

THIRD DIVISION
January 19, 2011

No. 1-08-3651

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. 93 CR 17185
)	
IGDALIAH GRAHAM,)	Honorable
)	Matthew E. Coghlan,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Neville and Steele concurred in the judgment.

O R D E R

HELD: Where the absence of a stated finding to support defendant's 75-year extended term sentence for first degree murder did not render sentence void, sentence was not subject to challenge via post-conviction petition, and record supported extended term sentence based on brutal and heinous nature of crime; the dismissal of defendant's petition was affirmed.

Defendant Igdaliah Graham appeals from an order of the circuit court granting the State's motion to dismiss his post-

conviction petition. Defendant contends his extended term sentence of 75 years is void because no factors supporting that sentence, as set out in section 5-5-3.2(b) of the Unified Code of Corrections (the Code) (730 ILCS 5/5-5-3.2(b) (West 1994)), were argued or relied upon by the trial judge. We affirm.

Following a 1996 jury trial, defendant was convicted of first degree murder on an accountability theory and was also convicted of two counts of armed robbery. The State presented evidence that on June 11, 1993, defendant and John Capers attacked the victims, George Pittman and Jacqueline Porter, as they sat in Pittman's car. Capers displayed a gun to Pittman and told him to get out of the car. Defendant pulled Porter, who was four months pregnant, out of the car and pushed her against the back passenger window. Defendant demanded Porter's wallet and told her to lie on the ground. Capers shot Pittman in the neck, killing him. Defendant testified he and Capers discussed stealing the car but he did not know Capers had a weapon. For impeachment purposes, the State introduced copies of defendant's 1995 convictions for burglary and possession of a controlled substance.

At sentencing, the State argued that defendant was eligible for a sentence of natural life in prison for committing felony murder, or murder during the course of the armed robbery, and that defendant was eligible separately for 60 years for murder

and 30 years for the robbery. The State asked the court to sentence defendant to "an extended term of something over the maximum of 60 years." The trial court stated it would "impose an extended term sentence of 75 years" on the murder count and two 30-year sentences for armed robbery to be served concurrently to the murder sentence.

On direct appeal, defendant raised several arguments challenging his 75-year sentence, including that the sentence was excessive given his role in the crime and that the trial court did not consider his rehabilitative potential or certain mitigating factors. This court affirmed. *People v. Graham*, No. 1-97-0417 (1998) (unpublished order under Supreme Court Rule 23).

In June 1999, defendant filed a petition for post-conviction relief. After his petition was summarily dismissed in February 2000, defendant appealed, and this court granted his motion for reversal of the petition's dismissal and remanded defendant's petition for second-stage post-conviction proceedings. *People v. Graham*, No. 1-00-1657 (2001) (dispositional order). On remand, counsel was appointed for defendant.

In 2007, post-conviction counsel filed a supplemental petition arguing, *inter alia*, that the trial court lacked a basis to impose an extended term sentence. The State moved to dismiss the petition. In December 2008, the circuit court granted the State's motion to dismiss defendant's post-conviction claims,

stating in a written order that because defendant challenged his extended term sentence on direct appeal, his claim was barred by *res judicata*.

On appeal, defendant argues the extended term portion of his 75-year sentence is void because (1) the trial court did not articulate any specific statutory factor to support the extended term; and (2) none of the statutory factors apply. He contends his sentence should be reduced to the non-extended term of 60 years or, alternatively, this court should remand his post-conviction petition for an evidentiary hearing.

The dismissal of a post-conviction petition without an evidentiary hearing is reviewed *de novo*. *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010). A post-conviction proceeding is a collateral matter, rather than an appeal of the underlying judgment, and allows the review of constitutional issues that were not, and could not have been, adjudicated on direct appeal. *People v. Ortiz*, 235 Ill. 2d 319, 328 (2009). Issues that could have been raised on direct appeal, but were not, are considered waived. *Ortiz*, 235 Ill. 2d at 328. The current sentencing issue is based on the trial record. Therefore, this argument could have been raised on direct appeal, along with defendant's other arguments challenging his sentence.

Waiver, however, does not preclude consideration of a void order (*People v. Arna*, 168 Ill. 2d 107, 113 (1995)) because a

void order can be attacked at any time. *People v. Hillier*, 237 Ill. 2d 539, 546 (2010), citing *People v. Thompson*, 209 Ill. 2d 19, 25 (2004). Any portion of a criminal sentence not authorized by statute is void. *Thompson*, 209 Ill. 2d at 23.

