

No. 1-09-1139

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

SIXTH DIVISION
APRIL 29, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)
)
) Plaintiff-Appellee,)
)
)
 v.) No. 00 CR 4982
)
)
 TYRONE GABB,)
) Honorable
) Mary Margaret Brosnahan,
)
) Defendant-Appellant.) Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Garcia and Justice R.E. Gordon concurred
in the judgment.

ORDER

Held: Defendant committed multiple offenses in separate courses of conduct. The trial court therefore had the discretion to impose consecutive sentences on defendant, and did not abuse its discretion in doing so. Defendant was not entitled to have the mittimus corrected to reflect 50% credit for his armed robbery convictions. This court affirmed the decision of the circuit court.

Following a bench trial, defendant Tyrone Gabb was found guilty of the attempted armed robbery and murder of his drug

supplier, Reginald Flowers. He also was found guilty of the armed robbery of Marlon Alfred (also Alford) and Serena Turner. Defendant was sentenced to consecutive terms of 4 years for attempted armed robbery, 24 years for murder, and 6 years for each armed robbery, resulting in a total of 40 years' imprisonment. In this direct appeal from his resentencing, defendant once again challenges the consecutive nature of his sentence under section 5-8-4 of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-4 (West 1998)). We affirm.

Defendant was tried¹ and convicted based on the testimony of the armed robbery victims, Alfred and Turner. Trial evidence established that on December 21, 1999, Flowers, Alfred, and Turner were all at Flowers' apartment. Defendant spoke to Flowers and Alfred by telephone and informed Alfred that he was coming over. Alfred opened the door for defendant and another man, hereinafter "co-assailant." Co-assailant stood by the door without entering the apartment or removing his coat or hat, and kept his hand in his pocket. Defendant proceeded to the living room, where he asked Flowers for drugs. Flowers denied having any.

Defendant and co-assailant brandished guns and ordered everyone to the floor. Flowers, Alfred, and Turner complied.

¹ Sheldon Myers was tried jointly with defendant but acquitted on all charges based on insufficient identification evidence.

Co-assailant queried, "who we here for," and defendant responded Flowers. Defendant and co-assailant said, "[w]here's the money at?" They then taped Flowers' wrists and ankles. Defendant searched Flowers, but did not take anything. They took \$60 from Turner, and \$750 from Alfred.

Defendant entered the kitchen, where Turner heard cabinet doors opening and closing and objects rattling. At that time, Flowers jumped up, charged co-assailant, and a struggle ensued. A gunshot sounded. Flowers ran to his bedroom, with co-assailant in close pursuit, and more gunshots sounded. Meanwhile, Alfred ran out the front door with defendant following him, but Alfred escaped the building.

Turner remained hidden until everyone was gone. When she emerged, she found Flowers lying face down on the floor with blood and a gun next to him.

Defendant and co-assailant were arrested and identified as the offenders. As stated, defendant was found guilty of attempted armed robbery, murder, and two counts of armed robbery, then was sentenced, respectively, to consecutive terms of 4 years, 24 years, and 6 years for each armed robbery count.

On appeal, defendant challenged the sufficiency of the evidence to sustain his attempted armed robbery conviction, and alternatively, the consecutive nature of his armed robbery sentences. *People v. Gabb*, No. 1-05-0716 (2007) (unpublished

order under Supreme Court Rule 23). This court rejected his claims on appeal. We noted that although the trial court did not specifically address the underlying reasons for imposing consecutive terms, a judge is presumed to know the law. We found defendant's sentence proper.

Pursuant to its supervisory authority, the supreme court ordered this court to vacate its opinion and remand the case to the circuit court for a new sentencing hearing, "including articulation on the record of the basis for imposing any consecutive sentences, if so ordered upon the conclusion of the new hearing." *People v. Gabb*, No. 104510 (Sept. 26, 2007).

