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No. 1-10-3199

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.)	
)	04 CR 3264 (01)
FREDERICK BAGLEY,)	
)	The Honorable
Defendant-Appellant.)	Edward Flood,
)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

ORDER

HELD: There was no merit to defendant's argument that he was acquitted of the charges of aggravated discharge of a firearm where the record revealed that the trial court unequivocally found him guilty of the charges but then sentenced him improperly to one combined sentence based on its erroneous finding that the aggravated discharge of a firearm convictions merged into a second-degree murder conviction. The merger was improper, as the convictions for aggravated discharge of a firearm were based on a separate victim. The ultimate issue in determining whether there was an acquittal is the court's finding as to guilt on the facts, and here the court unequivocally found defendant

guilty of the charges of aggravated discharge of a firearm. Despite the court's improper sentencing and judgment, there was no acquittal.

¶1

BACKGROUND

¶2

Defendant, Frederick Bagley, and Gregory Carr were indicted before a grand jury on February 4, 2004, as the result of a shooting which left one of the victims, Ernest Draine, dead. The other victim, Dejuan Houston, was not killed. The indictment charged Bagley with the following crimes which are relevant to this appeal: intentional or knowing first-degree murder of Ernest Draine with a firearm (count 1); strong-probability of death or great bodily harm first-degree murder of Ernest Draine (count 2); intentional or knowing first-degree murder of Ernest Draine by discharging a firearm (count 3); strong-probability of death or great bodily harm first-degree murder of Ernest Draine by discharging a firerarm (count 4); attempt first-degree murder of Dejuan Houston (count 5); aggravated discharge of a firearm in the direction of a vehicle Bagley knew or should have known to be occupied by Dejuan Houston (count 6); and aggravated discharge of a firearm in the direction of Dejuan Houston (count 7). The indictment also charged Bagley with four counts of aggravated unlawful use of a weapon (counts 8 through 11).

¶3

On December 15, 2006, after a bench trial, the court found Bagley guilty of second-degree murder of Ernest Draine instead of first-degree murder in counts 1, 2, 3 or 4, as the court found some provocation from the victim but also an unreasonable belief as to self-defense by Bagley. The court also found Bagley guilty of counts 6 and 7 for aggravated discharge of a firearm as to Dejuan Houston, and counts 8, 9, and 10 of aggravated unlawful use of a weapon. The court did not find Bagley guilty of attempt first-degree murder of Dejuan Houston in count 5, although there is no specific statement in the transcript of the court specifically finding him not

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guilty. There also was no finding as to count 11 for aggravated unlawful use of a weapon.

¶4 At sentencing, the State asked for the maximum 20-year sentence for the second-degree murder conviction, and stated that the second-degree murder conviction and the aggravated discharge of a firearm convictions required consecutive sentencing. However, the court found that the aggravated discharge of a firearm convictions merged into the second-degree murder conviction, despite the fact that the convictions were based on acts directed at different victims. The court sentenced Bagley to one term of 19 years' imprisonment.

¶5 Bagley appealed his convictions and sentence. In our unpublished order under Illinois Supreme Court Rule 23 (Ill. S. Ct. Rule 23 (eff. May 30, 2008)), we affirmed the convictions but remanded for the correct imposition of consecutive sentences, as mandatory consecutive sentences were required for the convictions. *People v. Bagley*, No. 1-07-0330 (1s Dist. Jan. 30, 2009). Bagley's petition for leave to appeal was denied. *People v. Bagley*, 233 Ill. 2d 566 (2009).

¶6 The case was remanded for resentencing. The court imposed consecutive terms of 12 years for the second-degree murder conviction and 7 years for aggravated discharge of a firearm. Bagley appeals.

¶7 ANALYSIS

¶8 Bagley argues that the trial court erred in following our instruction on remand in resentencing him to a consecutive term of imprisonment of seven years based on the trial court's finding that he was guilty of aggravated discharge of a firearm. Bagley argues that the trial court erred in sentencing him to 7 years' imprisonment for the charge of aggravated discharge of a

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firearm on remand because he was acquitted of that charge when the trial court did not impose a separate sentence for that charge. Bagley further argues that even if the trial court's ruling could be interpreted as a merger of the aggravated discharge of a firearm charge into the second degree murder conviction, this court lacked authority to remand for imposition of a consecutive sentence on such non-final, unsentenced conviction.

