

No. 1-09-0799

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).

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. 03 CR 23418
)	
ALVIN SMITH,)	Honorable
)	Joseph M. Claps,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Lampkin concur with the judgment.

ORDER

HELD: Trial court erred in vacating as void the 24-month adult probation received by minor defendant upon a negotiated plea to aggravated robbery with a firearm, holding a new hearing on how defendant should be sentenced, and imposing a new adult sentence. Aggravated robbery with a firearm charge arose out of the same actions as those upon which the other charged offenses of aggravated vehicular hijacking with a firearm and armed robbery with a firearm were based, and, therefore, adult sentencing of defendant was proper.

¶ 1 Defendant, Alvin Smith, filed a section 2-1401 petition (735 ILCS 5/2-1401) (West 2008)) seeking to vacate his aggravated robbery with a firearm conviction and sentence as void based upon the State’s failure to timely move to try him as an adult when he pleaded guilty to what he contends was a non-triggering offense. This appeal is from the denial, in part, of his petition and his resentencing as an adult after the trial court allowed the State extended time to move to try defendant as an adult.

¶ 2 In 2003, defendant was charged, *inter alia*, with aggravated vehicular-hijacking with a

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firearm (720 ILCS 5/18-4-(a)(4) (West 2002)), armed robbery while armed with a firearm (720 ILCS 5/18-2(a)(2) (West 2002)), and aggravated robbery while armed with a firearm (720 ILCS 5/18-5(a)) (West 2002)). The charges all arose out of an incident in October 2003, when a van and money were taken at gunpoint from Jesus Sanchez. Defendant was 15 years old at the time of these offenses. On June 30, 2004, defendant entered into a negotiated guilty plea to the aggravated robbery charge. He received a sentence of 24 months' adult probation with 20 days in the Sheriff's Work Alternative Program and an order of restitution. The other charges against him were dismissed as part of the plea bargain. Defendant orally waived juvenile jurisdiction at the time of his plea.

¶ 3 In 2006, defendant was charged with unlawful use of a weapon by a felon and violation of his 24-month adult probation. Defendant pleaded guilty to both charges and was sentenced to concurrent prison terms of five years, with a recommendation for boot camp.

¶ 4 On August 20, 2008, defendant filed a section 2-1401 petition (735 ILCS 5/2-1401 (West 2008)), and, for the first time, challenged his 2004 conviction and sentence. He contended the aggravated robbery charge was a non-triggering offense under the automatic transfer provision of section 5-130(1)(a) of the Juvenile Probation Act (the Act). 705 ILCS 405/5-30(1)(a) (West 2002), and because the State had failed to file a written motion for an adult transfer hearing within 10 days of his conviction on that charge under section 5-130(1)(c)(ii) of the Act (705 ILCS 405/5-130(1)(c)(ii) (West 2002)), the trial court had no authority to sentence him as an adult and, therefore, his sentence of 24 months' adult probation was void. Defendant requested that his adult conviction be vacated and replaced with an adjudication of delinquency, and that he be resentenced as a delinquent minor.

¶ 5 The State, in a written objection, argued that, because defendant's 2004 conviction and sentence were not void, his untimely section 2-1401 petition should be denied. The trial court found the sentence was void, granted the section 2-1401 petition in part, and vacated the sentence only. The court denied defendant's requests to vacate the conviction and replace the conviction with an

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adjudication of delinquency and sentence defendant as a delinquent minor. The trial court then allowed the State to file a motion to have defendant sentenced as an adult within 10 days under section 5–130(1)(c)(ii). Following a hearing on the State's subsequently filed motion, the trial court ordered defendant to be sentenced as an adult and, again, sentenced him to 24-months' adult probation. The trial court terminated the probation *instanter* due to the time defendant had served as a result of pleading guilty to the subsequent unlawful use of a weapon by a felon charge and the violation of the probation.

¶ 6 This appeal follows from the trial court's ruling on defendant's section 2–1401 petition. A section 2–1401 petition must be filed no later than two years after the judgment, unless the petitioner is under legal disability or duress, or the ground for relief is fraudulently concealed. 735 ILCS 5/2–1401(c) (West 2008). If these requirements are not met, the petition "cannot be considered." *People v. Pinkonsly*, 207 Ill 2d 555, 562 (2003). However, a request for relief from a void judgment is not affected by the limitations period. *People v. Harvey*, 196 Ill. 2d 444, 447 (2001); 735 ILCS 5/2–1401(f) (West 2008.) Defendant, here, filed his petition four years after his conviction and sentence, and sought to circumvent the procedural bar by arguing in the trial court that his 2004 conviction and sentence were void.

