FIRST DIVISION
July 25, 2011

2011 IL App (1st) 093501-U
No. 1-09-3501

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. 05 CR 24546
	)	
KENYON SLATER,	)	Honorable
	)	John J. Fleming,
Defendant-Appellant.	)	Judge Presiding.

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

O R D E R

HELD: Trial court's failure to comply with section 5-3-1 of the Unified Code of Corrections (730 ILCS 5/5-3-1 (West 2006)) was a voidable error, not subject to collateral attack; dismissal of petition for relief from judgment affirmed.

¶ 1 Defendant, Kenyon Slater, appeals from the circuit court's dismissal of his *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure. 735 ILCS 5/2-1401 (West 2008). Defendant contends, for the first time, that his sentence is void and should be vacated because the trial court failed to comply with the requirements of section 5-3-1 of the Unified Code of Corrections (Code) (730 ILCS 5/5-3-1 (West 2006)) at the time it was imposed.

¶ 2 On November 28, 2007, defendant entered a plea of guilty to aggravated battery with a firearm, and was sentenced to 11-years' imprisonment. At the commencement of that proceeding, the court clarified, with the State, that they would proceed on count II, and *nolle prosequi* the remaining counts.

¶ 3 The court then advised defendant, in relevant part:

> "[an] agreement has been reached in your case. Plead guilty today, State will dismiss the attempt murder charge and an armed robbery. There are certain UUW charges, aggravated battery charges. Plead guilty to aggravated battery with a firearm charge, and that is a Class X, that is six to thirty years in the penitentiary. You're eligible for extended term, it goes to sixty years.
>
> Any penitentiary term is followed by three years mandatory supervised release, it is not probationable.
>
> You can be fined up to $25,000.
>
> This charge is 85 percent which means you do 85 percent of your time."

Defendant indicated he understood the court's admonishment and that he would waive certain rights by pleading guilty. He also executed a written waiver of his right to a jury trial and to a presentence report of investigation (PSI) pursuant to section 5-3-1 of the Code. 730 ILCS 5/5-3-1 (West 2006). The State presented a factual basis for the plea, and defendant stipulated to it. The court found these facts sufficient to support the plea, and entered judgment on the finding of guilt.

¶ 4 The court then inquired if there was anything else in aggravation and mitigation, and both parties indicated they would rest on the conference. The State, however, noted "for the record" that

it "had originally asked for a term of approximately 18 years," and defense counsel requested some educational opportunities for defendant. Defendant declined the invitation to speak in allocution, and the court proceeded to sentencing.

¶ 5 The court stated it had heard the aggravation and mitigation, that defendant had an opportunity to speak, and defendant's attorney spoke on his behalf. The court then informed defendant:

> "[He] has a criminal history, the State was pretty vehement in asking for a higher sentence, your lawyer was pretty articulate in arguing on your behalf. So, I felt the lowest possible sentence was the 11 years. I do feel that is very -- well, is on the low end and you should be thanking [your attorney] for his representation of you. So, it will be eleven years in the Illinois Department of Corrections."

¶ 6 Following the imposition of sentence, the court admonished defendant, *inter alia*, that he had a right to appeal, however, prior to taking that appeal, defendant must file a written motion with the circuit court within 30 days to vacate his guilty plea. Defendant failed to do so, however, in February 2008, he filed a *pro se* written motion for reduction of his sentence, which was stricken as it was untimely filed.

¶ 7 On September 22, 2009, defendant filed a *pro se* section 2-1401 petition alleging he was not admonished that a three-year term of mandatory supervised release (MSR) would be added to his sentence. Defendant attached to his petition his affidavit in which he averred that he entered a plea agreement with the State, and as a result of a plea discussion and agreement, he pled guilty and received an 11-year sentence.

¶ 8 The circuit court dismissed defendant's section 2-1401 petition as frivolous. In doing so, the court noted the petition materially misrepresented the facts, and the record clearly demonstrated defendant was advised of the MSR term.

¶ 9 On appeal, defendant has abandoned the claim raised in his petition, and asserts for the first time, that his sentence should be vacated and his cause remanded for resentencing because the trial court failed to comply with section 5-3-1 of the Code. Defendant maintains he entered an open-guilty plea which required the trial court to order a PSI pursuant to section 5-3-1, and that, even if he entered a negotiated plea, the trial court was required to state his criminal history for the record. Since the court did neither, defendant maintains it failed to comply with section 5-3-1 which rendered his sentence void, and, thus, subject to review at any time.