On remand, the trial court issued the exact same sentence. In doing so, the trial court stated that the issue before it was not whether defendant should be sentenced to 4 years' imprisonment for attempted armed robbery followed by 24 years' imprisonment for murder, but whether the two additional armed robbery counts should run consecutively or concurrently to the 28-year sentence. Having reviewed the evidence, the court found "two separate bases" for imposing consecutive sentences. First, the court found that, based on defendant's actions on the evening of the offense, defendant posed "a serious threat and he would be a danger to the community." The court specifically noted that defendant committed the offense against Turner, who was then a mere 15 years old. Second, the court found that there was "a

change in the course of direction of the offense from the initial target of Reginald Flowers, who was going to be the original victim of armed robbery *** to [the] armed robbery of Alfred and Turner who just happened to be there." The court added that Alfred and Turner were simply "in the wrong place at the wrong time." Defendant was sentenced to consecutive terms of 4 years for attempted armed robbery, 24 years for murder, and 6 years for each armed robbery count.

Defendant now challenges that sentence. Defendant is entitled to be sentenced under the law as it existed at the time of his 1999 offense. *People v. Mescall*, 403 Ill. App. 3d 956, 964 (2010). The relevant sentencing statute, section 5-8-4 of the Code, reads:

"(a) ***. The court shall not impose consecutive sentences for offenses which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective, unless, one of the offenses for which defendant was convicted was a Class X or Class 1 felony and the defendant inflicted severe bodily injury, *** in which event the court shall enter sentences to run consecutively. Sentences shall run

concurrently unless otherwise specified by the court.

(b) The court shall not impose a consecutive sentence except as provided for in subsection (a) unless, having regard to the nature and circumstances of the offense and the history and character of the defendant, it is of the opinion that such a term is required to protect the public from further criminal conduct by the defendant, the basis for which the court shall set forth in the record; except that no such finding or opinion is required when multiple sentences of imprisonment are imposed on a defendant for offenses that were not committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective, and one of the offenses for which the defendant was convicted was a Class X or Class 1 felony and the defendant inflicted severe bodily injury ***, in which event the Court shall enter sentences to run consecutively." 730 ILCS 5/5-8-4 (West 1998).

Section 5-8-4(a) generally prohibits consecutive sentences for offenses arising out of a single course of conduct. *People v. Whitney*, 188 Ill. 2d 91, 96 (1999). An exception to this rule occurs when one of defendant's convictions was a Class X or Class 1 felony and he inflicted severe bodily injury. *Whitney*, 188 Ill. 2d at 96. In that case, the imposition of consecutive sentences is mandatory. *Whitney*, 188 Ill. 2d at 96.

The parties do not dispute that this exception applies here. Under section 5-8-4(a), defendant's 4-year sentence for attempted armed robbery, a Class 1 felony resulting in severe bodily harm, and 24-year sentence for murder must be served consecutively. 720 ILCS 5/8-4, 18-2 (West 1998); 730 ILCS 5/5-5-1(b)(1) (West 1998); see *People v. Carney*, 327 Ill. App. 3d 998, 1002 (2002). They agree that defendant is subject to at least 28 years' imprisonment.

Their dispute centers on the two armed robbery convictions, both "non-triggering offenses" under the statute. Defendant first contends the two armed robbery convictions must be served concurrently with his 28-year sentence. He argues that "there was no change in the course of conduct from the offenses against Flowers to the armed robberies of Alford and Turner." In support, he notes that defendant and co-assailant, in one fell swoop, brandished their guns and ordered all three individuals on the ground, then searched their pockets.

Whether offenses were committed during a single course of conduct, and the sentences thus served concurrently, is guided by determining the "overarching criminal objective." *People v. Daniel*, 311 Ill. App. 3d 276, 287 (2000). If the acts constituting the course of conduct were independently motivated, section 5-8-4(a) is inapplicable. *Daniel*, 311 Ill. App. 3d at 287. Determining course of conduct is a question of fact, and as such, we defer to the trial court's conclusion unless it is against the manifest weight of the evidence. *Daniel*, 311 Ill. App. 3d at 287.

