

No. 1-10-0416

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 31, 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. 07 C6 61025
)	
LONNIE O. HENRY,)	Honorable
)	Brian Flaherty,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Joseph Gordon and Hoffman concurred in the judgment.

O R D E R

HELD: Because the original order sentencing defendant to Cook County's "boot camp" program was void based on defendant's ineligibility for the program, the trial court's order resentencing defendant to four and a half years' imprisonment after being removed from the program was also void.

Defendant Lonnie Henry appeals from the circuit court's order sentencing him to four and a half years' imprisonment

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following defendant's removal from the Cook County Impact Incarceration Program ("boot camp") for health reasons. On appeal, defendant contends: (1) his guilty plea to aggravated discharge of a firearm in exchange for boot camp is void because he was ineligible for boot camp at the time he entered into the plea agreement, which also renders his subsequent prison sentence void; (2) his guilty plea was involuntary because the trial court failed to admonish defendant regarding a direct consequence he could be subjected to if he did not complete boot camp for any reason; (3) the trial court erred by not giving defendant an opportunity to withdraw his guilty plea after the trial court withdrew its concurrence to boot camp and resentenced him to 4 and a half years' imprisonment, in violation of Supreme Court Rule 402(d); (4) the trial court erred in sentencing defendant without ordering and considering a Preliminary Sentencing Investigation (PSI) report, as required by 730 ILCS 5/5-3-1 (West 2006); and (5) he was denied his constitutional right to effective assistance of trial counsel. For the reasons that follow, we vacate defendant's sentence and remand the cause for further proceedings consistent with this order.

BACKGROUND

Defendant was charged with four counts of aggravated discharge of a firearm based on an incident on July 11, 2007,

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where defendant allegedly knowingly discharged a firearm into a building he knew to be occupied. During pre-trial negotiations, the State offered to recommend to the trial court that defendant be sentenced to boot camp in exchange for a guilty plea. On April 29, 2009, defendant voluntarily entered into custody to be evaluated for his eligibility in the boot camp program. Defendant signed a consent form to participate in the program on May 19, 2009. The consent form provided:

"I am aware that any violation of the major acts outlined in the attachments during any part of the Boot camp or Reintegration phases may result in disciplinary action which could terminate my participation in the program. At that time, a Notice of Termination will be filed and I am aware that I will be returned to the Court for sentencing."

The consent form noted that if defendant was terminated from boot camp "voluntarily or otherwise," boot camp would no longer be a sentencing option.

On June 17, 2009, defendant pled guilty to aggravated discharge of a firearm, a Class 1 felony. See 720 ILCS 5/24-1.2(a)(2) (West 2006). The trial court then admonished defendant regarding the nature of the charge; the penalty range he could

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face for the charge, which was anywhere from 4 to 15 years' imprisonment, a fine up to \$25,000 and 2 years' mandatory supervised release; and what rights he was foregoing by pleading guilty. Defendant waived his right to a PSI report. After noting there were no aggravating circumstances and defendant did not have a criminal background, the trial court accepted defendant's negotiated plea and sentenced him to boot camp. The trial court then admonished defendant regarding his right to appeal, including the necessity to file a written motion to withdraw the previous plea of guilty or reconsider the sentence within 30 days to preserve any issues he might raise on appeal.

On July 24, 2009, defendant was removed from boot camp after complaining of chest pains. Defendant re-started boot camp on August 27, 2009, but was returned to the Cook County Department of Corrections after suffering chest pains. Defendant was subsequently diagnosed with a previously unknown heart condition.

On September 23, 2009, defendant appeared before the trial court for "resentencing." Following an off-the-record conference between the court and parties regarding sentencing, the court noted defendant was back before the court because he was unable to do boot camp. The court informed defendant he could be sentenced from anywhere between 4 to 15 years' imprisonment. The court then sentenced defendant to a four and a half year prison

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term, with credit for 137 days served. No PSI report was ordered prior to resentencing. The trial court did not provide any admonishments to defendant regarding his right to appeal the sentence. Defendant did not file a motion to reconsider the sentence or a motion to withdraw his guilty plea. We allowed defendant to file a late notice of appeal.

ANALYSIS

Defendant contends the trial court's order placing him into the boot camp program was void because he was not eligible for impact incarceration. As a result, defendant contends the trial court's September 2009 order "resentencing" him to four and a half years' imprisonment is also void. Specifically, defendant contends section 5-8-1.2 of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-1.2 (West 2008)) only applies to non-violent offenders, which would exclude defendant's Class 1 felony conviction for aggravated discharge of a firearm, a forcible felony. Defendant also notes he was ineligible for boot camp because he was not found in violation of probation for his offense, and has not previously served a sentence of probation for any other felony offense.

The State counters that the trial court properly sentenced defendant to the boot camp program because defendant met all of the statutory requirements. Specifically, the State suggests

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"the plain language of section 5-8-1.2(c)(4) prohibits boot camp as a sentence for an offender 'found in violation of probation' for an offense that is a forcible felony or violent crime, or for an offender convicted of a forcible felony or violent crime 'who has previously served a sentence of probation for any felony offense and who otherwise could be sentenced to a term of incarceration.' " The State also suggests defendant's Class 1 felony conviction for aggravated discharge of a firearm does not qualify as a "forcible felony" under section 5-8-1.2(c)(4) of the Code. The State concedes defendant did not have a criminal record prior to pleading guilty in this case.