¶ 7 On appeal, defendant argues the trial court erroneously denied his section 2–1401 petition in part and improperly allowed the State to file a motion to have him sentenced as an adult under section 5–130(1)(c)(ii) of the Act, and, therefore, his resentencing as an adult was void. 705 ILCS 405/5–30(1)(c)(ii) (West 2002). However, under our supreme court's recent decision in *People v. King*, 241 Ill. 2d 374 (2011), section 5–130(1)(c)(ii) is inapplicable under these facts and circumstances.

¶ 8 To understand the issues on appeal, we will review the relevant provisions of the Act. Section 5–130(1)(a) of the Act lists certain offenses which, when charged against a minor at least 15 years old, shall be prosecuted under the criminal laws of Illinois. 705 ILCS 405/5–30(1)(a) (West

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2002). The listed offenses include aggravated vehicular hijacking with a firearm and armed robbery while armed with a firearm, but not aggravated robbery while armed with a firearm. After listing the offenses which trigger adult prosecution, section 5–130(1)(a) states:

"These charges *and all other charges arising out of the same incident* shall be prosecuted under the criminal laws of this State." Emphasis added. 705 ILCS 405/5–130(1)(a) (West 2002).

¶ 9 Section 5–130(1)(b)(i) provides, if the defendant is not charged with an offense specified in paragraph (a), then he can only be tried in juvenile court, unless he waives that right in writing. 705 ILCS 405/5–130(b)(i) (West 2002).

¶ 10 Section 5–130(b)(ii) provides, if the defendant is charged with one or more offenses "specified in" paragraph (a) and additional offenses "not specified" in paragraph (a), "all of the charges arising out of the same incident" shall be prosecuted under the adult criminal code. 705 ILCS 405/5–130(b)(ii) (West 2002).

¶ 11 Section 5–130(c)(i) provides, if the defendant is convicted of any offense "covered" by paragraph (a), then he shall be sentenced as an adult. 705 ILCS 405/5–130(c)(i) (West 2002).

¶ 12 However, section 5–130(c)(ii) provides, if the defendant is convicted of an offense "not covered" by section 5–130(1)(a), he shall be sentenced as a juvenile unless, within 10 days after the finding or verdict, the State makes a written motion for a hearing to determine whether he should be sentenced as an adult. The court shall then hold a hearing and make the determination of whether the defendant shall be sentenced as a juvenile or as an adult. 705 ILCS 405/5–130(c)(ii) (West 2002).

¶ 13 Here, defendant was charged, *inter alia*, with armed robbery while armed with a firearm, an offense listed in paragraph (a), and charged with a lesser offense of that charge - aggravated robbery with a firearm, which is not listed in paragraph (a). As part of a plea agreement, defendant pleaded guilty to the lesser-included offense of aggravated robbery with a firearm. All other charges,

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including armed robbery while armed with a firearm, were dismissed. Defendant argues here, as he did below in his section 2–1401 petition, that the State was required by section 5–130(1)(c)(ii) to move for sentencing of defendant as an adult within the statutorily prescribed time period because he was convicted of an offense "not covered" under paragraph (a), which he equates as not listed therein. For this reason, defendant asserts his adult sentence in 2004 and his resentencing in 2009 were void. He further asserts he must be resentedenced as a juvenile.

¶ 14 In *King*, our supreme court determined that the reference in section 5–130(c)(i) to any offense "covered by" paragraph (a) included the explicit offense listed therein, as well as "all of the charges arising out of the same incident." *King*, 241 Ill. 2d at 383. The offenses referred to in section 5–130(1)(c)(ii) as "not covered" by section 5–130(1)(a) included only offenses which were lesser offenses of those listed in paragraph (a) where the greater offense was also not charged as part of the same incident. 705 ILCS 405/5–130(1)(a) (West 2002). In the latter case only, the State would have to timely move for a hearing on whether to sentence defendant as an adult. *King*, 241 Ill. 2d at 385.

¶ 15 Thus, under *King*, offenses "covered by" paragraph (a) include those offenses "arising out of" the offenses listed therein. For that reason, the provisions of section 5–130(1)(c)(i) apply to this "covered" offense, aggravated robbery with a firearm, and defendant was properly sentenced in 2004 as an adult pursuant to his guilty plea without the need for a motion by the State requesting a hearing to determine how he should be sentenced.

¶ 16 Because defendant's section 2–1401 was untimely, and the 2004 conviction and sentence were not void, the petition "could not be considered." The trial court erred in granting, in part, the section 2–1401 petition, in vacating defendant's original sentence as void, and in allowing the State to file a late motion for a hearing on how defendant should be sentenced. We do not reach the issue of whether a trial court may allow the State additional time to file a motion for hearing under section 5–130 (1)(c)(ii). We vacate that portion of the trial court's order finding defendant's sentence of adult probation in 2004 to have been void, and the resultant sentence of adult probation entered in

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2009. We affirm that part of the trial court's order, which denied defendant's section 2–1401 request to vacate his 2004 conviction.

¶ 17 Vacated in part;

¶ 18 affirmed in part.