

NOTICE

Decision filed 06/15/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-09-0544

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff-Appellee,)

v.)

BRETT A. COLE,)

Defendant-Appellant.)

Appeal from the
Circuit Court of
St. Clair County.

No. 07-CF-783

Honorable
John Baricevic,
Judge, presiding.

JUSTICE SPOMER delivered the judgment of the court.
Presiding Justice Chapman and Justice Welch concurred in the judgment.

RULE 23 ORDER

Held: Where the indictment contains all the required elements of the statute concerning unlawful possession of a stolen motor vehicle, the lack of a named owner of the vehicle at issue does not render the indictment defective and the circuit court's judgment is affirmed.

The defendant, Brett A. Cole, appeals the circuit court's denial of his motion to reconsider his sentence. He prays that this court will release him from his imprisonment. For the following reasons, we affirm the circuit court's judgment.

BACKGROUND

The defendant was charged and convicted of unlawful possession of a stolen vehicle. In a previous appeal, the procedural facts were set out as follows:

"On November 1, 2007, counsel for the defendant filed a posttrial motion requesting that the trial court enter an order setting aside the jury's verdict and enter an order for a new trial. Counsel also filed an amended posttrial motion on December 19, 2007.

On December 19, 2007, the date set for sentencing, the trial court denied

counsel's posttrial motions and sentenced the defendant to nine years in the Department of Corrections. On December 28, 2007, counsel for the defendant filed a successive posttrial motion entitled 'Motion to Reconsider.' This filing asked the court to 'reconsider its denial of defendant's post[]trial motion,' but it also asked the court to 'reconsider its sentence in regard to the defendant.' Thereafter, on January 8, 2008, the defendant filed his own *pro se* successive posttrial motion, alleging the ineffective assistance of counsel. On January 28, 2008, the defendant filed yet another *pro se* motion. On February 28, 2008, the defendant filed a *pro se* 'Motion for Arrest of Judgment.' In view of the defendant's claim of ineffective assistance of counsel, the trial court appointed new counsel for the defendant to handle the motion to reconsider sentence. All matters came on for a hearing on March 28, 2008, at which time the trial court took the defendant's request for a modification of his sentence under advisement. Later that day the trial judge entered a written order denying the defendant's request for a modification of his sentence. In addition the court also found that the defendant's trial counsel was not ineffective, and the court denied the defendant's successive posttrial motions for a new trial. It does not appear that the defendant was notified of the entry of this order.

On September 23, 2008, the defendant filed a *pro se* motion entitled 'Reamended Post Trial Motion/Rehearing.' In this filing, the defendant asked the trial court for a 'rehearing of the defendant's first amended post[]trial motion,' on the grounds of the ineffectiveness of the counsel who was appointed to replace the defendant's original counsel (which he also had argued was ineffective). The trial court denied this motion the date it was filed (September 23, 2008), stating in a written order as follows:

'Defendant asks for a rehearing of a post[]trial motion first filed on 11-1-07

and denied on 3-28-08. There is nothing contained in the pro se filing of 9-23-08 that suggests that but for the allegations of error that [*sic*] the outcome of the trial would have been different. This motion is denied and the order of 3-28-08 remains in effect.'

The circuit clerk of St. Clair County sent the defendant a 'Notice to Petitioner of Adverse Judgment' on September 24, 2008, notifying the defendant of the court's ruling and advising the defendant of the necessity of filing a notice of appeal within 30 days to preserve his right to appeal. On October 21, 2008, the defendant filed a three-page handwritten motion seeking an additional 30 days to file his notice of appeal. On October 22, 2008, the trial judge denied the defendant's motion, stating that the defendant's motion for an extension to file his notice of appeal 'is not within the jurisdiction of this court.' On October 31, 2008, the defendant filed a *pro se* notice of appeal." *People v. Cole*, No. 5-08-0567, order at 2-3 (June 18, 2009) (unpublished order under Supreme Court Rule 23 (eff. May 30, 2008)).

