

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).

2011 IL App (4th) 090978-U

Order filed August 24, 2011

NO. 4-09-0978

Modified upon denial of Rehearing October 13, 2011

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
DONALD JOSEPH WHALEN,)	No. 91CF344
Defendant-Appellant.)	
)	Honorable
)	Elizabeth A. Robb,
)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and McCullough concurred in the judgment.

ORDER

¶ 1 *Held:* As no meritorious issues could be raised on appeal, the office of the State Appellate Defender's motion to withdraw as defendant's counsel on appeal is granted, and the trial court's judgment is affirmed.

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal on the ground no meritorious issues can be raised in this case. For the following reasons, we agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 In November 1991, a jury found defendant, Donald Joseph Whalen, guilty of one count of first degree murder for the intent to kill or do great bodily harm to his father, William Whalen (Ill. Rev. Stat. 1991, ch. 38, par. 9-1(a)(1)). Defendant was also found guilty of a second count of first degree murder for the death of William Whalen because defendant had knowledge his actions created a strong probability of death or great bodily harm (Ill. Rev. Stat. 1991, ch. 38,

par. 9-1(a)(2)).

¶ 5 On December 27, 1991, the trial court sentenced defendant to 60 years' imprisonment with credit for time served. This court affirmed defendant's conviction in *People v. Whalen*, 238 Ill. App. 3d 994, 605 N.E.2d 604 (1992), which was later affirmed by the supreme court in *People v. Whalen*, 158 Ill. 2d 415, 634 N.E.2d 725 (1994).

¶ 6 On April 23, 2009, defendant filed a *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-1401 (West 2008)), arguing one of his murder convictions should be vacated because there had only been one victim in the case. Defendant requested resentencing and argued the trial court exceeded its authority because it improperly considered the erroneous first-degree-murder conviction at sentencing.

¶ 7 In July 2009, the State filed a motion to dismiss defendant's *pro se* petition. In its motion, the State agreed the trial court should vacate the strong-probability-murder conviction but argued remand for resentencing was unnecessary because (1) defendant waived the issue by not raising it at trial or sentencing, (2) defendant's *pro se* petition was untimely, and (3) the record did not indicate the court considered the erroneous conviction at sentencing.

¶ 8 In September 2009, the trial court vacated the strong-probability-murder conviction by agreement of the parties. In October 2009, defendant filed a *pro se* response to the State's motion to dismiss, arguing he was entitled to a remand for resentencing because the court improperly considered the erroneous conviction when it sentenced defendant to the maximum sentence for first degree murder.

¶ 9 In December 2009, the trial court denied defendant's *pro se* petition because it

was untimely. In particular, the court determined (1) the petition was not filed within two years from the date of the final order or judgment as required by section 1401(c) of the Civil Code (735 ILCS 5/2-1401(c) (West 2008)); (2) defendant's failure to file a timely petition was not excused because he did not argue the grounds for relief were fraudulently concealed, or he was under a legal disability or duress; (3) defendant's sentence was not void because the court had jurisdiction over the matter, and the sentence was within the authorized statutory range for first degree murder; and (4) resentencing was unnecessary because the record indicates the same sentence would have been imposed regardless of the erroneous conviction.

¶ 10 Defendant filed his notice of appeal in December 2009, and the trial court appointed OSAD to serve as his attorney. In January 2011, OSAD moved to withdraw, including in its motion a brief in conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The record shows service of the motion on defendant. On its own motion, this court granted defendant leave to file additional points and authorities by February 25, 2011. Defendant did not timely file additional points and authorities. After examining the record and executing our duties in accordance with *Finley*, we grant OSAD's motion and affirm the court's judgment.

¶ 11 II. ANALYSIS

¶ 12 OSAD argues this appeal presents no meritorious claim upon which defendant could realistically expect to obtain relief. Specifically, OSAD contends the trial court properly dismissed defendant's *pro se* petition for relief from judgment because (1) the petition was untimely, (2) defendant's failure to file a timely petition was not excused, and (3) the sentencing order was not void. OSAD further contends the case need not be remanded for resentencing as

timely petition is excused because the grounds for relief were fraudulently concealed. Instead, defendant argues his *pro se* petition should be considered because the sentencing judgment is void. Defendant argues the judgment is void because the trial court improperly considered the strong-probability-murder conviction when it imposed his sentence.

