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SIXTH DIVISION
November 4, 2011

2011 IL App (1st) 083478-U
No. 1-08-3478

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. 01 CR 29453
)	
BENNY DEANDA, JR.,)	
)	The Honorable
Defendant-Appellant.)	Thomas P. Fecarotta, Jr.,
)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

ORDER

¶ 1 *HELD:* Defendant's sentence on a negotiated guilty plea was void as below the minimum required by the firearm sentencing enhancement.

¶ 2 Defendant, Benny Deanda, Jr., entered a negotiated guilty plea for first degree murder and was sentenced to 30 years' imprisonment. Defendant appeals the trial court's second-stage dismissal of his petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2006)). Defendant contends his 30-year sentence is void because it was less than the 35-year minimum required by the firearm sentencing enhancement

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statute (730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2000)). Based on the following, we reverse the second-stage dismissal of defendant's postconviction petition and remand the case to the trial court to allow defendant to withdraw his guilty plea and proceed to trial, if he so chooses.

¶ 3

FACTS

¶ 4 Prior to trial, defense counsel filed a motion to quash defendant's arrest and to suppress defendant's statement.

¶ 5 In the motion to quash arrest, defendant argued that the police did not have probable cause or a warrant to arrest him at the house of his uncle, Pablo Deanda, located at 647 East Chicago Avenue, Elgin, Illinois. The trial court denied the motion finding that the police did have probable cause to arrest defendant based, in part, on a tentative identification and the fact that Pablo consented to the entry and search of his house, and both Pablo and defendant consented to the search of defendant's bedroom.

¶ 6 In the motion to suppress defendant's inculpatory police statement and statement to Assistant State's Attorney (ASA) Mary Beth Kinnerk, defendant argued that he did not fully understand his *Miranda* rights prior to being questioned, that no youth officer was present during his interview despite the fact that he was a minor, that he did not read the statement memorialized by the ASA before signing it, that he was not informed he could be tried as an adult, and that, despite his mother's presence during questioning, she failed to understand his rights and the seriousness of the charges against him because of her minimal understanding of English. The trial court denied the motion finding that defendant understood his rights and provided voluntary statements.

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¶ 7 The case proceeded to trial. The State's evidence demonstrated that, on November 4, 2001, defendant and two friends, Jonathon Aguiniga and Jose Cruz Sanchez, were walking in Elgin when a car drove up next to them. Defendant asked the driver, Mario Jiminez, to get out of the car. Francisco Valdez was a passenger in Jiminez's car. When Mario exited the car, he walked toward defendant. The pair exchanged words. Defendant then pulled a chrome handgun from under his sweatshirt and aimed the gun at Jiminez's face. Jiminez was approximately six feet away from defendant when defendant fired his gun. The discharged bullet did not hit Jiminez. In response, Jiminez ran toward defendant and defendant ran in the opposite direction while reloading his gun. Defendant then stopped, turned toward Jiminez, and fired his gun at Jiminez a second time. The bullet struck Jiminez in the face. Defendant, Aguiniga, and Sanchez fled.

¶ 8 Defendant and his friends went to Sanchez's house where defendant removed his sweatshirt. Defendant instructed Aguiniga and Sanchez to keep quiet about what had transpired. When defendant left Sanchez's house, he went to his uncle's house at 647 East Chicago, Elgin, Illinois, where he was living. Defendant hid his gun under a rock in the backyard and threw the discharged cartridges down a sewer near the house.

¶ 9 Elgin Police Detective Tom Wolek interviewed Valdez, Aguiniga, and Sanchez regarding Jiminez's murder. Based on the information learned during those interviews, defendant was arrested and brought to the police station on November 5, 2001, at around 2:30 a.m. Detective Wolek interviewed defendant twice in the presence of defendant's mother and two other officers. During the first interview, defendant said he saw an unknown individual shoot Jiminez.

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Approximately 10 minutes later, during the second interview, defendant inculpated himself in Jiminez's murder. Defendant and defendant's mother agreed to provide a handwritten statement to the ASA. In the statement, defendant admitted shooting Jiminez and said he disposed of the gun in the Fox River.

