

No. 1-10-1109

**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  
FIRST JUDICIAL DISTRICT

---

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 95 CR 12124
	)	
DWAYNE BRUCE,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

---

JUSTICE KARNEZIS delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

**ORDER**

¶ 1 *Held:* The 40-year extended-term portion of defendant's 100-year sentence for murder was not statutorily authorized and is therefore void when none of the aggravating factors listed in section 5-5-3.2(b) of the Unified Code of Corrections (730 ILCS 5/5-5-3.2(b) (West 1994)) were present in this case.

¶ 2 Defendant Dwayne Bruce appeals from the circuit court's dismissal of his *pro se* petition for relief from judgment filed pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). The primary issue in this appeal is whether the 40-year extended-term portion of the 100-year sentence imposed upon defendant's 1997 murder conviction was

void. For the reasons that follow, we find that the extended-term portion of the sentence was not authorized by statute, and, thus, is void.

¶ 3 After a jury trial in 1997, defendant was convicted of first degree murder and armed robbery.

¶ 4 The applicable sentencing statutes provided that the sentencing range for a first degree murder conviction was between 20 and 60 years in prison (730 ILCS 5/5-8-1(a)(1)(a) (West 1994)). An extended-term sentence ranged between 60 and 100 years in prison (730 ILCS 5/5-8-2(a)(1) (West 1994)), and was statutorily authorized when certain aggravating factors were present. Based on the record before us, the aggravating factor which led the sentencing court to extend the term of imprisonment involved defendant's prior criminal history. An extended term was authorized when the defendant was convicted of first degree murder after having previously been convicted in Illinois of any offense listed in section 5-5-3(c)(2) of the Unified Code of Corrections (the Code) (730 ILCS 5/5-5-3(c)(2) (West 1994)), when such a conviction occurred within 10 years of the previous conviction, excluding time spent in custody, and such charges were separately brought and tried and arose out of a different series of acts. See 730 ILCS 5/5-5-3.2(b)(7) (West 1994).

¶ 5 At the sentencing hearing, the trial court initially determined that defendant was eligible for the death penalty because the victim was killed during the course of an armed robbery. The State then presented several witnesses in aggravation and highlighted the evidence of defendant's prior criminal history which included a juvenile adjudication of delinquency for attempted murder and convictions for unlawful use or possession of a weapon and possession of a controlled substance with intent to deliver. The State also argued that defendant's behavior in this case was brutal and heinous indicative of wanton cruelty. See 730 ILCS 5/5-5-3.2(b)(2) (West 1994).

¶ 6 Ultimately, the trial court stated that after seeing the evidence presented in aggravation and mitigation at sentencing and reviewing the statutory factors in aggravation and mitigation, the death penalty would not be imposed. The court then stated that pursuant to "730 Illinois Law Compiled Statute 5-5.3.2(B)(2), Paragraph 7, that [defendant] qualified for an extended term." See 730 ILCS 5/5-5-3.2(b)(2), (7) (West 1994). The court sentenced defendant to an extended-term sentence of 100 years in prison for the murder conviction and to a consecutive term of 6 years for the armed robbery conviction.

¶ 7 Defense counsel immediately requested that the trial court reconsider the sentence. The State responded that an extended-term sentence was appropriate because of defendant's "brutal and heinous state of mind" as well as "all the other things" that were stated during the hearing. Defendant counsel disagreed, stating that defendant's "brutal and heinous state of mind" was not the issue. The trial court stated that it had not found defendant eligible for an extended sentence under "that section," and denied the motion.

¶ 8 Defendant then appealed contending, *inter alia*, that the trial court abused its discretion when it imposed the maximum extended-term sentence for the murder conviction. The court affirmed defendant's convictions and sentence, finding that the trial court did not abuse its discretion by sentencing defendant to an extended-term of 100 years in prison based upon defendant's criminal record which included "an attempted murder conviction as a juvenile." *People v. Bruce*, 299 Ill. App. 3d 61, 68 (1998).<sup>1</sup>

---

<sup>1</sup> Although the court stated that the trial court imposed an extended-term sentence of 100 years' incarceration pursuant to section 5-5-3.2(b)(1) of the Unified Code of Corrections (730 ILCS 5/5-5-3.2(b)(1) (West 1994)), the record reveals that the trial court found pursuant to "730 Illinois Law Compiled Statute 5-5.3.2(B)(2), Paragraph 7, that [defendant] qualified for an extended term" sentence.