¶ 18 "Whether a judgment is void or voidable presents a question of jurisdiction." *People v. Davis*, 156 Ill. 2d 149, 155, 619 N.E.2d 750, 754 (1993). A void judgment is a judgment entered by a court which lacks jurisdiction over the parties or subject matter, or which lacks the inherent authority to enter the judgment. *Lott*, 325 Ill. 2d at 751, 760 N.E.2d at 117. Additionally, a sentencing order is void if the sentence did not conform to statutory requirements. *People v. Arna*, 168 Ill. 2d 107, 113, 658 N.E.2d 445, 448 (1995). A void judgment may be attacked either directly or indirectly at any time. *Davis*, 156 Ill. 2d at 155, 619 N.E.2d at 754.

¶ 19 The sentencing judgment in the present case is not void for lack of jurisdiction. A person is subject to prosecution in Illinois for an offense committed either wholly or partly in Illinois. Ill. Rev. Stat. 1991, ch. 38, par. 1-5(1). Additionally, "[a] criminal defendant confers personal jurisdiction on the trial court when he appears personally before it." *People v. Speed*, 318 Ill. App. 3d 910, 915, 743 N.E.2d 1084, 1088 (2001).

¶ 20 The murder occurred in Bloomington, Illinois, and defendant personally appeared before the trial court. The court had jurisdiction to enter the sentencing judgment in this case, and the sentencing order is not void for lack of jurisdiction.

¶ 21 Next, the sentence imposed was within the prescribed statutory limits for first degree murder. The sentencing range for first degree murder is 20 to 60 years in prison. Ill. Rev. Stat. 1991, ch. 38, par. 1005-8-1(a)(1)(a). However, a defendant could be sentenced to a

term of natural life imprisonment if the trial court found the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. Ill. Rev. Stat. 1991, ch. 38, par. 1005-8-1(a)(1)(b).

¶ 22 Here, defendant was convicted of first degree murder for the murder of his father. The autopsy revealed the victim "sustained 39 blunt trauma wounds and 33 stab and incised wounds, including stab wounds to the heart and lungs." *Whalen*, 158 Ill. 2d at 418, 634 N.E.2d at 727. Additionally, [t]he blows to the head had nearly severed one of the victim's ears." *Whalen*, 158 Ill. 2d at 418, 634 N.E.2d at 727.

¶ 23 At the December 1991 sentencing hearing, the State argued the trial court should sentence defendant to natural life imprisonment, "the most severe penalty possible" for first degree murder, if the court found the murder was an "act of brutal and heinous behavior." The State argued a natural-life sentence was appropriate because the evidence showed the murder was the result of brutal and heinous behavior.

¶ 24 The trial court sentenced defendant "to the maximum term of imprisonment other than life imprisonment." In making the sentence determination, the court stated it agreed with the State and believed "there [was] exceptionally cruel wanton behavior in this death." However, the court declined to impose a sentence of natural life imprisonment due to defendant's background.

¶ 25 Defendant's 60-year sentence was within the 20- to 60-year sentencing range for first degree murder. The trial court recognized the option of sentencing defendant to natural life imprisonment but instead determined the appropriate sentence would be 60 years' imprisonment. Therefore, defendant's sentence was not void for failure to conform to statutory requirements

because it fell within the prescribed statutory range for first degree murder.

¶ 26 In contrast, a voidable judgment is a judgment "entered erroneously by a court having jurisdiction and is not subject to collateral attack." *Davis*, 156 Ill. 2d at 155-56, 619 N.E.2d at 754. Generally, once a court has acquired jurisdiction over a case, a later error or irregularity will not divest the court of jurisdiction. *Davis*, 156 Ill. 2d at 156, 619 N.E.2d at 754. Therefore, a court will not lose jurisdiction over a case because it makes a mistake in determining the law, the facts, or both. *Davis*, 156 Ill. 2d at 156, 619 N.E.2d at 754.

¶ 27 Defendant's sentence was not void because the trial court had jurisdiction in this case and the erroneous conviction did not divest the court of its jurisdiction. Therefore, the court correctly denied defendant's *pro se* petition for relief from judgment filed more than 17 years after sentencing.

¶ 28 B. Remand for Resentencing

¶ 29 Next, OSAD argues remand for resentencing is unnecessary because the record indicates the trial court would have imposed the same sentence regardless of the erroneous conviction. We agree.

¶ 30 A vacated conviction does not require remand for a new sentencing hearing when the record does not indicate the vacated conviction "had any bearing on the remaining sentence." *People v. Lee*, 376 Ill. App. 3d 951, 957, 876 N.E.2d 671, 677 (2007). However, if it is not clear from the record whether the sentence was predicated on the erroneous conviction, the matter should be remanded for resentencing on the remaining conviction. *People v. Fields*, 199 Ill. App. 3d 888, 902, 557 N.E.2d 629, 638 (1990).

¶ 31 In this case, defendant was convicted of two counts of first degree murder and