¶ 10 While in transit to the Fox River to retrieve the murder weapon, defendant told Detective Wolek that the gun was at his "crib" instead. Detective Wolek rerouted the car to 647 East Chicago, Elgin, Illinois, and found the gun hidden under a rock identified by defendant.

¶ 11 Robert Berk, a forensics scientist, performed tests on the sweatshirt worn by defendant at the time of the offense and the sweatshirt worn by Jiminez. Berk concluded that both sweatshirts contained gun powder residue indicating that the individuals wearing the sweatshirts were in close proximity when a gun was fired.

¶ 12 Doctor Bryan Mitchell performed the autopsy on Jiminez and concluded that his cause of death was a gunshot wound to the nose, which penetrated the head and lacerated the brain. A portion of a bullet was recovered from Jiminez's brain.

¶ 13 Tests performed on the recovered bullet and the recovered handgun revealed that the bullet was fired from the gun.

¶ 14 At the close of the State's evidence, defense counsel made a motion for a directed finding. The motion was denied. The trial was commenced and continued until two days later. On the next trial date, defense counsel informed the court that, after continuing negotiations, the State and defendant had reached an agreement. The terms of the agreement were that, in exchange for a 30-year prison term, defendant agreed to plead guilty to count 5 of his indictment,

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which was described as intentional or knowing murder while armed with a firearm in violation of section 9-1(a)(1) of the Criminal Code of 1961 (720 ILCS 5/9-1(a)(1) (West 2000)). Defense counsel informed the court that she was willing to proceed with trial by presenting evidence to support a finding of not guilty based on self defense or, in the alternative, argue for a finding of second degree murder. According to defense counsel, defendant, however, wished to accept the negotiated guilty plea.

¶ 15 Prior to accepting the negotiated plea, the trial court admonished defendant that by pleading guilty he was giving up his right to trial, his right to confront and cross-examine witnesses, his right to present a defense, and his right to testify. Defendant said he understood that he was relinquishing those rights and that it was his choice to do so. Defendant informed the court that he was not offered anything of value or promised anything in exchange for his plea and that he was not forced or threatened to enter the plea. The court then said:

“You’re pleading guilty to count five, which is first degree murder. The law requires that I tell you what the minimum and maximum penalty could be. I can sentence you from a minimum of 20 years in the Illinois Department of Corrections up to 60 years in the Illinois Department of Corrections followed by five years mandatory supervised release, which is like parole. If you qualified for an extended term because of a prior conviction or any other fact, I could sentence you from a minimum of 40 to a maximum of 100 years in the Illinois Department of Corrections. Knowing this do you still wish to plead guilty.”

Defendant responded in the positive.

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¶ 16 The State provided a factual basis for the plea demonstrating that defendant fired his handgun at the victim's face causing the victim's death. The factual basis was stipulated to by defendant. The trial court accepted the negotiated guilty plea finding defendant guilty of first degree murder. The court expressly stated that “defendant’s waivers to continue with trial and all waivers are done knowingly and voluntarily.” Defendant was sentenced to 30 years’ imprisonment on April 3, 2003. No motion to withdraw the plea or notice of appeal were filed.

¶ 17 Defendant filed his *pro se* postconviction petition on June 19, 2007. On September 14, 2007, the trial court, explaining that the petition contained a list of alleged constitutional issues, docketed the petition and appointed the public defender to represent defendant. On April 25, 2008, defendant’s appointed postconviction attorney filed a certificate in accordance with Supreme Court Rule 651(c) stating that defendant’s *pro se* petition “adequately presents his claims of deprivations of constitutional rights.” On August 8, 2008, the State filed a motion to dismiss defendant’s petition. On November 14, 2008, the trial court conducted a hearing on the motion to dismiss. The trial court found defendant was not culpably negligent in the delayed filing of his petition, but concluded that “there is nothing in the record that would merit this petition in any remote shape.” The State’s motion to dismiss defendant’s postconviction petition was granted. Defendant appeals the second-stage dismissal of his petition.