Here, the court found the motivation to commit the attempted armed robbery and eventual murder of Flowers was independent of the motivation to commit the armed robberies of Alfred and Turner. The trial court specifically noted that there was "a change in the course of direction of the offense from the initial target of Reginald Flowers, who was going to be the original victim of armed robbery *** to [the] armed robbery of Alford and Turner who just happened to be there." The record supports this finding. It shows that both defendant, who sold drugs for Flowers, and co-assailant armed themselves before entering Flowers' apartment with the intent to rob Flowers. Defendant immediately proceeded to the living room, where Flowers was located, and asked him for drugs. Only after Flowers denied having any did defendant and co-assailant brandish their guns and

order the victims to the floor. Defendant clarified that Flowers was the intended target of the armed robbery even as he searched and took money from Alfred and Turner. Defendant then continued to search the kitchen. Clearly, the overarching criminal objective was to rob Flowers of his drugs, and upon discovering there were none, the criminal objective changed to robbing all three victims of their money. See *People v. Radford*, 359 Ill. App. 3d 411, 421 (2005); *People v. Hummel*, 352 Ill. App. 3d 269, 273 (2004); *People v. Tigner*, 194 Ill. App. 3d 600, 610 (1990). We therefore find the court's determination that Alfred and Turner were simply "in the wrong place at the wrong time" reasonable.

The attempted armed robbery and murder of Flowers was not committed within the same course of conduct as the armed robberies of Alfred and Turner. Concurrent sentences were not required. Under section 5-8-4(b), the court then had the discretion to impose consecutive sentences upon finding them necessary "to protect the public from further criminal conduct by the defendant." See 730 ILCS 5/5-8-4(b) (West 1998). Its decision is entitled to great deference. *People v. Coleman*, 166 Ill. 2d 247, 258 (1995).

Here, prior to resentencing defendant, the court reviewed the trial transcripts, presentence investigation report, and considered the evidence in aggravation and mitigation, as well as

the arguments of counsel. Given defendant's prior drug convictions and the violent nature of the offense, we cannot say the court abused its discretion in imposing the consecutive sentences. See *People v. Kyle*, 194 Ill. App. 3d 827, 829 (1990). Both defendant and co-assailant armed themselves with guns before entering Flowers' apartment. As a result, the use of force was not an unlikely result. Although defendant did not shoot Flowers, he remained accountable for the actions of the co-assailant. See 720 ILCS 5/5-2 (West 2008); *People v. Sangster*, 91 Ill. 2d 260, 264-65 (1982) (section 5-8-4 applies to defendants found guilty under accountability theory); *People v. Coleman*, 166 Ill. 2d 247, 260 (1995). Moreover, defendant pursued Alfred, threatened 15-year-old Turner, and appears to have instigated the entire episode. His sentence was proper. See *Coleman*, 166 Ill. 2d at 261-62 (1995); *People v. Couch*, 387 Ill. App. 3d 437, 445-46 (2008).

In reaching our determination, we note that the trial court stated its principal reason for imposing consecutive sentences was to protect defendant from the public; its secondary reason was the offenses were committed in separate courses of conduct. However, as this order makes clear, a court must *first* determine whether the non-triggering offenses were committed in separate courses of conduct. *People v. Sergeant*, 326 Ill. App. 3d 974, 985 (2001). If the offenses were committed in separate courses

of conduct, only then does the court possess discretion to impose consecutive sentences under section 5-8-4(b). *Sergeant*, 326 Ill. App. 3d at 985, 987 (noting that "section 5-8-4(b) only applies to offenses that were committed in separate courses of conduct"). Although the trial court's findings were issued out of order, the sentence comports with the statute, and the discretionary determinations fit within the framework of section 5-8-4. See *People v. Harris*, 203 Ill. 2d 111, 116 (2003) (we defer to the trial court's findings of fact, yet review the interpretation of a statute *de novo*); *cf. People v. Arna*, 168 Ill. 2d 107, 113 (1995). We defer the court's determination finding defendant subject to consecutive sentences.

