

No. 1-10-1632

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 Cook County.
Respondent-Appellee,)	
)	
v.)	No. 99 CR 05180
)	
JAMES DOLIS,)	Honorable
)	Joseph G. Kazmierski,
Petitioner-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Karnezis and Rochford concurred in the judgment.

ORDER

- ¶ 1 *Held:* The dismissal of defendant's petition for relief from judgment is reversed, and his second conviction and sentence for home invasion is vacated.
- ¶ 2 Defendant, James Dolis, appeals from the dismissal of his petition for post-judgment relief pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), which challenged his conviction on two counts of home invasion. For the reasons that follow, we reverse the decision of the trial court and vacate one home invasion conviction and corresponding sentence.
- ¶ 3 Defendant was charged with multiple counts of home invasion based on his unauthorized

No. 1-10-1632

entry into a dwelling when he knew that Ellen Stefanits and Glenn Podeszwa were present. He was also charged with the aggravated battery of Podeszwa. Following a jury trial, defendant was found guilty on two counts of home invasion and one count of aggravated battery. At sentencing, the trial court ordered defendant to serve concurrent terms of 30 years for the home invasion convictions, along with a concurrent term of five years for aggravated battery.

¶ 4 This court affirmed defendant's convictions on direct appeal (*People v. Dolis*, No. 1-00-0759 (2002) (unpublished order under Supreme Court Rule 23)), as well as the denial of his combined post-conviction petition and petition for post-judgment relief (*People v. Dolis*, No. 1-05-0988 (2006) (unpublished order under Supreme Court Rule 23)). Defendant then filed another section 2-1401 petition challenging his conviction for aggravated battery as a lesser included offense of home invasion, which the trial court dismissed. In his motion to reconsider, defendant argued for the first time that he could not be convicted of two counts of home invasion based upon one entry. The trial court denied the motion, and defendant has appealed.

¶ 5 Relying on *People v. Cole*, 172 Ill. 2d 85, 665 N.E.2d 1275 (1996), defendant argues that he was improperly convicted of two counts of home invasion based upon a single unauthorized entry. In particular, he asserts that his multiple home invasion convictions violate the one act, one crime rule and exceed the trial court's authority. According to defendant, one of his home invasion convictions must be vacated. In response, the State argues that defendant's appeal should be dismissed because he was convicted and sentenced on only one count of home invasion. We reject the State's contention and agree with defendant.

¶ 6 At the sentencing hearing, the trial judge stated, in relevant part, as follows:

"Based on all these factors, I'm going to sentence you to concurrent sentences on each of the counts of home invasion and – with a concurrent sentence on the charge of aggravated battery. *** On the counts of home invasion, I'm going to sentence you to a term of thirty years [in the] Illinois Department of Corrections to run concurrent with each other. On the count of aggravated battery, I'm going to sentence you to a term of five years [in the] Illinois Department of Corrections."

¶ 7 In urging us to affirm the dismissal of defendant's section 2-1401 petition, the State argues that, although the trial judge may have been inarticulate, his comments indicate that he sentenced defendant to one 30-year sentence for home invasion, not two. More specifically, the State focuses on the trial judge's statement that he was sentencing defendant to "a term of thirty years" for the home invasion convictions, arguing that the trial judge would have said "terms" if he had intended to sentence defendant on both counts. We find, however, that the plain language of the trial court's statements cannot be reconciled with the State's assertion.

¶ 8 Defendant clearly was given concurrent sentences on the two home invasion convictions, as demonstrated by the court's use of the phrase "each of the counts of home invasion." While the trial judge did refer to "a term," as the State points out, that reference was immediately followed by the phrase "to run concurrent with each other." The plain meaning of the trial court's statement is that defendant was being sentenced to concurrent terms of 30 years on each of the two counts of home invasion. Thereafter, the court imposed a separate, concurrent sentence of five years for aggravated battery.

¶ 9 The State also argues that the trial court's decision should be affirmed because the mittimus

No. 1-10-1632

and the records of the Illinois Department of Corrections indicate that defendant was convicted of only one count of home invasion and is serving one sentence of 30 years for that conviction. We disagree.