¶ 18

DECISION

¶ 19

I. Void Sentence

¶ 20 Defendant first contends that his sentence is void because it is below the statutory minimum required for a conviction of first degree murder while armed with a firearm. The State

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responds that defendant's sentence is not void as a result of a new rule of law announced in *People v. White*, No. 109616 (June 16, 2011), because the new rule does not have retroactive application. In the event this court finds defendant's sentence is void, the State argues that defendant's guilty plea need not be vacated. Rather, the State contends defendant is estopped from challenging his plea. In the alternative, the State invites this court to keep defendant's plea intact, vacate the sentence, and remand the case to the trial court for resentencing.

¶ 21 Although defendant did not raise this issue in his postconviction petition or during his dismissal hearing, a void sentence may be attacked at any time. *People v. Wade*, 116 Ill. 2d 1, 5, 506 N.E.2d 954 (1987); see *People v. Ramey*, 393 Ill. App. 3d 661, 662, 913 N.E.2d 670 (2009). We review this question of law *de novo*. *People v. Robinson*, 232 Ill. 2d 98, 105, 902 N.E.2d 622 (2008).

¶ 22 The factual basis offered by the State in support of defendant's guilty plea demonstrated that the victim died of a gunshot wound to the face and defendant fired the bullet causing the victim's death. See Ill. S. Ct. R. 402 (eff. July 1, 1997) (Supreme Court Rule 402 requires a factual basis before the court can enter a final judgment on a plea of guilty). Pursuant to section 5-8-1 of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-8-1 (West 2000)), the sentencing range for first degree murder is not less than 20 years and not more than 60 years. A sentencing enhancement is imposed where a firearm is used in the commission of the offense such that "15 years shall be added to the term of imprisonment imposed by the court." 730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2000).

¶ 23 "Once a trial court accepts a plea of guilty, it is the duty of the court to fix

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punishment. [Citation.] We have 'repeatedly recognize that the legislature has the power to prescribe penalties for defined offenses, and that power necessarily includes the authority to prescribe mandatory sentences, even if such sentences restrict the judiciary's discretion in imposing sentences.' [Citation.] A court does not have authority to impose a sentence that does not conform with statutory guidelines [citations] and a court exceeds [its] authority when it orders a lesser or greater sentence than that which the statute mandates [citations]. In such a case, the defendant's sentence is illegal and void. [Citations.]" *White*, No. 109616, slip op. at 7.

¶ 24 Addressing identical arguments as those raised here, the supreme court in *White* concluded that the trial court did not have the authority to impose a 28-year prison term as negotiated by the parties where the facts underlying the plea agreement demonstrated that the defendant was accountable for the shooting death of the victim. *Id.* at 7-8. The supreme court clarified that the factual basis for a plea agreement acts as a trigger for the firearm enhancement when the factual basis demonstrates that a firearm was used in the commission of a first degree murder. *Id.* at 8-9. The supreme court recognized that the State has the authority to enter plea agreements on charges of its choosing; however, a trial court does not have the authority to accept a negotiated guilty plea below the mandatory minimum sentence of 35 years' imprisonment for first degree murder with the use of a firearm. *Id.* at 8-9. In her special concurrence, Justice Theis identified that the State could negotiate around the mandatory firearm enhancement if it "amended the indictment and presented a factual basis that referred to a

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dangerous weapon, rather than a firearm." *Id.* at 13 (Theis, J., specially concurring). The supreme court further noted that the trial court need not make an actual finding, pursuant to *Apprendi v. New York*, 530 U.S. 466 (2000), that the defendant was armed with a firearm in order to trigger the sentencing enhancement because the factual basis of the plea triggers the enhancement and neither the parties nor the trial court can agree to a sentence not authorized by the law. *Id.* at 9-10.

¶ 25 Here, we conclude defendant's sentence was void as below the minimum authorized by statute in violation of *People v. Arna*, 168 Ill. 2d 107, 113, 658 N.E.2d 445 (1995). The factual basis underlying defendant's guilty plea established that he used a firearm in the commission of the victim's first degree murder. As a result, the firearm enhancement provision was triggered and the minimum sentence available to defendant was 35 years' imprisonment. Defendant's 30-year sentence violated the firearm enhancement statute and, thus, was void.