¶ 10 The State responds that defendant's appeal should be dismissed because he failed to comply with Supreme Court Rule 604(d) by failing to timely file a written motion in the circuit court asking it to vacate his plea, and he also waived this sentencing issue by failing to raise it below. Ill. S. Ct. R. 604(d) (eff. July 1, 2006). In the alternative, the State maintains that, since defendant entered a negotiated plea, the trial court was not required to order a PSI, and its failure to state his criminal history on the record rendered his sentence voidable, not void.

¶ 11 Although a void order may be reviewed at any time, it must be raised in the context of a proceeding properly before the court. *People v. Flowers*, 208 Ill. 2d 291, 308 (2004). In order to perfect an appeal from either an open or negotiated-guilty plea, defendant must file a written post-plea motion with the trial court within 30 days of sentencing. Ill. S. Ct. R. 604(d) (eff. July 1, 2006). Failure to comply with this rule prevents defendant from perfecting a direct appeal, but the rule does

not purport to do more than that. *People v. Mathis*, 357 Ill. App. 3d 45, 49 (2005). Thus, where, as here, defendant filed a collateral attack on the judgment pursuant to section 2-1401, Rule 604(d) is inapplicable. *Id*. at 49. As a result, we reject the State's argument that the circuit court lacked subject matter jurisdiction based on the Rule 604(d) violation, and find it attached when defendant timely filed his section 2-1401 petition. *Id.* at 49.

¶ 12 That said, we observe defendant did not allege in his section 2-1401 petition that his sentence was void based on the court's failure to comply with section 5-3-1. Nonetheless, if the sentencing order was void, it may be attacked at any time. *Id*. at 53.

¶ 13 Section 5-3-1 of the Code provides in relevant part:

> "[O]ther than for felony sex offenders being considered for probation, the court need not order a presentence report of investigation where both parties agree to the imposition of a specific sentence, provided there is a finding made for the record as to defendant's history of *** criminality, including any previous sentence to a term of probation, periodic imprisonment, conditional discharge or imprisonment." 730 ILCS 5/5-3-1 (West 2006).

¶ 14 Here, defendant waived a PSI report, and the record reflects that a conference had been held where aggravating and mitigating factors were discussed. During the sentencing phase of the plea proceeding, the parties rested on the conference, save for defense counsel's request for some educational opportunities for defendant, and the State noting for the record that it had argued for a lengthier term. At that point, the court announced it had heard the aggravating and mitigating factors and noted defendant had a criminal history without reciting any specifics. The court then entered the 11-year term without any objections raised by the State or by defendant.

¶ 15 Defendant claims that, because the parties did not agree to the imposition of a specific sentence, the court was required to order a PSI, and even if there was a negotiated plea, the court still erred by failing to state his criminal history on the record. Defendant maintains that the court's errors rendered his sentence void, relying on *People v. Johnson*, 97 Ill. App. 3d 976 (1981). The State contends the plea was negotiated, and, as such, the court's failure to comply with section 5-3-1 of the Code, by stating defendant's criminal history on the record, was merely a voidable error, citing *People v. Sims*, 378 Ill. App. 3d 643 (2007).

¶ 16 In *Sims*, this court disagreed with defendant's contention that the trial court's failure to comply with section 5-3-1 of the Code rendered the sentence entered on his negotiated plea void, and, thus, found the dismissal of his tardy section 2-1401 was proper. *Id*. at 648. In doing so, this court relied on *People v. Davis*, 156 Ill. 2d 149 (1993) as instructive in distinguishing between a void and voidable judgment. The *Davis*, court explained that a judgment is void where the trial court exceeds its authority and acts without jurisdiction, whereas a voidable judgment is one entered erroneously by a court with jurisdiction and is not subject to collateral attack. *Id*. at 647, citing *Davis*, 156 Ill. 2d at 156. In *Sims*, we noted *Davis* also found that a trial court's jurisdiction is conferred by the Illinois Constitution, not by the personal rights of defendant, and once a court has acquired jurisdiction, no subsequent error or irregularity will oust it of its jurisdiction. *Id*. at 647, citing *Davis* 156 Ill. 2d at 156.