¶9 The State counters that the issue has already been resolved in the prior appeal and is therefore barred by *res judicata*, that Bagley forfeited review of the issue by not timely raising the argument, and that the law of the case of our decision in the prior appeal disposes of the issue. We find *res judicata* and law of the case do apply. *Res judicata* applies between the same parties if the following elements exist: “ ‘(1) an identity of the parties or their privies; (2) an identity of the causes of action; and (3) a final judgment on the merits.’ ” *Cabrera v. First National Bank of Wheaton*, 324 Ill. App. 3d 85, 92 (2001), quoting *Conner v. Reinhard*, 847 F.2d 384, 394 (7th Cir. 1988). *Res judicata* operates as a bar not only as to every matter which was raised to sustain or defeat a claim, but also as to “ ‘any other matter which might have been offered for that purpose. [Citations.]’ ” *Sarno v. Thermen*, 239 Ill. App. 3d 1034, 1044-45 (1992). "With some very narrow exceptions, the judgment of the reviewing court on a previous appeal is *res judicata* as to all issues actually decided, and any issue that could have been presented, but was not, is waived." *People v. Olinger*, 176 Ill. 2d 326, 342 (1997) (citing *People v. Ruiz*, 132 Ill. 2d 1, 9 (1989)). Further, "[i]t is well settled that 'where a cause is re-docketed after litigation is prosecuted to a court of review and passed upon, not only the questions that were raised and considered, but also all that could have been raised and passed upon, are *res*

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judicata whether they were raised or not.' " *People v. Knox*, 3 Ill. App. 3d 22, 23 (1971) (quoting *Village of Oak Park v. Swigart*, 266 Ill. 60, 61 (1914)).

¶10 It is equally true that the law of the case governs and that we have already determined that the trial court improperly merged the convictions and should have instead entered consecutive sentences. The law of the case doctrine generally bars relitigation of an issue previously decided in the same case. *People v. Sutton*, 233 Ill. 2d 89, 100 (2009). Therefore, the determination of a question of law by an appellate court in a first appeal may be binding on that court in a second appeal. *Sutton*, 233 Ill. 2d at 100. The law of the case doctrine does not bind review by the Illinois supreme Court. *Id.* However, Bagley appealed but his petition for leave to appeal was denied. *People v. Bagley*, 233 Ill. 2d 566 (2009). Our holding in the previous appeal thus became the law of the case.

¶11 Nevertheless, a claim that a sentence is void can be raised and corrected at any time. *People v. Schlabach*, 2012 IL App (2d) 100248 at ¶ 18 (January 31, 2012). See also *People v. Ramey*, 393 Ill. App. 3d 661, 662 (2009) (holding that *res judicata* did not bar a claim that a sentence was void because a void sentence can be attacked at any time). Thus, such claims are not subject to forfeiture and we therefore address the merits of Bagley's argument.

¶12 Bagley argues that at sentencing the court did not improperly merge the aggravated discharge of a firearm convictions into the second degree murder conviction but instead found him not guilty of aggravated discharge of a firearm and therefore acquitted him, thereby subjecting him to double jeopardy in the imposition of a sentence on these convictions on remand. However, the record reveals that the court did not acquit Bagley but instead found him

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guilty of aggravated discharge of a firearm and then at sentencing merely improperly merged the convictions.

"The doctrine of double jeopardy bars the re prosecution of an individual that has been acquitted of a criminal offense." *People v. Wilson*, 309 Ill. App. 3d 235, 243 (1999) (citing *People v. Ortiz*, 151 Ill. 2d 1, 9 (1992)). Double jeopardy principles are codified in the Illinois Code of Criminal Procedure of 1961. See 720 ILCS 5/3-4 (West 2008). "An acquittal occurs when the judge's ruling, regardless of its label, actually resolves some factual elements of the offense in defendant's favor." *People v. Leezer*, 387 Ill. App. 3d 446, 448 (2008) (citing *People v. Wallerstedt*, 77 Ill. App. 3d 677, 680 (1979)). "[W]hat constitutes an acquittal for purposes of the double jeopardy clause is not necessarily controlled by the form of the judge's action [citation], or what the judge calls it [citations]." *People v. Rudi*, 103 Ill. 2d 216, 224 (1984) (quoting *People v. Deems*, 81 Ill. 2d 384, 388 (1980)). "An acquittal occurs when the trier of fact renders a finding of not guilty based upon the evidence before it." *People v. Smith*, 151 Ill. App. 3d 922, 924 (1987) (citing *People v. King*, 17 Ill. App. 3d 1064, 1066-67 (1974)). "A defendant is acquitted of an offense when a trial judge finds the evidence insufficient at trial and finds the defendant not guilty." *People v. Lewis*, 379 Ill. App. 3d 829, 833 (2008) (citing *People v. Brown*, 227 Ill. App. 3d 795, 798 (1992)).

