

No. 1-10-2316

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. 08 CR 14281
)	
EVERETTE SILAS,)	Honorable
)	Thomas M. Tucker,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice R.E. Gordon and Justice Garcia concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where the trial court's participation in the plea negotiations did not render defendant's plea void, we affirm its decision summarily dismissing defendant's petition under the Post-Conviction Hearing Act.
- ¶ 2 Defendant Everette Silas appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010). On appeal, defendant contends that his non-negotiated guilty pleas are void because the trial court, not the State, offered a proposed sentence in exchange for the plea. We affirm.
- ¶ 3 Defendant and his codefendant Martez Myles, who is not a party to this appeal, were charged with armed robbery and aggravated unlawful restraint based on events occurring on June

24, 2008. On July 7, 2009, the trial court advised defendant that defense counsel and the State were seeking a conference pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 1997). The court explained that at the conference, it would hear the facts of the case and defendant's criminal background, and that an agreement might or might not be reached that is acceptable to defendant. The court then stated,

"In the event we do not [reach an agreement], you would not have a right to have another judge preside at your trial, be it a bench trial or jury trial for the reason I have participated in the conference. Do you understand, and you want me to participate; is that correct?"

Defendant responded "yes."

¶ 4 The facts of the case were revealed at the conference, showing that on June 24, defendant and his codefendant entered a hotel wearing hats and hoodies. Defendant, who was carrying a hammer, jumped over the hotel check-in counter and stole \$500 from the cash register. Defendant was subsequently arrested and identified in a lineup as one of the offenders. Defendant's criminal history showed that he was previously convicted of aggravated robbery, armed robbery and armed robbery as a juvenile. After defendant's criminal history was revealed, the following conversation regarding sentencing occurred between the trial court, the assistant State's Attorney, and the assistant public defender:

"THE COURT: Well, I think six is not appropriate. Eight I'll give him.

MR. WARNER [assistant Public Defender]: Would it make a difference if that was not an armed robbery, but was an aggravated robbery? Because that was my understanding ***.

THE COURT: [Mr. Warner], it would still be a Class X felony.

MR. WARNER: It still would.

THE COURT: And I don't know that he's entitled to the minimum

sentence, given what they did ***.

MR. WARNER: Right. Understand. But there's a number between the minimum and eight.

THE COURT: Seven is what you're saying. ***

MS. BERG [assistant State's Attorney]: With two aggs [*sic*] and/or armed[sic] in his background.

THE COURT: I don't think eight's a bad offer. I really don't.

MS. BERG: We'd be asking for –

THE COURT: Tell me anyway

MS. BERG: Judge, he's got two separate case numbers in the court file ***. One's an armed robbery, he received six and a half years IDOC. And then four and a half years on another count, but it's not even another count, it's another case.

THE COURT: It's a separate case.

MS. BERG: Two separate cases.

MR. WARNER: Well, that's what I'm asking. I was under the impression that they were both agg [*sic*] robberies. Would that make a difference in your offer?

THE COURT: Those two?

MR. WARNER: Whether the armed robbery that she's talking about -- whether that was aggravated.

THE COURT: It was separate cases, and -- no. I think eight's fair. I really do.

MR. WARNER: Okay.

THE COURT: I'm sorry. But I think it's fair, [Mr. Warner]. I don't think

that's -- no. Because he keeps doing it -- no. No. No. Those are crimes of violence, no."

¶ 5 After the case was passed, defendant was advised of the charges against him and the sentencing ranges he faced. The court admonished defendant of the rights he would waive by pleading guilty, accepted his plea and found him guilty of armed robbery and aggravated unlawful restraint. Prior to sentencing, defendant waived his right to have a presentence investigation report prepared on his behalf. The court then sentenced him to respective, concurrent terms of eight and five years' imprisonment for armed robbery and aggravated unlawful restraint. After imposing sentence, the trial court admonished defendant of his postplea rights under Illinois Supreme Court Rule 605(b) (eff. Oct. 1, 2001), which governs non-negotiated pleas. Defendant also signed a written acknowledgment that he was advised of his Rule 605(b) rights by the court. Following that proceeding, defendant did not file a postplea motion or otherwise attempt to perfect an appeal.

¶ 6 On June 24, 2010, defendant filed a postconviction petition alleging that he was denied the benefit of his bargain through the imposition of a three-year period of mandatory supervised release (MSR), and that MSR as currently applied is unconstitutional. The circuit court summarily dismissed his petition on July 9, 2010.

