

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).

NO. 4-10-0682

Order Filed 4/19/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Calhoun County
RONALD D. FLAUGHER,)	No. 90CF23
Defendant-Appellant.)	
)	Honorable
)	Richard D. Greenlief,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and Steigmann concurred in the judgment.

ORDER

Held: The stay entered by the trial court as part of defendant's sentencing judgment, which ordered the execution of his sentence suspended until he was released from federal prison, was not void for a lack of definiteness though defendant's federal sentence had not yet been imposed.

I. BACKGROUND

In August 1991, a jury convicted defendant of two counts of attempt (first degree murder) for the July 1990 shootings of his brother and sister-in-law. At the time of defendant's jury trial, he was in federal custody, appearing by writ, after having been convicted a few months earlier on three federal drug and weapon charges. In October 1991, the trial court, the Honorable Alfred L. Pezman presiding, sentenced defendant to two consecutive 15-year prison terms. The sentences were mandatorily consecutive as Judge Pezman had found that defendant's sister-in-law had been "severely injured." The sentencing judgment provided: "Mittimus is stayed until defendant is released from

custody of the United States Department of Justice." In June 1992, a federal court sentenced defendant to 235 months in prison. After multiple unsuccessful appeals to this court on issues unrelated to those presented herein, defendant, in April 2008, filed a motion for declaratory judgment. He sought an order declaring that his state sentences were to run concurrently to his federal sentence. Defendant was released from federal custody in June 2008. Five days after his release, the trial court, the Honorable Richard D. Greenlief presiding, conducted a hearing on defendant's motion for declaratory judgment.

During his opening statement at the hearing, defendant's counsel claimed that Judge Pezman's stay effectively ordered defendant's state sentences to run consecutively to his federal sentence, which, he claims, was improper since the federal sentence had not yet been imposed at the time the stay was entered. At that time, defendant did not claim the sentencing judgment, which included the stay order, or the sentence itself was void. After considering evidence presented by both parties, the trial court announced in open court that, because defendant had served 17 years "sitting in a federal cell" without incident, he would receive credit for the time served in federal prison against his state sentences. On June 24, 2008, the court entered a written order, in which it specifically found that "protection of the public is *not* necessary and defendant pose[d] no threat to safety of other persons." (Emphasis in original.) The amended sentencing judgment indicated that defendant's two 15-year prison terms would be served concurrently to each other and to his federal sentence. The State appealed, claiming the court was without jurisdiction and, as a result, the June 2008 sentencing judgment was void.

This court held that Judge Greenlief's order was not void for lack of jurisdiction, as the trial court had been re-vested with jurisdiction upon defendant's release

from federal prison to consider a reduction in defendant's unexpired state-court sentence. See 730 ILCS 5/5-8-1(f) (West 2006). *People v. Flaughner*, 396 Ill. App. 3d 673, 682 (2009). However, we held that the court was without jurisdiction to modify defendant's 1991 sentences from mandatory consecutive to concurrent. *Flaughner*, 396 Ill. App. 3d at 683. We also determined that, although the trial court had been revested with jurisdiction to consider whether defendant should receive credit toward his state sentences, the court had no discretion to award such credit because defendant committed the federal felonies while on pretrial release and, therefore, the sentences were required to be served consecutively. See 730 ILCS 5/5-8-4(h) (West 2006). Given these holdings, we vacated the trial court's June 2008 sentencing judgment and remanded for the court to enter a subsequent amended sentencing judgment making defendant's state sentences consecutive to each other and consecutive to his federal sentence, with no credit for time served in federal custody. *Flaughner*, 396 Ill. App. 3d at 685. The supreme court denied defendant's petition for leave to appeal. *People v. Flaughner*, 236 Ill. 2d 561 (2010).

On remand, on January 28, 2010, Judge Greenlief entered an order clarifying that the June 2008 sentencing judgment contained a clerical error. According to Judge Greenlief, he never intended to order that defendant's two 15-year terms be served concurrently. He entered an order reflecting that the two 15-year sentences be served consecutively.

On February 23, 2010, defendant filed a motion to set aside a void order. Defendant claimed Judge Pezman's 1991 sentencing judgment was void and unenforceable due to the inclusion of the stay provision. Defendant argued the court had no authority to stay the execution of defendant's sentence for an undetermined amount of time.

On August 3, 2010, the trial court conducted a hearing on defendant's motion and, after considering the parties' arguments, found the issue barred from consideration by the doctrine of *res judicata*. The court found "that this issue has already been considered, argued in front, if not argued, at least considered by the appellate court." The court entered an amended written sentencing judgment in accordance with this court's 2009 decision. This appeal followed.

II. ANALYSIS

Defendant claims Judge Pezman's 1991 sentencing order is void and the sentences unenforceable because the judgment contained an indefinite stay of his sentences. Excusing his failure to previously contest the alleged invalidity of the court's order, defendant relies on the principle of law that suggests that a void order can be attacked at any time. See *People v. Wade*, 116 Ill. 2d 1, 5 (1987). Only now, 20 years after the entry of the order, does defendant claim that Judge Pezman's statement in that order serves to invalidate the sentences imposed therein. Judge Pezman ordered as follows: "Mittimus is stayed until defendant is released from custody of the United States Department of Justice." In this appeal, defendant claims that statement causes the order to become void and his sentence unenforceable because it effectively ordered a stay for an indefinite period of time.