¶ 9 Defendant next filed an unsuccessful collateral attack on his conviction. See *People v. Bruce*, No. 1-02-3361 (2004) (unpublished order under Supreme Court Rule 23). In 2009, defendant filed a *pro se* motion for leave to file a successive postconviction petition alleging, among other claims, that he was actually innocent. The circuit court denied him leave to file the successive *pro se* petition. Defendant's appeal from that order is pending before this court. See *People v. Bruce*, No. 1-09-3401.

¶ 10 In January 2010, defendant filed the instant *pro se* section 2-1401 petition alleging that the trial court erred by sentencing him to an extended-term sentence when he did not have the requisite prior convictions making him eligible for such a sentence. He argued, relying on *People v. Rankin*, 297 Ill. App. 3d 818 (1998), that his juvenile adjudication was not a "conviction," and, consequently, could not render him eligible for an extended-term sentence pursuant to section 5-5-3.2(b)(7) of the Code. 730 ILCS 5/5-5-3.2(b)(7) (West 1994). The circuit court denied defendant relief.

¶ 11 On appeal defendant contends that the extended-term portion of his 100-year sentence is void because his prior convictions did not make him eligible for an extended-term sentence pursuant to section 5-5-3.2(b)(7) of the Code (730 ILCS 5/5-5-3.2(b)(7) (West 1994)).

¶ 12 Section 2-1401 of the Code of Civil Procedure provides a mechanism by which final judgments and orders may be challenged more than 30 days after their entry (735 ILCS 5/2-1401 (West 2010)), and is intended to correct errors of fact unknown to a defendant and the court at the time of the judgment which would have prevented its entry had they been known (*People v. Pinkonsly*, 207 Ill. 2d 555, 565-66 (2003)). The petition must be filed no later than two years after the judgment, unless the defendant is under legal disability or duress, or the ground for relief has been fraudulently concealed. 735 ILCS 5/2-1401(c) (West 2010); *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). A request for relief from a void judgment, however, may be raised after

this limitations period. 735 ILCS 5/2–1401(f) (West 2010). When the trial court enters either a judgment on the pleadings or a dismissal, that order is subject to *de novo* review. *Vincent*, 226 Ill. 2d at 18.

¶ 13 Before reaching the merits of defendant's claim, we first address the State's procedural challenges. Initially, the State contends that defendant has forfeited review of this claim because defendant filed the instant *pro se* section 2-1401 petition 10 years after the statutory limitations period. However, here, defendant is challenging the extended-term portion of his sentence as void. A sentence not authorized by statute is void and be attacked at any time. *People v. Hillier*, 237 Ill. 2d 539, 546-47 (2010); see also *People v. Thompson*, 209 Ill. 2d 19, 24-25 (2004) (when a court does not have the statutory authority to impose an extended-term sentence, the extended-term portion of the sentence is void).

¶ 14 The State next contends that because defendant challenged his sentence on direct appeal, his claim is barred by the doctrine of *res judicata* when the court on direct appeal determined that defendant's sentence was not an abuse of the trial court's discretion. In other words, defendant cannot avoid the effects of *res judicata* by rephrasing his challenge to his sentence.

¶ 15 Defendant concedes that he challenged his sentence on direct appeal. However, he emphasizes that he did not challenge the extended-term portion of the sentence as void; rather, he argued that the trial court abused its discretion when it imposed the maximum extended-term sentence. Defendant contends that the doctrine of *res judicata* is not applicable when a judgment is void. See *Miller v. Balfour*, 303 Ill. App. 3d 209, 215 (1999). He further contends, relying on *People v. Harper*, 345 Ill. App. 3d 276, 285 (2003), that *res judicata* does not bar the relitigation of a claim when fundamental fairness requires that the claim be relitigated. See *Harper*, 345 Ill. App. 3d at 285 (determining that sentencing a defendant to a term of imprisonment that is longer

than what is statutorily permitted is fundamentally unfair and *res judicata* would not bar a defendant from challenging that void sentence).

¶ 16 Here, this court will address the merits of defendant's claim because defendant has not previously challenged the trial court's authority to impose an extended-term sentence under section 5-5-3.2(b) of the Code (730 ILCS 5/5-5-3.2(b) (West 1994)), and because a void order may be attacked at any time (*Hillier*, 237 Ill. 2d at 546).