Given the analysis set forth above, we also reject defendant's alternative argument that his six-year sentences for the two armed robberies must run concurrent to each other because they occurred in the same course of conduct. We repeat that, under section 5-8-4(a), a court "shall not impose consecutive sentences for offenses which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective ***." 730 ILCS 5/5-8-4(a) (West 1998). In *Daniels*, this court acknowledged that although this provision was "not a model of legislative drafting," the legislative intent could be gleaned by carefully reading the language in its plain and ordinary meaning. *Daniels*, 311 Ill.

App. 3d at 286. *Daniels* observed that, given the absence of punctuation in the relevant phrase, the language "during which there was no substantial change in the nature of the criminal objective" was meant to *limit instead of define* the language "single course of conduct." *Daniels*, 311 Ill. App. 3d at 286. As stated, the logical result of this observation is: if the acts constituting the course of conduct were independently motivated, section 5-8-4(a) is inapplicable. *Daniels*, 311 Ill. App. 3d at 287.

Here, the multiple offenses - attempted armed robbery, murder, and two counts of armed robbery - were committed in the same location and within minutes of each other and thus, at least *physically*, within "a single course of conduct." However, as necessary, we examined whether the offenses were independently motivated. We agreed with the trial court that the attempted armed robbery and murder of Flowers was independently motivated from the armed robbery of Alfred and Turner. We then found, in accordance with *Daniels*, that section 5-8-4(a) was inapplicable, as there was a change in the overall criminal objective. We concluded that the court then had the discretion to impose consecutive sentences on *any* of the multiple offenses committed.

Defendant's interpretation of the statute would require us to find a change in criminal objective with respect to each offense committed within a single physical course of conduct. We

do not believe this interpretation is consistent with the statute. The statute simply does not lend itself to parsing offenses in the manner that defendant suggests. If under section 5-8-4(a), a court shall not impose consecutive sentences for offenses committed in a single course of conduct during which there was no substantial change in the nature of the criminal objective, then, logically, a court *may* impose consecutive sentences for offenses committed in a single course of conduct during which there was a substantial change in the criminal objective. Based on the foregoing, defendant's claim that the armed robbery counts must be served concurrently fails.

Finally, defendant contends that the mittimus should be amended to reflect that he is entitled to 50% credit against his armed robbery sentences. See 730 ILCS 5/3-6-3(a)(2)(iii), (a)(2.1) (West 1998). Defendant notes that the lesser 15% credit is afforded to a prisoner convicted of armed robbery accompanied by bodily harm, and that a trial court is required to make an on-the-record finding as to bodily harm. 730 ILCS 5/5-4-1(c-1) (West 1998). Defendant asserts that the trial court did not make such a finding and this renders his sentence void, making him entitled to the 50% credit under section 3-6-3(a)(2.1) (730 ILCS 5/3-6-3(a)(2.1) (West 1998). We disagree.

A judgment is void where the court lacks jurisdiction. *In re M.W.*, 232 Ill. 2d 408, 414 (2009). However, not every error

made by the trial court or every failure to strictly comply with the provisions of the statute creating the justiciable matter is an act in excess of statutory authority that creates a void judgment. See *M.W.*, 232 Ill. 2d at 422.

Here, the trial court did not make an on-the-record finding as to injury. That error did not oust the court of jurisdiction, especially where the court made no finding as to the applicable statute regarding good conduct credit. In such a case, the court could not have exceeded its authority.

While the sentence is not void, we agree with defendant that the record shows he is subject to section 3-6-3(a)(2.1) and thus day-for-day good conduct credit against his armed robbery sentences because there was no finding of bodily injury to Alfred or Turner. However, defendant cites no authority to support his assertion that we may correct the mittimus to reflect that he is actually "entitled" to 50% credit against his sentences. The Department of Corrections maintains authority over good conduct credit and early release (see 730 ILCS 5/3-6-3(a)(1) (West 1998)), and an inmate's right to receive credit is contingent on good behavior while in prison. *People v. Davis*, 405 Ill. App. 3d 585, 603 (2010). Here, the amount of credit that defendant will receive remains yet to be seen.

Based on the foregoing, we affirm the decision of the circuit court of Cook County.

1-09-1139

Affirmed.