffering" is simply not synonymous with "*torture* or the infliction of *unnecessary* pain" (*La Pointe*, 88 Ill. 2d at 501) (emphasis added). One may intend the former without intending the latter.

¶ 27 Surely, defendant cannot contend that the record failed to show that he intended to inflict pain and suffering on Moreno. Defendant, with premeditation, shot Moreno twice at close range. Even if this conduct did not amount to torture or the infliction of "unnecessary" pain, it proved that defendant consciously sought to inflict pain and suffering on Moreno. That is the natural and probable consequence of two gunshots to the head or neck.

¶ 28 There is a middle ground between torture and no pain or suffering at all. Defendant's conduct fell within that middle ground. And, as the supreme court has said since *La Pointe*, the infliction of torture, or of suffering that is unnecessary to the criminal objective, is not necessary for exceptionally brutal or heinous conduct indicative of wanton cruelty. "Cases in which this court has found [exceptionally] brutal or heinous behavior to be present have generally involved prolonged pain, torture, *or* premeditation." (Emphasis added.) *People v. Lucas*, 132 Ill. 2d 399, 445 (1989). That is why supreme court opinions that vacate sentences based on the "brutal or heinous" factor specifically note the absence of premeditation. See, *e.g.*, *id.* at 446; *Andrews*, 132 Ill. 2d at 466.

¶ 29 In defendant's case, premeditation is a given. There was no further requirement of torture or the infliction of wholly unnecessary pain. *La Pointe*'s statement that a defendant can be subject to the "brutal or heinous" sentencing enhancement without proof of torture or unnecessary pain is still the law. Defendant's attempt to read later supreme court authority as implying otherwise is unpersuasive. *La Pointe* still has *res judicata* effect.[1]

[1]Even were we to agree with defendant that *La Pointe*'s construction of the statute has been

¶ 30 Defendant also cites a number of appellate court opinions that, he contends, relied on *Andrews* to vacate or modify extended-term sentences that were imposed per "brutal or heinous" findings. Whatever these opinions hold, we fail to see how the appellate court can overrule *La Pointe* or vitiate the *res judicata* effect of the supreme court's opinion. Defendant does not explain how the appellate court can overrule the supreme court. Of course, as we have explained, defendant is also mistaken in asserting that *Andrews* undermined *La Pointe*.

¶ 31 In sum, defendant has not persuaded us that anything that the supreme court has done since *La Pointe* frees us from our obligation to adhere to its holding that defendant's sentence of natural life is proper. Therefore, the trial court properly denied his petition for relief.

¶ 32 The judgment of the circuit court of Du Page County is affirmed.

¶ 33 Affirmed.

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repudiated and that the new construction is inconsistent with *La Pointe*, there would still be the question of whether defendant's extended-term sentence is void in part or merely an abuse of discretion. As noted, *Andrews* held not that the trial court had lacked the authority to impose the natural-life sentence there, but only that the trial court had abused its discretion. The difference is potentially important because defendant recognized that his petition had to frame the issue as one of voidness, not merely voidability, in order to get around the limitations period of section 2-1401. See 735 ILCS 5/2-1401(f) (West 2008). Given our holding, we need not discuss this problem.