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2011 IL App (3d) 100157-U

Order filed December 14, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the 10 th Judicial Circuit
)	Tazewell County, Illinois
Plaintiff-Appellee,)	
)	Appeal No. 3-10-0157
v.)	Circuit No. 08-CF-142
)	
HOWARD W. SEELYE,)	Honorable
)	Timothy M. Lucas
Defendant-Appellant.)	Judge Presiding

JUSTICE LYTTON delivered the judgment of the court.
Justice McDade concurred in the judgment.
Justice Wright dissented.

ORDER

- ¶ 1 *Held:* Defendant's extended-term sentence for driving while license revoked was void where defendant was also sentenced to an extended-term sentence for aggravated fleeing and eluding.
- ¶ 2 Defendant, Howard W. Seelye, pled guilty to aggravated fleeing and eluding and driving while license revoked in exchange for extended-term sentences of imprisonment of nine years and six years, respectively. On appeal, defendant argues that his extended-term sentence for driving

while license revoked is void and must be reduced. We vacate the extended-term portion of defendant's sentence for driving while license revoked and reduce his sentence on that conviction to three years' imprisonment.

¶ 3 In March 2008, defendant was charged by information with two counts of aggravated fleeing and eluding, one count of driving while license revoked, one count of aggravated driving under the influence, and one count of reckless driving. In June 2008, another count of aggravated driving under the influence was added to the information.

¶ 4 In July 2008, defendant entered into a fully negotiated plea agreement. Pursuant to the agreement, defendant would plead guilty to one count of aggravated fleeing and eluding and one count of driving while license revoked in exchange for extended-term sentences of nine years for fleeing and eluding and six years for driving while license revoked. After hearing the factual basis for defendant's plea and admonishing defendant, the trial court accepted the plea agreement and sentenced defendant to extended-term sentences of nine years' imprisonment for fleeing and eluding and six years' imprisonment for driving while license revoked.

¶ 5 In August 2009, defendant filed a postconviction petition, asserting that his speedy trial rights had been violated. The trial court appointed counsel to represent defendant for postconviction proceedings. Following an evidentiary hearing, the court denied defendant's postconviction petition. Defendant appealed the denial of his petition.

¶ 6 On appeal, defendant argues for the first time that his extended-term sentence for driving while license revoked is void and must be vacated. The State responds that defendant has waived objection to his sentence by failing to raise the issue in his postconviction petition.

¶ 7 Section 5-8-2(a) of the Unified Code of Corrections (Unified Code) authorizes an extended-

term sentence only "for the class of the most serious offense of which the offender was convicted." 730 ILCS 5/5-8-2(a) (West 2008). The plain language of section 5-8-2(a) of the Unified Code requires that when a defendant has been convicted of multiple offenses of differing classes, an extended-term sentence may be imposed only on the conviction within the most serious class. *People v. Thompson*, 209 Ill. 2d 19, 23 (2004).

¶ 8 A sentence, or portion thereof, that is not authorized by statute is void. *Thompson*, 209 Ill. 2d at 24. Where a court sentences a defendant to an extended term for a conviction that is not the most serious offense for which the defendant was convicted, the extended term is unauthorized by statute and void. *Id.*

¶ 9 "An argument that an order or judgment is void is not subject to waiver." *Thompson*, 209 Ill. 2d at 27. A void order may be attacked at any time or in any court, either directly or collaterally. *Id.* at 25. A defendant may argue on appeal that his sentence is void even if he does not raise the issue in his postconviction petition. *Id.* at 27.

¶ 10 Here, defendant was convicted of aggravated fleeing and eluding, a Class 3 felony (625 ILCS 5/11-204.1(b) (West 2008)), and driving while license revoked, a Class 4 felony (625 ILCS 5/6-303(d) (West 2008)). The trial court could only impose an extended-term sentence on the fleeing and eluding conviction. See 730 ILCS 5/5-8-2(a) (West 2008). Thus, the extended-term portion of defendant's driving while license revoked conviction is void and can be challenged at any time. See *Thompson*, 209 Ill. 2d at 24.

¶ 11 Without an extended term, defendant could not be sentenced to more than three years for his driving while license revoked conviction. See 730 ILCS 5/5-8-1(a)(7) (West 2008). Thus, we vacate the extended-term portion of defendant's sentence for driving while license revoked and reduce his

sentence to the maximum nonextended term of three years' imprisonment. See Ill. S. Ct. R. 615(b)(4) (eff. Aug. 27, 1999) ("On appeal the reviewing court may *** reduce the punishment imposed by the trial court.").

¶ 12

CONCLUSION

¶ 13 The order of the circuit court of Tazewell County is vacated and modified in part.

¶ 14 Vacated and modified in part.