¶ 17 A sentence that does not conform to a statutory requirement is void. *People v. Arna*, 168 Ill. 2d 107, 113 (1995); see also *In re M.W.*, 232 Ill. 2d 408, 422 (2009) ("when the legislature creates a justiciable matter, the court only has that authority conferred upon it by the statute and \*\*\* the court acts in excess of its authority by taking any action that exceeds its statutory authority").

¶ 18 The record reveals that the trial court sentenced defendant to an extended-term sentence pursuant to section "5-5.3.2(B)(2), Paragraph 7" of the Code.

¶ 19 At the time of defendant's sentencing, an extended-term sentence was statutorily authorized pursuant to section 5-5-3.2(b) when one of eight factors was present. These factors included, *inter alia*, when the offender was convicted of a felony and the court found that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty (730 ILCS 5/5-5-3.2(b)(2) (West 1994)), and when the offender was convicted first degree murder, after previously having been convicted in Illinois of any offense listed in section 5-5-3(c)(2) of the Code (730 ILCS 5/5-5-3(c)(2) (West 1994)), within 10 years after the previous conviction, excluding time spent in custody, and such charges were separately brought and tried and arose out of a different series of acts (730 ILCS 5/5-5-3.2(b)(7) (West 1994)).

¶ 20 Defendant contends that the trial court intended to sentence him pursuant to section 5-5-3.2(b)(7) of the Code (730 ILCS 5/5-5-3.2(b)(7) (West 1994)), because section 5-5-3.2(b)(2) of

the Code does not have subparagraphs. See 730 ILCS 5/5-5-3.2(b)(2) (West 1994). In further support of his position, defendant highlights that the court stated it had not imposed the extended-term sentence pursuant to section 5-5-3.2(b)(2) of the Code (730 ILCS 5/5-5-3.2(b)(2) (West 1994)).

¶ 21 Defendant contends, relying on *People v. Rankin*, 297 Ill. App. 3d 818, 824-25 (1998), that his juvenile adjudication for attempted murder is not a "conviction" qualifying him for an extended-term sentence because a juvenile adjudication is not a "conviction" pursuant to section 5-5-3.2(b)(7) of the Code. See *Rankin*, 297 Ill. App. 3d at 824 (because the Code defined a "conviction" as "a judgment of conviction or sentence entered upon a plea of guilty or upon a verdict or finding of guilty of an offense, rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury" (see 730 ILCS 5/5-1-5 (West 1994)), and this definition did not include juvenile adjudications, a juvenile adjudication could not serve as the previous "conviction" necessary to impose an extended-term sentence under section 5-5-3.2(b)); see also *People v. Taylor*, 221 Ill. 2d 157, 164 (2006) (noting that no Illinois case had held that a juvenile adjudication constituted a criminal conviction and citing *In re W. W.*, 97 Ill. 2d 53, 57 (1983), and *Rankin*, 297 Ill. App. 3d at 824, as specifically holding that juvenile adjudications did not constitute convictions). The State makes no argument with regard to *Rankin's* holding.

¶ 22 Similarly, here, as defendant's juvenile adjudication for attempted murder is not a "conviction" as defined by the Code, it cannot serve as the previous conviction rendering defendant eligible for an extended-term sentence under section 5-5-3.2(b)(7) of the Code. See *Rankin*, 297 Ill. App. 3d at 824-25

¶ 23 Defendant admits that his criminal history at the time of sentencing also included a conviction for possession of a controlled substance with intent to deliver for which he was

sentenced to 30 months of probation and a conviction for unlawful use or possession of a weapon by a felon. However, he contends that neither of these convictions is a qualifying "conviction" as defined by section 5-5-3.2(b)(7) of the Code.