¶ 17 This court, in *Sims*, recognized that the "*Illinois Constitution, and not section 5-3-1 of the Code, gives the trial court jurisdiction* to accept a guilty plea and impose a sentence," and that a court exceeds its jurisdiction when it imposes a sentence lesser or greater than authorized by statute.

(Emphasis added.) *Sims*, 378 Ill. App. 3d at 648. In light of these principles, this court concluded the trial court did not exceed its authority when it imposed the agreed-upon term, and we were not persuaded that the court's failure to follow section 5-3-1 deprived the court of jurisdiction over defendant or render his sentence void. *Id*. at 648.

¶ 18 In reaching this conclusion, this court considered *Johnson.* In that open plea case, the defendant waived a PSI, and subsequently filed a post-conviction petition seeking reduction of his sentence, which the trial court allowed and reduced his sentence. *Johnson*, 97 Ill. App. 3d at 977. On appeal, *Johnson* held that the sentence imposed was void because a PSI was not a personal right of a defendant, but, rather, was for the enlightenment of the court; as such, the trial court was without jurisdiction to reduce defendant's sentence in the absence of a PSI. *Id*. at 978-79.

¶ 19 This court found defendant's reliance on *Johnson* misplaced because the defendant in *Johnson* entered an open plea, as opposed to a negotiated plea, and disagreed with *Johnson*'s holding that a sentence imposed in the absence of a PSI is void. *Sims*, 378 Ill. App. 3d at 650. We concluded that the failure to set forth defendant's criminal history on the record rendered the agreed sentence voidable, but not void. *Id*. at 650. Consistent with that ruling, we find, under the circumstances and procedural posture of this case, that the trial court's failure to comply with section 5-3-1 of the Code rendered defendant's sentence voidable, and not void.

¶ 20 In reaching this conclusion, we necessarily find from the record that defendant entered a negotiated plea. A negotiated plea is defined in Supreme Court Rule 605(c) as "one in which the [State] has bound itself to recommend a specific sentence or *** range of sentence, or where the [State] has made concessions relating to the sentence to be imposed ***. Ill. S. Ct. R. 605(c) (6) (eff.

July 1, 2006).

¶ 21 The record, here, shows a plea conference was held off the record, and when the case was recalled, the court noted an "agreement has been reached." That agreement called for defendant to plead guilty to aggravated battery with a firearm which has a sentencing range of 6 to 30 years, for which the State would *nolle prosequi* the remaining charges, including an attempted murder charge, which has a sentencing range up to 60 years based on defendant's history. Through this agreement, the State was foreclosed from arguing for a sentence from the full range of penalties, indicative of a negotiated plea, rather than an open plea. *People v. Dunn*, 342 Ill. App. 3d 872, 880 (2003). Furthermore, the trial court noted in open court that an agreement had been reached (*Id*., at 880), and although the State noted for the record that it had argued for a more severe sentence, the record shows it was in agreement with the plea and did not object to the term imposed.

¶ 22 Moreover, we observe that in following the plea, the court admonished defendant under Rule 605(c) which governs negotiated guilty pleas. In addition, defendant averred in the affidavit attached in support of his section 2-1401 petition that he entered a plea agreement with the State, and as a result of a plea discussion and agreement, he received an 11-year sentence. Under these circumstances, we conclude defendant entered a negotiated plea, and as a result, the trial court's failure to state defendant's criminal history on the record rendered his sentence voidable, not void. *Sims*, 378 Ill. App. 3d at 650.

¶ 23 Relying on the dissent in *Sims,* defendant claims *Sims* disregards case law finding the requirements of section 5-3-1 are not personal rights, but are "for the enlightenment of the court." See, e.g., *People v. Watson*, 357 Ill. App. 3d 819 (2005); *People v. Evans*, 273 Ill. App. 3d 252

(1994). The issue as to the characterization of the requirements of section 5-3-1 was not squarely addressed by our majority opinion in *Sims*. However, we expressly distinguished those cases as being brought in timely direct appeals and the holdings were left untouched by our decision in *Sims*. We continue to find the conclusion in *Sims* sound, and conclude in this case that the trial court's sentencing error was voidable, and, thus, not subject to collateral attack. *Davis*, 156 Ill. 2d at 157-58.

¶ 24 In light of the foregoing, we affirm the order of the circuit court of Cook County dismissing defendant's section 2-1401 petition for relief from judgment.

¶ 25 Affirmed.