¶ 15 JUSTICE WRIGHT, dissenting:

¶ 16 The majority's decision allows defendant to avoid the consequences of our supreme court rules and successfully blocks the State from reinstating all charges dismissed pursuant to this fully-negotiated plea agreement. See Ill. Sup. Ct. R. 604(d) (eff. July 1, 2006); Ill. Sup. Ct. R.605(c) (eff. Oct. 1, 2011). For this reason, I respectfully dissent.

¶ 17 The State filed an information on March 13, 2008, charging defendant with two counts of aggravated fleeing and eluding (Class 3 felonies), one count of driving while license revoked (Class 4 felony), one count of aggravated driving under the influence (Class 4 felony), and one count of reckless driving (Class A misdemeanor). On June 16, 2008, the State added an additional count of aggravated driving under the influence (Class 2 felony) to the information.

¶ 18 Shortly thereafter, on July 14, 2008, defendant entered into a fully-negotiated plea agreement with the State. The State agreed to dismiss four serious offenses, including the most serious charge defendant was facing, aggravated driving under the influence (Class 2 felony). In exchange, defendant pled guilty to one count of aggravated fleeing and eluding (Class 3 felony) and one count of driving while license revoked (Class 4 felony). Pursuant to this plea agreement, the parties agreed defendant would receive concurrent, extended term sentences of nine years and

six years, respectively for each count.

¶ 19 I do not dispute the general proposition that the imposition of the extended term sentences in this case renders the lesser extended term sentence void. See 730 ILCS 5/5-8-2(a) (West 2008); *People v. Thompson*, 209 Ill. 2d at 23-24. However, I disagree that *Thompson* supports the majority's decision to simply reduce one agreed, but nonetheless void, sentence, thereby modifying the terms of the negotiated agreement.

¶ 20 I point out that, in *Thompson*, the State dismissed two charges in exchange for *Thompson's* guilty pleas on the two remaining criminal charges. However, in *Thompson*, there was no agreement as to sentencing. In that case, absent an agreement, the trial court erroneously imposed a void sentence following a sentencing hearing, which our supreme court corrected on review. See *People v. Thompson*, 209 Ill. 2d at 21.

¶ 21 Here, defendant has successfully persuaded the majority to reduce only one of defendant's sentences in a manner that modifies the terms of a fully-negotiated sentence. In effect, the defendants are seeking to hold the State to its part of the bargain while unilaterally modifying the sentences to which they had earlier agreed. *People v. Evans*, 174 Ill. 2d 320, 327 (1996) (citing *United States v. Harvey*, 791 F. 2d 294, 300 (4th Cir.1986)). The same is true in this case.

¶ 22 As our supreme court noted, "Neither side should be able, any more than would be private contracting parties, unilaterally to renege or seek modification simply because of uninduced mistake or change of mind," and held it is also inconsistent with constitutional concerns of fundamental fairness. *Evans*, 174 Ill. 2d at 327 (quoting *Harvey*, 791 F. 2d at 300)). Consequently, I dissent because this defendant's effort to unilaterally to reduce one sentence

while holding the State to its part of the entire bargain should not be allowed. See Evans, 174 Ill. 2d at 327.

¶ 23 Our supreme court has strongly discouraged the practice of reducing fully-negotiated sentences because to hold otherwise would “ ‘encourage gamesmanship of a most offensive nature.’ ” Evans, 174 Ill. 2d at 327 (quoting United States ex rel. Williams v. McMann, 436 F.2d 103, 106 (2d Cir. 1970)). I dissent because such gamesmanship is evident in this case.

¶ 24 In this case, defendant has not made a request on appeal for leave to file an untimely motion to withdraw his guilty plea in order to correct a manifest injustice. People v. Evans, 174 Ill. 2d at 332. I suggest the reason for this omission is obvious because it eliminates any risk that the State will have the corresponding opportunity to request to reinstate any dismissed charges.

¶ 25 I respectfully suggest we should remand the matter to the trial court with directions to offer this defendant an opportunity to withdraw both guilty pleas on the grounds that a manifest injustice may exist due to the singular void sentence which was a part of a fully-negotiated agreement disposing of six charges. Based on this record, it is unclear whether defendant would even elect to exercise this option on remand and risk the reinstatement of the most serious charge he was facing.

¶ 26 However, if defendant elects to request, and is allowed, to withdraw his guilty pleas on remand, the trial court should also be directed to allow the State the corresponding privilege of requesting to reinstate any of the dismissed charges pursuant to our Supreme Court Rules. See Ill. Sup. Ct. R. 604(d) (eff. July 1, 2006); Ill. Sup. Ct. R.605(c) (eff. Oct. 1, 2011).

¶ 27 For these reasons, I respectfully dissent.