A sentence which is contrary to a statutory requirement is void and may be attacked at any time, either directly or collaterally. See *People v. Whitfield*, 228 Ill. 2d 502, 510-11 (2007), citing *People v. Arna*, 168 Ill. 2d 107, 113 (1995); *People v. Wade*, 116 Ill. 2d 1, 5-6 (1987). See also *People v. Simmons*, 256 Ill. App. 3d 651, 652 (1993). Moreover, when a probation order for a defendant's original conviction is void, the subsequent order revoking his probation and imposing a prison sentence is likewise void. *People v. Johnson*, 338 Ill. App. 3d 213, 216 (2003), citing *People v. Winston*, 316 Ill. App. 3d 618, 620-21 (2000).

Section 5-8-1.2(c) of the Unified Code of Corrections (Code)

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provides that in order to be eligible to be sentenced to a county impact incarceration program by the court, the defendant shall meet all of the following requirements:

"(1) the person must be not less than 17 years of age nor more than 35 years of age;

(2) the person has not previously participated in the impact incarceration program and has not previously served more than one prior sentence of imprisonment for a felony in an adult correctional facility;

(3) The person has not been convicted of a Class X felony, first or second degree murder, armed violence, aggravated kidnapping, criminal sexual assault, aggravated criminal sexual abuse or a subsequent conviction for criminal sexual abuse, forcible detention, or arson and has not been convicted previously of any of those offenses.

(4) The person *has been found in violation of probation* for an offense that is a Class 2, 3, or 4 felony that is not a forcible felony as defined in Section 2-8 of

the Criminal Code of 1961 or a violent crime as defined in subsection (c) of Section 3 of the Rights or Crime Victims and Witnesses Act who otherwise could be sentenced to a term of incarceration; or the person is convicted of an offense that is a Class 2, 3, or 4 felony that is not a forcible felony as defined in Section 2-8 of the Criminal Code of 1961 or a violent crime as defined in subsection (c) of Section 3 of the Rights or Crime Victims and Witnesses Act *who has previously served a sentence of probation for any felony offense and who otherwise could be sentenced to a term of incarceration.*

(5) The person must be physically able to participate in strenuous physical activities of labor.

(6) The person must not have any mental disorder or disability that would prevent participation in a county impact incarceration program.

(7) The person was recommended and approved for placement in the county impact

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incarceration program and to the terms and conditions of the program. The Sheriff may consider, among other matters, whether the person has any outstanding detainers or warrants, whether the person has a history of escaping or absconding, whether participation in the county impact incarceration program may pose a risk to the safety or security of any person and whether space is available.”

(Emphasis added.) 730 ILCS 5/5-8-1.2(c)
(West 2008).

In *Wade*, the defendant pled guilty to robbery as part of a negotiated plea agreement in which the parties stipulated that he had no prior convictions. Under the plea agreement, the defendant was sentenced to 90 days in the Cook County Jail, with time considered served, and 36 months' probation. Nine months later, the circuit court was informed by a probation officer that the defendant had previously been convicted of armed robbery and rape, which made him ineligible for probation under the Unified Code of Corrections. The trial court held the order granting probation was void on the grounds that the defendant was not eligible at the time of sentencing, rejecting the defendant's argument that the court had lost jurisdiction 30 days after

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entering the sentencing order. The defendant was allowed to withdraw his guilty plea. Following a jury trial, he was found guilty of robbery and sentenced to nine years' imprisonment. The appellate court affirmed the defendant's conviction.

On appeal, the defendant contended the circuit court did not have jurisdiction to vacate the sentence 11 months later. The State countered that because the circuit court lacked authority to impose probation, the first sentencing order was void and could be set aside at any time. The supreme court noted that it had previously held a trial court "has an obligation to order the criminal penalties mandated by the legislature." *Wade*, 116 Ill. 2d at 6, citing *People ex rel. Carey v. Bentivenga*, 83 Ill. 2d 537, 544 (1981). "A trial court, upon determining guilt, has no authority to assess a fine or impose a sentence other than that provided by statute." *Wade*, 116 Ill. 2d at 6. The supreme court affirmed the defendant's conviction.

In *Simmons*, the defendant was convicted of aggravated discharge of a firearm and unlawful use of a firearm by a felon on July 30, 1991. He was placed on 30 months' probation, over the State's objection that he was ineligible for probation because he had prior class 2 felony convictions. On December 20, 1991, the State filed a petition for violation of probation, alleging the defendant committed the offenses of possession of a

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stolen motor vehicle and burglary. The circuit court found defendant guilty of the violation and revoked his probation. He was sentenced to 15 years' imprisonment for the probation violation. On appeal, defendant contended the original order placing him on probation was void because he was ineligible for probation; that the subsequent order revoking his probation was also void; and, consequently, that his 15-year sentence for violating probation must be vacated as void.