¶13 The transcript of the court's after the bench trial reveals the court specifically found Bagley guilty of the counts for aggravated discharge of a firearm:

"The Court finds that there is no valid self-defense in this case. The motivation for the killing appears to be the defendant's being provoked by the victim robbing him the

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night before,. Thus, finding of guilty of second degree murder, lesser included in Count 1; *finding of guilty of aggravated discharge of a firearm in Counts 6 and 7*; finding of guilty of aggravated unlawful use of weapon in Counts 8, 9 and 10; finding of not guilty as to Counts 2, 3 and 4. Judgments on the findings."¹ (Emphasis added.)

The court unequivocally found Bagley guilty of the charges of aggravated discharge of a firearm in counts 6 and 7, which were based on acts toward Dejuan Houston.

¶14 At sentencing, the prosecutor sought consecutive sentences for the second degree murder conviction and the aggravated discharge of a firearm conviction. However, the transcript of the

¹ The court did not find Bagley guilty of count 5, attempt first-degree murder of Dejuan Houston by shooting at Houston with a firearm, although the court did not specifically state a finding of not guilty on the record. The court's failure to explicitly state a finding as to count 5 also did not result in an acquittal pursuant to section 3-4(a) of the Criminal Code of 1961 (720 ILCS 5/3-4(a) (West 2008)), because aggravated discharge of a firearm is not a lesser-included offense of attempt first-degree murder because of the impossibility doctrine. See *People v. Files*, 260 Ill. App. 3d 618, 630 (1994). Thus, there was neither a conviction nor an acquittal of this charge. Also, although the parties do not raise the issue, we clarify the record that the trial court did not sentence Bagley on the aggravated unlawful use of a weapon counts and the State did not raise the issue of sentencing on these counts below, nor does the State raise the issue now on appeal. See *People v. Medrano*, 282 Ill. App. 3d 887, 893 (1996) ("[T]he prosecution's failure to pursue sentencing at an appropriate time in the circuit court, whether deliberate or inadvertent, may result in a finding on appeal that the conviction has been abandoned.").

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sentencing hearing reveals that the trial court felt that the aggravated discharge of a firearm conviction merged into the second degree murder conviction, without any reasoning:

"[Prosecutor]: Based on the Second Degree Murder and the Agg Discharge the State is asking that you impose consecutive sentences.

THE COURT: The Aggravated Discharge is part of the Second Degree Murder."

¶15 The prosecutor attempted to explain that the convictions could not be merged because there was a different victim for the aggravated discharge of a firearm convictions, but the court persisted in its belief that the aggravated discharge of a firearm convictions were merged into second-degree murder, despite the fact that the second-degree murder conviction was for a different victim and based on a different act:

"[Prosecutor]: Well, it's actually – The victim listed in that [charge] was a Dejuan Houston.

THE COURT: Well, I'm not going to impose a sentence and enter judgment of not guilty on Aggravate Discharge of [a] Firearm because that basically is – went into the murder itself."

[Prosecutor]: I'm sorry?

THE COURT: So I feel that Aggravated Discharge of a Firearm merged into the Second Degree Murder of Earnest Draine, and I'm only going to impose one sentence and that will be on the Second Degree Murder of Earnest Draine."

¶16 Thus, the court did not find Bagley not guilty and acquit him of the charges of aggravated discharge of a firearm. Although the trial court's colloquy at sentencing was not clear whether

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the court meant it was not going to impose a sentence and also *not enter* judgment of not guilty on the aggravated discharge of a firearm counts, or whether it meant that was not going to impose a sentence and *enter* a judgment of not guilty, the court certainly was clear in its *findings* that it specifically found Bagley guilty of the aggravated discharge of a firearm counts.

¶17 However, counts 6 and 7 for aggravated discharge of a firearm specifically were based on Dejuan Houston and not Ernest Draine. Bagley was not charged with aggravated discharge of a firearm as to Ernest Draine. The court's statements at sentencing regarding what judgment he would enter on the aggravated discharge of a firearm were dependent solely on his mistaken belief that the convictions for aggravated discharge of a firearm were merged with the second-degree murder conviction, and did not constitute a new finding of not guilty so as constitute an acquittal.

¶18 Here, the convictions for aggravated discharge of a firearm could not legally merge into the conviction for the second-degree murder conviction because the convictions were based on charges for acts directed toward different victims. "When multiple convictions of greater and lesser offenses are obtained for offenses arising from a single act, a sentence should be imposed on the most serious offense and the convictions on the less serious offenses should be vacated." *People v. Garcia*, 179 Ill. 2d 55, 71 (1997) (citing *People v. Cardona*, 158 Ill. 2d 403, 411 (1994)). "In order to be classified as a lesser included offense, "all the elements of the lesser must be included within the greater." [Citation.]" *Shum*, 117 Ill. 2d at 363 (quoting *People v. Smith*, 78 Ill. 2d 298, 306 (1980)). Discharge of a firearm is not an element of second-degree murder. See 720 ILCS 5/9-2 (West 2004). Bagley has made no argument that the offense of

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aggravated discharge of a firearm is a lesser-included offense of the crime of second-degree murder. A person commits aggravated discharge of a firearm when he knowingly or intentionally discharges a firearm in the direction of another person. 720 ILCS 5/24-1.2 (a)(2) (West 2004). Thus, the findings of guilty and convictions for aggravated discharge of a firearm can not be vacated as lesser-included offenses.