¶ 26 The State recognizes the holding of *White*, but contends that a new rule of law was announced which does not have retroactive application to defendant. We disagree. In *Teague v. Lane*, 489 U.S. 288 (1989), the Supreme Court held that a new constitutional rule of criminal procedure cannot be applied to cases on collateral review unless the rule complies with one of two exceptions. *Id.* at 311-13. However, prior to assessing whether one of the exceptions applies, a court must determine whether the rule is actually new. In recognizing the difficulty with first determining whether a new rule is announced, the Supreme Court advised "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. [Citations.] To put it differently, a case announces a new rule if the

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result was not *dictated* by the precedent existing at the time the defendant's conviction became final." (Emphasis in original.) *Id.* at 301.

¶ 27 Turning to the *White* decision, the central holding was that a sentence not authorized by statute is void. This rule of law has been consistently applied since *Arna* in 1995. See, e.g., *People v. Jackson*, 2011 IL 110615 ¶10, *People v. Marshall*, 242 Ill. 2d 285, 302, 950 N.E.2d 668 (2011), *People v. Bishop*, 218 Ill. 2d 232, 254, 843 N.E.2d 365 (2006), *People v. Thompson*, 209 Ill. 2d 19, 25, 805 N.E.2d 1200 (2004), *People v. Pinkonsly*, 207 Ill. 2d 555, 569, 802 N.E.2d 236 (2003). Contrary to the State's argument, the supreme court's holding in *White* did not create a new rule by eliminating the prosecution's discretion in seeking to include the firearm enhancement. Rather, what the supreme court did in *White* was to clarify that the facts underlying a plea agreement can trigger the firearm enhancement statute and, under those circumstances, the minimum sentence imposed must be 35 years' imprisonment despite any negotiations to the contrary. Consequently, the prosecution retains discretion whether to seek the enhancement when it decides how to charge the defendant and what facts to submit to support the plea agreement. Moreover, the supreme court essentially clarified that the factual basis for a plea as submitted by the State, stipulated to by the parties, and accepted by the trial court can satisfy the requirements of section 111-3(c-5) of the Code of Criminal Procedure of 1963 (725 ILCS 5/111-3(c-5) (West 2000)),¹ in that the use of the firearm is submitted to the trier of fact as an aggravating factor and found beyond a reasonable doubt.

¶ 28 We agree with defendant that "if a lack of clarity before a decision meant that that

¹The statute was enacted in response to *Apprendi*.

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decision announced a new rule of law, then *every* decision would be a new rule of law, and no decision would *ever* be retroactive." [Emphasis in original.] We recognize that, in our prior decision in this case, we concluded the sentencing enhancement was not at issue because the record did not demonstrate an express finding, beyond a reasonable doubt, by the trial court that defendant used a firearm in committing the victim's first degree murder. Although our finding was at odds with *White*, we do not find the *White* decision created a new rule of law. The *White* decision did not break new ground or impose any new obligations. See *Teague*, 489 U.S. at 301; compare *People v. Morris*, 236 Ill. 2d 345, 363, 925 N.E.2d 1069 (2010) (finding a new rule was announced in *People v. Whitfield*, 217 Ill. 2d 177, 840 N.E.2d 658 (2005), because the supreme court concluded, for the first time, that a faulty mandatory supervised release admonishment denied the defendant the benefit of his bargain with his plea agreement and, therefore, violated his due process rights). Instead, the *White* decision reaffirmed the long-standing principle that a sentence below the statutory-required minimum is void and a plea agreement establishing the use of a firearm in the commission of first degree murder could not include a sentence below 35 years' imprisonment. We, therefore, conclude the holding in *White* applies retroactively to defendant.