We noted a sentence is void for lack of inherent power where the court orders a lesser sentence than is mandated by statute. *Simmons*, 256 Ill. App. 3d at 652, citing *Wade*, 116 Ill. 2d at 6. The circuit court placed the defendant on probation despite the State's objection that he was ineligible in light of his prior felony convictions. Relying on *Wade*, we held the order placing him on probation was void because he was ineligible. *Simmons*, 256 Ill. App. 3d at 653. "The court lacked the inherent power to order a sentence lesser than mandated by statute." *Simmons*, 256 Ill. App. 3d at 653. Because the underlying order of probation was void, we held the subsequent order revoking the defendant's probation and the 15-year sentence imposed upon revocation of the probation were likewise void. We vacated the order revoking defendant's probation and his 15-year sentence, and remanded for resentencing on the defendant's original convictions. *Simmons*,

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256 Ill. App. 3d at 653.

Likewise, in *Johnson*, the defendant pled guilty to aggravated possession of a stolen motor vehicle. The trial court sentenced him to five years' probation and ordered him to participate in the Treatment Alternatives for Safe Communities (TASC) program. Pursuant to section 5-5-3(c)(2)(F) of the Unified Code of Corrections (730 ILCS 5/5-5-3(c)(2)(F) (West 1998)), defendant was not eligible for probation due to his prior convictions. After the State presented evidence that the defendant had violated his probation, the trial court revoked the defendant's probation and sentenced him to an eight-year prison term. On appeal, the defendant contended the trial court's order placing him on probation was void because he was ineligible for probation at the time. Thus, he argued, the order revoking his probation and sentence was also void. The defendant asked the court to vacate both orders and remand the case "for a resumption of plea negotiations or, if necessary, trial." *Johnson*, 338 Ill. App. 3d at 216. The State conceded the order of probation was void. However, the State argued the case did not have to be remanded for continuation of plea negotiations or a new trial.

This court held that because the defendant was not eligible for probation, the defendant and the State "now necessarily lack agreement on the plea offer." *Johnson*, 338 Ill. App. 3d at 216.

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To return the State and the defendant to their respective positions prior to the trial court's erroneous imposition of probation, the court held the defendant should be allowed to withdraw his guilty plea and face trial, should he so elect. *Johnson*, 338 Ill. App. 3d at 216, citing *Wade*, 116 Ill. 2d at 6 (after negotiated plea agreement, probation order held to be void due to defendant's ineligibility for probation; trial court vacated probation order and allowed defendant to withdraw guilty plea and stand trial). The court vacated the trial court's order of probation and the subsequent order revoking the defendant's probation and sentencing him to eight years in prison. To return the State and the defendant to their positions prior to the trial court's imposition of probation, the court held the defendant was allowed to move for the withdrawal of his guilty plea and face trial, should he so elect. *Johnson*, 338 Ill. App. 3d at 217.

In this case, pursuant to section 5-8-1.2(c)(4), we find defendant was statutorily ineligible for the boot camp program because he had not either "been found in violation of probation" of an offense listed in the applicable section, or "previously served a sentence of probation for any felony offense" when he was initially sentenced by the trial court--something that is specifically required by the statute's plain language in order for a defendant to be eligible for the program. See 730 ILCS

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5/5-8-1.2(c) (4) (West 2008). The record clearly indicates defendant had never served probation for a prior felony conviction, or violated probation on the current charge, prior to pleading guilty to the charge and being sentenced to the boot camp program. Contrary to the State's contentions regarding how the statute should be interpreted, we find that fact alone made defendant ineligible for the boot camp program under section 5-8-1.2(c) (4). See 730 ILCS 5/5-8-1.2(c) (4) (West 2008) ("the person shall meet all the following requirements.") Because defendant was ineligible for the boot camp program under the plain language of the statute, the trial court should not have sentenced defendant to that program even if defendant specifically agreed to plead guilty in exchange for such a recommendation. See *Wade*, 116 Ill. 2d at 6 ("A trial court, upon determining guilt, has no authority to assess a fine or impose a sentence other than that provided by statute.")

CONCLUSION

In light of *Wade* and *Simmons*, we find the order placing defendant into the boot camp program must be considered void because the trial court lacked authority "to assess a fine or impose a sentence other than that provided by statute." *Simmons*, 256 Ill. App. 3d at 653; *Wade*, 116 Ill. 2d at 4-7. Because defendant's probation sentence is void, we must also vacate the

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trial court's order "resentencing" defendant to four and a half years' imprisonment for aggravated discharge of a firearm. See *Johnson*, 338 Ill. App. 3d at 217-19. In order to return defendant and the State to their respective positions prior to the trial court's improper imposition of the boot camp program sentence, we find defendant is allowed to move for the withdrawal of his guilty plea and face trial, should he so elect on remand. See *Johnson*, 338 Ill. App. 3d at 219. Given our conclusion, we find it unnecessary to address defendant's remaining contentions on appeal.

Vacated and remanded.