In the present case, defendant's sentence was authorized by statute. The general sentencing range for first degree murder was 20 to 60 years in prison (730 ILCS 5/5-8-1(a)(1)(a) (West 1994)), which was extendable to 100 years when one of the seven factors enumerated in section 5-5-3.2(b) of the Code (730 ILCS 5/5-5-3.2(b) (West 1993)) was present.

The record reveals that the trial court did not state a particular eligibility factor for the imposition of the extended term. Contrary to defendant's position, however, the absence of a stated finding does not render his sentence void. *People v. Sterling*, 357 Ill. App. 3d 235, 254-55 (2005); see also *People v. Sims*, 378 Ill. App. 3d 643, 648 (2007) (lack of on-the-record finding of certain criteria did not render sentence void in guilty plea). In *Sterling*, this court held that the lack of a specific finding by the trial court did not render an extended term sentence void where "we can ascertain from the comments of the court that it did find an extended term sentence appropriate for defendant." *Sterling*, 357 Ill. App. 3d at 255; see also *People v. Lucien*, 109 Ill. App. 3d 412, 420 (1982). The record here clearly establishes such intent where, at sentencing, the

trial court specifically stated that "on the charge of first degree murder, the court will impose an extended term sentence" of 75 years in prison.

Defendant next contends, and the State apparently agrees, that the only statutory factor relevant to the imposition of an extended term sentence here authorizes such term where defendant's commission of a felony is "accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty." 730 ILCS 5/5-5-3.2(b)(7) (West 1994).

At the time of defendant's conviction and sentence, the trial court had the discretion to determine whether a crime was brutal or heinous and indicative of wanton cruelty. "It is within the trial court's discretion to determine what constitutes exceptionally brutal [or] heinous behavior indicative of wanton cruelty for the purpose of imposing an extended term sentence, and absent an abuse of that discretion, the sentence of the trial court may not be altered on review." *People v. Pugh*, 325 Ill. App. 3d 336, 345 (2001) (holding in a direct appeal that extended term was within court's discretion); *cf. People v. Wilson*, 303 Ill. App. 3d 1035, 1047-48 (1999); *People v. Mangum*, 260 Ill. App. 3d 631, 636-37 (1994) (holding in direct appeals that trial court abused discretion in finding such conduct).

Defendant's reliance on *Wilson* and *Mangum* is misplaced because those decisions arose on direct appeal and considered the

nature of the crime under an abuse of discretion standard, not on voidness grounds.

Here, the record is replete with references to the applicability of an extended term, as argued by the State, as conceded by defense counsel at trial and as expressly stated by the court at sentencing, where the court stated that "on the charge of first degree murder, the court will impose an extended term sentence" of 75 years in prison. Defendant did not seek clarification of the specific reason or reasons for the extended term at his sentencing hearing. Although defendant apparently filed a motion to reduce his sentence, that motion is not included in the record on appeal, and the report of proceedings is not illuminative on this point because defense counsel waived argument and stood on the contents of the motion.

Furthermore, in challenging his sentence on direct appeal, we specifically held:

"After considering all the relevant factors, the [trial] court determined that defendant's actions justified imposing an extended term sentence [citing to section 5-5-3.2(b)]. Defendant was sentenced to 75 years' imprisonment, which was well within the statutory range of possible sentences

[citing section 5-8-2, under which an extended term sentence of between 60 and 100 years can be imposed]. It is not our function to serve as a sentencing court, and we will not substitute our judgment for that of the trial court merely because a different sentence could have been imposed. [Citation.] The trial court acted within the scope of its discretion when it sentenced defendant to 75 years' imprisonment." *Graham*, No. 1-97-0417, at 10.

Defendant pulled Porter from a car, demanded money, and ordered her to lie face down. Defendant was legally accountable for the deeds of his co-offender, Capers, who shot Pittman in the neck, killing him, and defendant's failure to fire the fatal shot is of no import because a defendant convicted on an accountability theory can receive an extended term sentence under section 5-5-3.2(b)(2) for the brutal or heinous behavior of his co-offender. See *People v. Rodriguez*, 229 Ill. 2d 285, 292-93 (2008). Capers shot Pittman in the neck at close range, leaving him to die in the street while his pregnant companion watched.

In light of this record and the relevant law, defendant's sentence was statutorily authorized and does not fall within the

1-08-3651

definition of a void judgment. Accordingly, the grant of the State's motion to dismiss his post-conviction petition is affirmed.

Affirmed.