¶ 29 Turning to the State's estoppel argument, we have consistently held that "[a] challenge to an alleged void order is not subject to forfeiture." *Marshall*, 242 Ill. 2d at 302. The State elaborates that it does not procedurally challenge defendant's ability to raise the voidness argument, but instead argues that defendant has received the benefit of his bargain, in that the State dropped certain charges in exchange for the plea, and he cannot now complain that his

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sentence was too lenient. The State's argument lacks merit where the invalidation of the plea will expose defendant to all the original charges in addition to a sentence at least five years longer than provided under the negotiated plea. See Ill. S. Ct. R. 605(c)(4) (eff. Oct. 1, 2001) ("that upon the request of the State any charges that may have been dismissed as part of a plea agreement will be reinstated and will also be set for trial").

¶ 30 The final matter before us is what should happen on remand. The State encourages this court to keep defendant's plea intact and merely remand for resentencing, allowing the State to amend the indictment and the factual basis supporting the plea, as suggested by Justice Theis in her special concurrence in *White*, in order to preserve defendant's 30-year prison term and eliminate the imposition of the firearm enhancement statute. The State cites *Whitfield* as support for our ability to "fashion an alternative, equitable remedy." *Whitfield*, however, is distinguishable where the defendant's sentence was not void; rather, his guilty plea was deemed a violation of due process because he was not admonished regarding the requisite three-year mandatory supervised release term that would be added to his negotiated sentence and, therefore, he would not receive the benefit of his bargain. *Whitfield*, 217 Ill. 2d at.205 Here, there is no argument that defendant's plea was involuntary or a violation of his due process rights as not providing the benefit of his bargain. On the contrary, the argument is that defendant's sentence was void and, therefore, his sentence, as negotiated, is illegal. *People ex rel. Ryan v. Roe*, 201 Ill. 2d 552, 778 N.E.2d 701 (2002), is equally inapplicable where the source of voidness in the defendant's sentence was the failure to apply the truth-in-sentencing statute. In *Roe*, the supreme court exercised its supervisory authority to award a writ of *mandamus* finding an equitable

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solution uncontested by the State in order to provide the defendant with the benefit of his original bargain. *Id.* at 557-58. In *Roe*, the defendant's actual sentence was legal, only the notation that the sentence was not subject to truth-in-sentencing made the sentence void, whereas our defendant's sentence is illegal as below the minimum required by the firearm enhancement statute.

¶ 31 In response to the State's argument that allowing defendant to withdraw his guilty plea and potentially proceed to trial could cause prejudice to the State after so much time has elapsed since the plea was entered, we return to the distinguishing factors between those cases cited by the State where the plea at issue violated the defendants' due process rights because the defendants were not admonished regarding mandatory supervised release (see *Whitfield*, 217 Ill. 2d at 205; *People v. Smith*, 406 Ill. App. 3d 879, 893-94, 941 N.E.2d 975 (2010); *People v. Chamness*, 373 Ill. App. 3d 492, 494-95, 869 N.E.2d 291 (2007)) and the instant plea which is unquestionably void. The State does not cite to, and we are unaware of, any cases instructing this court to consider the potential prejudice to the State if defendant decided to seek a trial upon remand following the withdrawal of his void plea.

¶ 32 We conclude that the appropriate remedy does not allow us to keep defendant's plea intact and remand for resentencing where an essential part of the agreement was illegal. *People v. Gregory*, 379 Ill. App. 3d 414, 419-22, 883 N.E.2d 762 (2008), citing *People v. Hare*, 315 Ill. App. 3d 606, 609-11, 734 N.E.2d 515 (2000); *People v. Johnson*, 338 Ill. App. 3d 213, 216, 788 N.E.2d 152 (2003); *People v. Caban*, 318 Ill. App. 3d 1082, 1086-89, 743 N.E.2d 600 (2001). We see no need to divert from the supreme court's decision in *White* where the cause was

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remanded to the trial court for the withdrawal of the defendant's guilty plea. *White*, No. 109616, slip op. at 10.

¶ 33

CONCLUSION

¶ 34 Because the trial court's imposition of a 30-year prison term pursuant to a negotiated plea agreement is void as noncompliant with section 5-8-1(a)(1)(d)(i) of the Unified Code, we reverse the trial court's dismissal of defendant's postconviction petition and remand this case to the trial court with instructions to allow defendant to withdraw his guilty plea and proceed to trial, if he so chooses.

¶ 35 Reversed and remanded.