¶ 10 Where the court's written judgment conflicts with its oral pronouncement, "the oral pronouncement controls." *People v. Lewis*, 379 Ill. App. 3d 829, 837, 884 N.E.2d 823 (2008); see also *People v. Smith*, 242 Ill. App. 3d 399, 402, 609 N.E.2d 1004 (1993). A written order merely serves as evidence of the court's judgment. *Lewis*, 379 Ill. App. 3d at 837. Furthermore, it is a long-standing rule in Illinois, that the mittimus is not part of the common law record. *People v. Quintana*, 332 Ill. App. 3d 96, 110, 772 N.E.2d 833 (2002). Based on the record presented, we find that defendant was convicted and sentenced on two counts of home invasion.

¶ 11 The State next argues that, because defendant's second conviction and sentence for home invasion was merely voidable, he has forfeited his right to challenge the validity of his multiple convictions because he did not do so in his direct appeal, his post-conviction petition, or his initial section 2-1401 petition. Again, we disagree with the State's argument.

¶ 12 A sentence that is voidable is not subject to collateral attack. *People v. Davis*, 156 Ill.2d 149, 155-56, 619 N.E.2d 750 (1993). Conversely, a sentence that is void may be attacked at any time, either directly or collaterally. *People v. Wade*, 116 Ill.2d 1, 5, 506 N.E.2d 954 (1987). The question of whether a sentence is void, as opposed to voidable, is a question of jurisdiction. *Davis*, 156 Ill. 2d at 155. "A judgment is void when entered by a court without jurisdiction of the parties or the subject matter or that lacks the inherent power to make or enter the particular order involved. [Citations.]" *Wade*, 116 Ill. 2d at 5.

No. 1-10-1632

¶ 13 This case involves the offense of home invasion as defined in section 12-11(a) of the Criminal Code of 1961 (720 ILCS 5/12-11(a) (West 1992)). In *Cole*, the Illinois Supreme Court interpreted the home invasion statute and found that its plain language demonstrated that the legislature intended "that a single entry will support only a single conviction, regardless of the number of occupants." *Cole*, 172 Ill. 2d at 102. Consequently, multiple convictions based upon a single entry exceed the limitations of the home invasion statute and violate the one act, one crime rule. *People v. Hicks*, 181 Ill. 2d 541, 549, 693 N.E.2d 373 (1998).

¶ 14 The supreme court has held that a sentence, or portion thereof, which is not authorized by statute is void. *People v. Thompson*, 209 Ill. 2d 19, 23, 805 N.E.2d 1200 (2004). "A trial court, upon determination of guilt, has no authority to assess a fine or impose a sentence other than that provided by statute." *Wade*, 116 Ill. 2d at 6. Because the home invasion statute allows only one conviction per entry, and because a court has no authority to impose a sentence not authorized by statute, defendant's second conviction for home invasion is void and must be vacated. *See Hicks*, 181 Ill. 2d at 544 (holding that because a defendant can only be convicted of one count of home invasion for one entry, the surplus convictions "must be vacated"); see also *People v. Morgan*, 385 Ill. App. 3d 771, 779-81, 896 N.E.2d 417 (2008) (McDade, J., specially concurring). Therefore, although defendant will serve the same amount of time in prison, his second conviction for home invasion must be vacated "because of [the] potential for adverse collateral consequences." *See Morgan*, 385 Ill. App. 3d at 775.

¶ 15 Based upon the record presented, we find that defendant was convicted of two counts of home invasion based upon one entry, that the trial court exceeded its authority when it entered

No. 1-10-1632

multiple convictions for that offense, and that the surplus conviction for home invasion is void. We, therefore, reverse the dismissal of defendant's section 2-1401 petition and vacate one of his convictions of home invasion, pursuant to Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994). *See People v. Cunningham*, 365 Ill. App. 3d 991, 994, 851 N.E.2d 653 (2006).

¶ 16 Reversed; one conviction and sentence for home invasion vacated.