¶ 24 Pursuant to section 5-5-3.2(b)(7), an extended-term sentence is authorized when the defendant is convicted of first degree murder after having previously convicted in Illinois of any offense listed in section 5-5-3(c)(2) of the Code (730 ILCS 5/5-5-3(c)(2) (West 1994)), when such a conviction occurred within 10 years of the previous conviction, excluding time spent in custody, and such charges are separately brought and tried and arise out of a different series of acts. 730 ILCS 5/5-5-3.2(b)(7) (West 1994). A conviction for a violation of section (c)(2) of section 401 of the Illinois Controlled Substances Act (720 ILCS 570/401(c)(2) (West 1994)), "which relates to more than 5 grams of a substance containing cocaine or an analog of," is a prior conviction qualifying a defendant for an extended-term sentence. See 730 ILCS 5/5-5-3(c)(2)(D) (West 1994). Although defendant was convicted of the possession of a controlled substance with intent to deliver, the fact that he was sentenced to probation indicates that he possessed less than five grams of cocaine. See Ill. Rev. Stat. 1989 ch. 38, par. 1005-5-3(c)(2). Accordingly, as defendant was sentenced to probation for possession of less than five grams of cocaine, and probation "shall not be imposed" for any of the offenses listed in section 5-5-3(c)(2) of the Code (see 730 ILCS 5/5-5-3(c)(2) (West 1994)), this conviction cannot serve as the prior conviction necessary to render defendant eligible for an extended-term sentence under section 5-5-3.2(b)(7) of the Code. Defendant's other conviction, for the unlawful use or possession of a weapon by a felon, is not one of the offenses listed in section 5-5-3(c)(2) of the Code (see 730 ILCS 5/5-5-3(c)(2) (West 1994)). Therefore, as neither defendant's juvenile adjudication nor his other convictions were previous "convictions" as defined by section 5-5-3.2(b)(7), the extended-term portion of his sentence was not authorized pursuant to that section.

¶ 25 The State contends that even if defendant was not eligible for an extended-term sentence under section 5-5-3.2(b)(7), the trial court could have imposed an extended-term sentence pursuant to section 5-5-3.2(b)(2) of the Code based upon defendant's brutal and heinous behavior. See 730 ILCS 5/5-5-3.2(b)(2) (West 1994). However, the record reveals that the trial court did not make any findings on the record as to the brutal or heinous nature of the crime. In fact, when the State argued that an extended-term sentence was appropriate because of defendant's "brutal and heinous state of mind," the trial court specifically stated that it had not found defendant eligible for an extended-term sentence under "that section."

¶ 26 Additionally, none of the remaining six factors listed in section 5-5-3.2(b) that would support the imposition of an extended-term sentence are present in this case. See 730 ILCS 5/5-5-3.2(b) (West 1994). First, defendant had not been previously convicted of the same or similar class felony or greater felony within 10 years of his 1997 conviction for murder. See 730 ILCS 5/5-5-3.2(b)(1) (West 1994). Second, defendant was not convicted of voluntary manslaughter, second degree murder, involuntary manslaughter or reckless homicide in which more than one individual died. See 730 ILCS 5/5-5-3.2(b)(3) (West 1994). Third, the victim was not less than 12 years old, older than 60 years old, or physically handicapped at the time of the crime. See 730 ILCS 5/5-5-3.2(b)(4) (West 1994). Fourth, defendant was not convicted of either aggravated criminal sexual assault or criminal sexual assault. See 730 ILCS 5/5-5-3.2(b)(5) (West 1994). Fifth, the offense did not involve specific misconduct committed as part of a rite or ceremony. See 730 ILCS 5/5-5-3.2(b)(6) (West 1994). Finally, the trial court did not find that the murder was committed by several individuals of which defendant was the organizer. See 730 ILCS 5/5-5-3.2(b)(8) (West 1994).

¶ 27 Because the record reveals that none of the eight factors which would support the imposition of an extended-term sentence are present in this case the trial court exceeded its

statutory authority by sentencing defendant to an extended-term of imprisonment when the court was statutorily authorized to impose an extended-term sentence only when one of those factors was applicable. See *M.W.*, 232 Ill. 2d at 422. As the trial court acted beyond its statutory authority, the 40-year extended-term portion of defendant's sentence was unauthorized by statute and, thus, is void. *Arna*, 168 Ill. 2d at 113. Accordingly, this court vacates the extended-term portion of defendant's sentence and reduces his sentence to the maximum nonextended term of 60 years' imprisonment. See *Thompson*, 209 Ill. 2d at 27-29 (a sentence exceeding the maximum term authorized by statute is void and subject to correction by a reviewing court's reduction of the sentence to the applicable statutory maximum).

¶ 28 The circuit court erred by dismissing defendant's *pro se* section 2-1401 petition because the 40-year extended-term portion of defendant's sentence for murder is void. Pursuant to Supreme Court Rule 615(b)(4) (eff. Aug. 27, 1999), we modify defendant's sentence to the applicable statutory maximum of 60 years in prison and order the clerk of the circuit court to issue a corrected mittimus reflecting that sentence.

¶ 29 Reversed; judgment modified; mittimus corrected.