¶19 Also, under *People v. King*, 66 Ill. 2d 551 (1977), separate convictions may not be entered on multiple offenses stemming from the same act. *King*, 66 Ill. 2d at 566. However, in *King* there was only a single victim. The defendant in *King* was charged with rape and with burglary with intent to commit rape following his assault of a single victim. *King*, 66 Ill. 2d at 555. As the State points out, however, it is well-established that separate victims require separate convictions and sentences. *People v. Shum*, 117 Ill. 2d 317, 363 (1987) (citing *People v. Butler*, 64 Ill. 2d 485, 488-89 (1976)). Crimes committed against separate victims constitute separate criminal acts. *People v. Pryor*, 372 Ill. App. 3d 422, 434 (2007).

¶20 Bagley cannot dispute that the convictions for aggravated discharge of a firearm were based on another victim. Here, the convictions for aggravated discharge of a firearm were based on counts 6 and 7, which were based on another victim, Dejuan Houston, and not the same victim as the second-degree murder conviction, Ernest Draine.

¶21 Count 6 charged that Bagley and Gregory Carr committed the offense of aggravated discharge of a firearm in that:

"THEY, KNOWINGLY OR INTENTIONALLY DISCHARGED A FIREARM IN THE DIRECTION OF A VEHICLE THEY KNEW OR REASONABLY SHOULD HAVE

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KNOWN TO BE OCCUPIED BY A PERSON, TO WIT: *DAJUAN HOUSTON* [sic], IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 24-1.2(A)(2) OF THE ILLINOIS COMPILED STATUTES OF 1992 AS AMENDED ***." (Emphasis added.)

¶22 Count 7 charged that Bagley and Gregory Carr committed the offense of aggravated discharge of a firearm in that:

"THEY, KNOWINGLY OR INTENTIONALLY DISCHARGED A FIREARM IN THE DIRECTION OF ANOTHER PERSON, TO WIT: *DAJUAN HOUSTON* [sic], IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 24-1.2(A)(2) OF THE ILLINOIS COMPILED STATUTES 1992 AS AMENDED ***." (Emphasis added.)

Thus, merger of the convictions and refusal to enter judgment on the separate convictions was improper.

¶23 Bagley argues alternatively that "even if the original trial court's post-trial ruling is interpreted to be a merger of the aggravated discharge of a firearm count into Bagley's second degree murder conviction, the judgment on the aggravated discharge counts was not final absent a sentence, and an appeal cannot be entertained in the absence of a final judgment," and thus that we lacked jurisdiction to review an unsentenced conviction and therefore his conviction and seven-year sentence must be vacated. However, whether the judgment was final is not dispositive of whether there was an acquittal or not. Rather, we look to the court's specific findings to determine whether there was a finding of guilty or not guilty to determine whether there was an acquittal (see *Lewis*, 379 Ill. App. 3d at 833), and here the court unequivocally found that Bagley was guilty of aggravated discharge of a firearm. Bagley's argument on this

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point is circular and without merit, as the court indeed entered a sentence on the improperly merged charges. The fact that the court did not enter a separate sentence for the aggravated discharge of a firearm is due to the fact that the court improperly merged it into the second-degree murder charge.

¶24 We also reject Bagley's argument that his counsel was ineffective for failing to argue that Bagley was acquitted of the aggravated discharge of a firearm. A defendant suffers prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), if his or her appellate counsel did not raise a meritorious issue that would have been successful on appeal. *People v. Childress*, 191 Ill. 2d 168, 175 (2000). Here, Bagley's claim regarding acquittal is meritless. Thus, Bagley has not established any claim of ineffective assistance of appellate counsel.

¶25

CONCLUSION

¶26 We hold that although Bagley raises a void sentence issue which is not subject to forfeiture, there is no merit to his argument that he was acquitted of the charges of aggravated discharge of a firearm. Bagley was not acquitted. Rather, the trial court sentenced him improperly on these charges, sentencing him to one combined sentence based on its erroneous finding that the aggravated discharge of a firearm charge merged into the second-degree murder charge. The merger was improper, as the convictions for aggravated discharge of a firearm were based on a separate victim from the second-degree murder conviction. The ultimate issue in determining whether there was an acquittal is the court's finding as to guilt on the facts, and here the court unequivocally found him guilty of the charges of aggravated discharge of a firearm.

¶27 Affirmed.