Defendant blames the court system, the faulty administration of justice, and the erroneous "handling" of his case by the trial court and this court for the fact that he has been required to serve "the functional equivalent of a life sentence." What defendant fails to mention is that he could have applied for relief within 30 days of the imposition of his federal sentence. See Ill. Rev. Stat., Ch. 38, para. 1005-8-4(a) (West 1991), now cited as 730

ILCS 5/5-8-4(a) (West 2008). He failed to do so. Instead, he now insists that both the trial court and this court exceeded their respective jurisdiction--the trial court by ordering an indefinite stay in 1991, and this court by, according to him, erroneously finding that he committed the federal crimes while on pretrial release from his state crimes (applying section 5-8-4(h) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-8-4(h) (West 2006)). Nevertheless, we will address defendant's argument presented in this appeal.

We must first determine whether we have jurisdiction to address the validity of an order entered in 1991. It is well established in our case law that a void order can be challenged at any time. See *Wade*, 116 Ill. 2d at 5. Apparently, "at any time" has been interpreted literally by Illinois courts and thus, the doctrines of *res judicata* and forfeiture do not serve to bar a claim challenging a void order. See *People v. Harper*, 345 Ill. App. 3d 276, 285 (2003).

Defendant insists that because Judge Pezman ordered a stay of the execution of defendant's two 15-year prison terms for an indefinite period of time and failed to "deliver" the mittimus to the Illinois Department of Corrections, defendant's sentence is void and he is now excused from serving those sentences. We conclude the stay was not entered for an indefinite period of time. According to Black's Law Dictionary, "indefinite" means "without fixed boundaries." *Black's Law Dictionary, 6th Edition* (1990). "Indefinite" does not describe the stay entered by Judge Pezman. Defendant's two 15-year prison terms were to be served upon the completion of defendant's federal sentence, in other words, after a fixed boundary. Admittedly, the exact number of years that would constitute that fixed boundary was unknown to Judge Pezman at the time he entered the

order. However, the specific unknown number of years does not constitute an "indefinite" stay when there is a condition (*i.e.*, defendant's release from federal prison) that clearly defines the day the stay would be lifted. Defendant's situation is not one where he was allowed to go "at liberty" with no steps being taken to execute the sentencing judgment. *Cf. People ex rel. Powers v. Shattuck*, 274 Ill. 491, 493 (1916) (delay of six years after sentencing while the trial judge considered the defendant's motion to set aside part of the judgment was unreasonable and rendered the sentence unenforceable).

Judge Pezman had no choice but to enter the sentencing order as he did. Defendant's person did not belong to Illinois at the time he was sentenced. He was in the custody of the federal government and was, as the State put it, "on loan" to Illinois via writ. Until defendant satisfied the sentencing requirements of the federal government, he was not available to serve any sentence in state court. Judge Pezman did not know when defendant would be available, as he had not yet been sentenced in federal court. The June 1991 sentencing judgment reflected exactly and accurately the circumstances at that time. At defendant's federal sentencing hearing, the judge was aware of the unexpired Illinois sentences. Thus Judge Pezman's order did nothing to disturb the imposition of defendant's federal sentence.

Pursuant to the facts before us, defendant's only chance of having all three sentences reviewed with the hope of serving less than "the functional equivalent of a life sentence" occurred nearly 20 years ago in July 1992. Thirty days after he was sentenced in federal court in June 1992, defendant had the opportunity to ask Judge Pezman for relief pursuant to section 5-8-4(a) of the Unified Code (Ill. Rev. Stat., Ch. 38, para. 1005-8-4(a) (West 1991)). Unfortunately, he failed to do so. At this point, and on this record, he is not

entitled to the relief he now requests. Any prejudice suffered by defendant resulted from his failure to seek relief when he had the opportunity to do so.

Defendant also asks that this court reconsider our decision from his last appeal with regard to our interpretation and application of sections 5-8-1(f) and 5-8-4(h) of the Unified Code (730 ILCS 5/5-8-1(f), 5-8-4(h) (West 2006)). There, we held that section 5-8-1(f) (a provision affording a defendant the opportunity within 30 days of release to request sentencing credit from a term just served) was otherwise applicable to defendant's case and could have provided relief in the form of awarding him credit for time served in federal prison but for the fact that defendant had committed his federal offenses while on pretrial release from his state offenses, thereby requiring the imposition of consecutive terms pursuant to section 5-8-4(h). 730 ILCS 5/5-8-1(f), 5-8-4(h) (West 2008). Defendant claims this court exceeded its jurisdiction in ordering mandatory consecutive terms thereby creating a void judgment. He contends we should now correct that void judgment.

This court has not only the power to correct a void sentence *sua sponte*, it has a duty to do so. *Harper*, 345 Ill. App. 3d at 284. Contrary to defendant's position, section 5-8-4(h) applies to this case and mandates the imposition of consecutive terms. 730 ILCS 5/5-8-4(h) (West 2006). See also *People v. Clark*, 183 Ill. 2d 261, 266 (1998) ("section 5-8-4(h) does not allow for any discretion to be exercised in deciding whether to impose a concurrent or consecutive sentence when another felony is committed while a defendant is on pretrial release"). The trial court had no discretion in 2008 to order anything other than ordering defendant's state-court sentences to run consecutively to his federal sentence. Our holding in our 2009 order was the law of the case and, without justification or any

reason to deviate therefrom, we will not reconsider our previous decision. See *People v. Hopkins*, 235 Ill. 2d 453, 469 (2009) ("the determination of a question of law by an appellate court in the first appeal may be binding on that court in a second appeal").

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment. Moreover, we note defendant is not without some recourse as the trial court in its 2008 hearing made certain findings concerning defendant's rehabilitation that could support a petition to the Governor for commutation. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal.

Affirmed.