¶ 7 We review *de novo* the summary dismissal of a postconviction petition. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 8 Defendant now claims, for the first time on appeal, that his guilty pleas are void because the record shows that his sentence was negotiated with the trial court rather than the State. Defendant claims the trial court improperly fashioned a sentence that it offered to him in exchange for pleading guilty in violation of Supreme Court Rule 402 (eff. July 1, 1997).

¶ 9 The State correctly asserts that defendant forfeited this issue on appeal by failing to include it in his postconviction petition. The supreme court has repeatedly stated that the

question on appeal from an order dismissing a postconviction petition is whether the allegations "in the petition," are sufficient to invoke relief under the Act. *People v. Jones*, 213 Ill. 2d 498, 505 (2004); see also *People v. Coleman*, 2011 IL App (1st) 091005, ¶ 16. A claim not raised in the original postconviction petition cannot be argued for the first time on appeal. *Jones*, 213 Ill. 2d at 505. As applied here, we find that defendant's claims are forfeited on appeal. *People v. Jones*, 211 Ill. 2d 140, 149-50 (2004).

¶ 10 To overcome forfeiture, defendant contends that the trial court engaged in conduct not authorized by any source in Illinois law. Defendant claims the judgment is void and a void judgment can be attacked at any time. Defendant's position fails because actually the trial court is authorized by Supreme Court Rule 402 to participate in plea discussions, and even a violation of Rule 402 does not render the plea void.

¶ 11 Under Rule 402, a trial court may not initiate plea negotiations. Ill. S. Ct. R. 402(d) (eff. July 1, 1997). However, the rule does contemplate the trial court's limited participation in negotiations. *Id.*; *People v. Smith*, 406 Ill. App. 3d 879, 888 (2010). To show that a plea was rendered involuntary due to the trial court's actions, a defendant must show facts that reasonably demonstrate that either the court departed from its judicial function and that its participation improperly influenced the defendant to plead guilty, or the defendant reasonably believed he could not receive an impartial trial and therefore had no choice but to accept the plea. *Id.*

¶ 12 Here, defendant has failed to show that the trial court's participation in the plea discussion was improper. There are no facts in the record that demonstrate that the court departed from its judicial function, or that its participation in the negotiations improperly influenced defendant to plead guilty. Instead, the record clearly establishes that defendant initiated the plea conference and agreed to the trial court's participation in the discussion.

¶ 13 Rule 402 does not prohibit the trial court from suggesting a sentence it would impose if defendant were to plead guilty, and we see nothing inherently coercive or improper about a court

doing so.¹ To the extent that defendant relies on *People v. Garibay*, 366 Ill. App. 3d 1103 (2006), we note that in *Garibay*, the court was determining whether the defendant had complied with Supreme Court Rule 604(d) (eff. July 1, 2006). *Id.* at 1106-07. Thus, we find *Garibay* to be inapposite to the case here.

¶ 14 We further reject defendant's contention that the pleas were involuntary because the trial court gave defense counsel the impression that, if defendant did not accept the court's offer, he could risk a longer sentence if convicted following a trial. Nothing in the trial court's statements suggest that defendant would receive a greater sentence as punishment for declining to plead guilty. In fact, defendant acknowledges this when he states in his opening brief that "the record does not reveal the discussion between defense counsel and [defendant] after the conference." Because the record lacks any indication by the trial court that it would sentence defendant to a harsher sentence if he decided to go to trial, defendant's argument to the contrary is unpersuasive.

¶ 15 Even if defendant were correct that the trial court's participation in the Rule 402 conference was improper, the judgment was not void. A judgment is void instead of voidable where the court entering the judgment either lacked jurisdiction over the parties or subject matter, or the court exceeded its statutory authority. *Smith*, 406 Ill. App. 3d at 887. A violation of Rule 402 does not render the plea void. *Id.* Specifically, this court has held "a violation of Rule 402, a procedural rule, does not defeat the trial court's jurisdiction to enter convictions based on a defendant's pleas and such a violation, even if constitutional in dimension, renders a conviction merely voidable." *Id.* Furthermore, contrary to defendant's assertion that "a trial court does not have the power to extend an offer of sentence in exchange for a guilty plea or to 'broker a plea

¹ We note that Rule 402 was recently amended, effective July 1, 2012. As amended, the rule explicitly states that "at the end of the conference, the judge may make a recommendation as to what an appropriate sentence would be" and "the defendant or the prosecutor is free to accept or reject the judge's recommendation." Ill. S. Ct. R. 402(d)(1) (eff. July 1, 2012).

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agreement' with the defendant," there is nothing in the language of Rule 402(d) that prohibits the trial court from suggesting a sentence during a properly commenced plea conference. Therefore, defendant's assertion is without merit.

¶ 16 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 17 Affirmed.