The reviewing court remanded the cause with directions to admonish the defendant of his appeal rights in accordance with Supreme Court Rule 605(a) (eff. Oct. 1, 2001). On September 8, 2009, a hearing was held and the circuit court admonished the defendant of his appeal rights. On September 15, 2009, the defendant, through counsel, filed a motion to reconsider the sentence. On September 30, 2009, a hearing was held on the motion to reconsider. During the hearing, the circuit court denied the defendant's motion to reconsider and advised the defendant that his posttrial motion of June 10, 2009, was being recharacterized as a postconviction petition. The court also instructed the defendant's counsel to prepare a notice of appeal for the defendant at his request.

On October 8, 2009, the defendant filed a timely notice of appeal. The Office of the

State Appellate Defender (OSAD) was appointed as counsel. However, on the motion of the defendant, OSAD has been discharged and the defendant has been allowed to proceed *pro se*.

ANALYSIS

On appeal, the defendant argues that his conviction is void because the indictment was defective. He argues that the name of the owner of the vehicle at issue was not included in the indictment and that it was required. The defendant also argues that his trial counsel was ineffective for failing to inspect the indictment and for failing to object to the defective charging instrument. He prays that this court will deem the indictment defective and release him from prison immediately.

In response, the State argues that the indictment must simply present the essential elements of the offense, and it argues that the identity of the owner of the stolen vehicle is not an essential element. Accordingly, the State argues that the owner is not required to be listed in the indictment and that, thus, the indictment was not defective.

First, we note that the defendant did not raise this argument in the proceedings in the circuit court. However, a void judgment may be attacked at any time, either directly or collaterally, and thus, the issue can be raised for the first time on appeal. *People v. Thompson*, 209 Ill. 2d 19, 25 (2004).

The defendant's arguments stem from the charging instrument. "When an indictment or information is attacked for the first time on appeal, it is sufficient that the indictment or information 'apprised the accused of the precise offense charged with sufficient specificity to prepare his defense and allow pleading a resulting conviction as a bar to future prosecution arising out of the same conduct.'" *People v. Thingvold*, 145 Ill. 2d 441, 448 (1991) (quoting *People v. Gilmore*, 63 Ill. 2d 23, 29 (1976)).

An indictment must contain the statutory provision, the nature and elements of the

offense, the date and county of the offense, and the name of the defendant. 725 ILCS 5/111-3(a) (West 2006). The defendant was charged with unlawful possession of a stolen vehicle under section 4-103(a)(1) of the Illinois Vehicle Code (Vehicle Code) (625 ILCS 5/4-103(a)(1) (West 2006)). The elements of this charge are as follows:

"A person not entitled to the possession of a vehicle or essential part of a vehicle to receive, possess, conceal, sell, dispose, or transfer it, knowing it to have been stolen or converted; additionally the General Assembly finds that the acquisition and disposition of vehicles and their essential parts are strictly controlled by law and that such acquisitions and dispositions are reflected by documents of title, uniform invoices, rental contracts, leasing agreements and bills of sale. It may be inferred, therefore that a person exercising exclusive unexplained possession over a stolen or converted vehicle or an essential part of a stolen or converted vehicle has knowledge that such vehicle or essential part is stolen or converted, regardless of whether the date on which such vehicle or essential part was stolen is recent or remote[.]" *Id.*

In the instant case, the record shows that the indictment describes the statutory provision, the date and county of the offense, and the name of the defendant. Moreover, it also describes the nature of the offense and the elements of the offense as listed in section of 4-103 of the Vehicle Code. The defendant is correct that the indictment does not list the owner of the vehicle at issue. However, identifying the owner of the stolen vehicle is not required by the statutory provision at hand. We conclude that all the statutorily required elements were properly included in the indictment, and the lack the name of the owner was not fatal to the charging instrument. Thus, the charging instrument was not defective and the judgment is not void.

Moreover, since the charging instrument was not defective, we find the defendant's arguments that counsel should have objected to the indictment because of its defectiveness

to be without merit, and we will not address them.

CONCLUSION

For the foregoing reasons, the circuit court's judgment, including the denial of the defendant's motion to reconsider, is affirmed.

Affirmed.