

No. 1-09-1455

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).

FIFTH DIVISION
March 11, 2011

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. 06 CR 28496
)	
SIDNEY McDOWELL,)	Honorable
)	Victoria A. Stewart,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE JAMES FITZGERALD SMITH delivered the judgment of the court.

Justices Howse and Epstein concurred in the judgment.

O R D E R

Held: The petition for revocation of probation, although filed by a probation officer, was valid. In addition, defendant's sentence of probation was not void, but rather avoidable, where the trial court failed to obtain a presentence investigation report (PSI) or make a record finding as to defendant's criminal history. However, because the trial court also failed to obtain a PSI when sentencing defendant on his revocation of probation, this court found defendant was entitled to a new sentencing hearing. This court affirmed the trial court's judgment in all other respects.

Defendant Sidney McDowell pleaded guilty to possession of a stolen motor vehicle and was sentenced to two years' probation. Subsequently, he was found guilty of violating probation and sentenced to seven years' imprisonment on his underlying conviction. Defendant raises five claims on appeal from that order, contending that (1) the petition for revocation of probation was void *ab initio* because it was filed by the probation officer, not the State's Attorney; (2) his two-year probation sentence is void because the trial court failed to obtain a presentence investigation report; (3) the court erred by sentencing him for violating probation absent a statutorily required sentencing hearing and presentence investigation report; (4) he was deprived of his right to be present at the hearing on his motion to reconsider his sentence; and (5) he is entitled to additional days of presentencing custody credit. We affirm in part, and vacate in part.

On January 12, 2007, defendant entered into a negotiated guilty plea for possession of a stolen motor vehicle. Although defendant executed a written waiver of the presentence investigation report, and acknowledged the waiver in open court, the trial court did not make a record finding as to defendant's criminal history, as required by statute (730 ILCS 5/5-3-1 (West 2008)). Defendant was sentenced to the agreed term of two years' probation, with the conditions that he pay restitution within 12

months, report to the probation department, refrain from committing other crimes, and complete high school or a GED program.

Defendant's probation officer filed a violation of probation for failing to meet these conditions. The court, thereafter, presented defendant with numerous opportunities to meet the conditions of his probation. At one point, the court informed defendant that he would be subject to a seven-year sentence of imprisonment if he did not pay the restitution.

On December 9, 2008, defendant's probation officer, Michael F. Opat, filed a supplemental petition for violation of probation, entitled "PETITION TO REVOKE PROBATION," requesting defendant's appearance for a hearing to answer the petition and determine whether probation should be revoked. Opat alleged that defendant, while still on probation, had committed battery and aggravated assault and was sentenced to one year of court supervision with community service. Opat also alleged that defendant failed to report to the probation department in September, October, and November 2008. Opat then signed the petition on the line designated for the "Assistant State's Attorney." At Opat's request, the judge issued a warrant for defendant's arrest.

A hearing on the petition was held. The State called Opat, who testified that defendant had violated all the conditions of

his probation. Defendant took the stand and admitted that he had failed to pay restitution within the prescribed period, pled guilty to aggravated assault while on probation, and failed to report to probation numerous times.

The trial court found defendant guilty of violating probation and, as promised, sentenced him to seven years' imprisonment on the underlying conviction. Defendant filed a motion to reconsider, which the court denied without defendant present. This appeal followed.

Relying on *People v. Kellems*, 373 Ill. App. 3d 1129 (4th Dist. 2007), and *People v. Herrin*, 385 Ill. App. 3d 187 (3rd Dist. 2008), defendant first contends that the probation officer was not permitted to file the petition for revocation probation. Both *Kellems* and *Herrin* concluded that a probation officer had no authority to file a petition to revoke probation or supervision, but rather such a duty was within the exclusive province of the State's Attorney. See 55 ILCS 5/3-9005(a)(1) (West 2008)). Defendant argues that, as in *Herrin*, we should find this rendered the petition to revoke probation invalid *ab initio*.

The State does not dispute that the probation officer here filed the charges alleging defendant's violation of probation. However, relying on this district's decision in *People v. Keller*, 399 Ill. App. 3d 654 (1st Dist. 2010), the State asserts that a probation officer has the statutory authority to file petitions

for revocation of probation, and the revocation order thus was proper. We agree with the State.

The relevant statute in the Unified Code of Corrections (Code) provides that "[t]he conditions of probation *** may be modified by the court on motion of the supervising agency or on its own motion ***." 730 ILCS 5/5-6-4(f) (West 2008). It further provides that "[i]nstead of filing a violation of probation ***, an agent or employee of the supervising agency *** may serve on the defendant a Notice of Intermediate Sanctions." 730 ILCS 5/5-6-4(I) (West 2008). "Supervising agency" includes probation officers, as they are agents of the probation department. See 730 ILCS 110/9b (West 2008); *Keller*, 399 Ill. App. 3d at 659.

Given this language, *Keller* held that a probation officer is a "proper party" to file a petition for violation of probation. *Keller* reasoned that the phrase, "instead of filing a violation of probation," clearly modified, "an agent or employee of the supervising agency." *Keller*, 399 Ill. App. 3d at 660. *Keller* further reasoned that it would make little sense for the legislature to allow a probation officer to make a motion to modify the probationary conditions under subsection 5-6-4(f) of the Code, but then deny the same officer the ability to file a petition charging a violation of probation. The court noted that had the legislature intended only State's Attorneys to file

petitions for violation of probation, it would have so specified. Finally, *Keller* concluded that a probation officer who files a petition to revoke is not engaging in the unauthorized practice of law, as *Herrin* asserted, but is acting as a judicial employee and agent of the trial court. See 730 ILCS 100/9b(3), 110/12(5) (West 2008).

We observe that the issue regarding whether probation officers have the authority to file petitions alleging violations of probation and seeking revocation of probation is currently pending before the supreme court in *People v. Alberty*, No. 1-08-1149 (2010) (unpublished order under Supreme Court Rule 23), *appeal allowed*, No. 110705 (Sept. 29, 2010). It has been consolidated with *People v. Hammond*, 397 Ill. App. 3d 342, 352-53 (2009), *appeal allowed*, No. 110044 (Sept. 29, 2010), upon which *Keller* relies, wherein the fourth district held that probation officers may seek intermediate sanctions under the Code even when against the wishes of the State's Attorney. See *People v. Hammond*, Nos. 110044, 110705 cons. (Sept. 29, 2010). Unless and until the supreme court rules in a manner contrary to *Keller*, we will continue to follow *Keller's* cogent reasoning and result.

Based on the foregoing, the petition in this case charging defendant with a violation of probation was proper.

Defendant next contends that his sentence of probation is void because the trial court failed to obtain a presentence

investigation report or make a finding on the record as to defendant's criminal history, as required under section 5-3-1 of the Unified Code of Corrections (Code) (730 ILCS 5/5-3-1 (West 2008)). Defendant argues that, consequently, his seven-year sentence to the Department of Corrections resulting from the revocation of probation also is void.

In this case, the parties agreed to the sentence of probation. Although the court was not required to order a presentence investigation report under section 5-3-1 of the Code, it was required to make a record finding as to defendant's criminal history. See *People v. Youngbey*, 82 Ill. 2d 556, 561 (1980); *People v. Walton*, 357 Ill. App. 3d 819, 821-23 (2005). The court did not do so.

Defendant did not seek to withdraw his guilty plea or file a direct appeal therefrom based on this error. Rather, he now argues as part of his direct appeal from his revocation of probation case that the error rendered his two-year probation sentence void. Defendant notes that his probationary sentence was entered upon a fully negotiated plea. As a result, he argues that the entire plea must be vacated - as the plea and sentence go "hand in hand" - in order to return the parties to the status quo.

The State responds that the error merely rendered defendant's sentence of probation voidable, and therefore it is

not subject to collateral attack. We agree with the State.

A judgment is rendered void and may be attacked indirectly or directly at any time where the court lacks jurisdiction. *In re M.W.*, 232 Ill. 2d 408, 414 (2009); *People v. Davis*, 156 Ill. 2d 149, 155 (1993). By contrast, a voidable judgment is one entered erroneously by a court having jurisdiction and is not subject to collateral attack. *Davis*, 156 Ill. 2d at 155-56. Jurisdiction is comprised of subject matter jurisdiction, which refers to the court's power to hear and render a particular judgment or sentence in a given case, and personal jurisdiction, which is the court's power to bring a person into its adjudicative process. *M.W.*, 232 Ill. 2d at 414-15; *Davis*, 156 Ill. 2d at 156.

Defendant does not question that the court had personal jurisdiction over him. Rather, he challenges the court's subject matter jurisdiction, arguing that because the court failed to order a presentence investigation report or make a finding of defendant's history of criminality, the court lacked the power to sentence him.

In *People v. Sims*, 378 Ill. App. 3d 643, 648 (2007), this court considered and rejected this exact argument, raised on collateral review. *Sims* noted that the Illinois Constitution, not section 5-3-1 of the Code, gives a trial court jurisdiction to accept a guilty plea and impose a sentence. *Sims* further

noted that a trial court exceeds its authority when it imposes a sentence that is lesser or greater than authorized by statute. *Sims* found, in its case, the negotiated sentence imposed on the defendant was within the statutory parameters, and further, that the failure to follow section 5-3-1 did not deprive the trial court of jurisdiction or render the negotiated guilty plea and sentence void. Accordingly, the court concluded that the error merely rendered the sentence voidable. *But see People v. Butler*, 186 Ill. App. 3d 510, 518 (1989) (absent compliance with section 5-3-1, a court has no jurisdiction to sentence a defendant); *People v. Johnson*, 97 Ill. App. 3d 976, 979 (1981) (same).

We see no reason to depart from the holding in *Sims*. Here, the court's failure to comply with section 5-3-1 simply made defendant's sentence voidable, not void. As the supreme court in *M.W.* recently observed: "Error or irregularity in the proceeding, while it may require reversal of the court's judgment on [direct] appeal, does not oust subject matter jurisdiction once it is acquired." *M.W.*, 232 Ill. 2d at 423. Defendant's sentence of probation was not void as a result of the court's error.

Defendant next contends that the trial court failed to conduct a sentencing hearing and order a presentence investigation report, as required, on finding him guilty of violating probation and before sentencing him to seven years'

1-09-1455

imprisonment on his underlying conviction. See 730 ILCS 5/5-3-1, 5/5-4-1, 5-6-4(h) (West 2008).

The State concedes, and we agree, that defendant is entitled to a new sentencing hearing because the court did not order a presentence investigation report and there was no agreed disposition. See 730 ILCS 5/5-3-1 (West 2008); *People v. Harris*, 105 Ill. 2d 290, 299 (1985). We note that, like the initial sentencing hearing, this error rendered the sentence merely voidable. However, unlike the initial sentencing hearing, defendant perfected a timely appeal of his seven-year sentence, thereby preserving the error for our review.

Based on the foregoing, we need not consider defendant's remaining contentions that he was he deprived of his right to be present at the hearing on his motion to reconsider his sentence and that he is entitled to additional days of presentencing custody credit. Our disposition renders these arguments moot.

We therefore vacate the judgment of the trial court and remand the cause solely for the purpose of resentencing defendant in a manner consistent with this opinion. We affirm the trial court's determinations in all other respects.

Affirmed in part; vacated in part.