

2012 IL App (2d) 100309-U
No. 2-10-0309
Order filed January 11, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of Kendall County.
)	
Plaintiff-Appellee,)	
)	
v.)	Nos. 98-CF-229
)	98-CF-230
)	98-CF-231
)	
GLEN D. WALDRUP,)	Honorable
)	James M. Wilson and
)	T. Clint Hull,
Defendant-Appellant.)	Judges, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justice Schostok and Hudson concurred in the judgment.

ORDER

Held: Defendant's claim of ineffective assistance of post-conviction counsel fails; defendant's original sentencing order for home invasion and three counts of aggravated criminal sexual assault was void because the trial court failed to follow the statute requiring consecutive sentences, therefore, a new sentencing hearing is required.

¶ 1 Defendant, Glen D. Waldrup, appeals from the denial of his postconviction petition, motion to reconsider sentence, and motion for rehearing of his postconviction petitions. We affirm the

denial of defendant's postconviction petition and motion for rehearing; we vacate the sentencing order and remand for a new sentencing hearing.

¶ 2

I. BACKGROUND

¶ 3 Defendant was charged with home invasion (720 ILCS 5/12-11 (West 1998)), three counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(1) (West 1998)), and two counts of aggravated unlawful restraint (720 ILCS 5/10-3.1(a) (West 1998)). In 1998, prior to trial, the trial court, Judge James M. Wilson presiding¹, read each of the charges to defendant and informed him of the potential penalty for each offense, telling him that he could receive prison terms of six to 30 years' imprisonment for home invasion and for each count of aggravated criminal sexual assault. The trial court also admonished defendant that

“in the event the State proves that you committed any of these acts, the home invasion and the aggravated criminal sexual assault charges as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective, and one of the offenses being a Class X or greater or Class I or greater, that the criminal sexual assault charge being one of them, that the Court in any event, if you are convicted of those offenses in combination, the Court is required to enter a sentence to run consecutively, in other words, that with the other charges you could be sentenced to consecutive terms on these charges if convicted in conjunction with each other, do you understand that? [*sic*]”

Defendant indicated he understood. The trial court admonished him further: “In the event that they *** prove that, any of the sentences are to run concurrently unless the Court finds there are proper

¹Judge James M. Wilson retired before the motion for rehearing on October 25, 2005, order denying the post-conviction petition.

reasons for entering the sentence to be consecutive; do you understand that.” Defendant again indicated that he understood.

¶4 The trial court continued: “That’s a provision in the statute when aggravated criminal sexual assault is one of the charges along with a Class X or another Class I felony, the court then is required if you are convicted of both those, to be sentenced [*sic*] consecutively; do you understand that?”; to which defendant answered “Yes, Your Honor.” Later, the trial court asked “Do you have any questions about anything that I have explained to you up to this point regarding the nature of any charges, the penalties prescribed by law, both minimum and maximum as to any charges, or anything else regarding your constitutional rights or anything else that I have explained?” Defendant answered “No, Your Honor.” Defendant then entered a plea of not guilty.

¶5 On November 19, 1998, after a jury trial, defendant was found guilty of home invasion, three counts of aggravated criminal sexual assault, and two counts of aggravated unlawful restraint. On January 28, 1999, he was sentenced to serve consecutive terms of 15 years’ imprisonment for each of the three counts of aggravated criminal sexual assault, for a total of 45 years. See 720 ILCS 5/5-8-4(a), (b) (West 1998). He was also sentenced to a term of 20 years’ imprisonment for home invasion, to be served concurrently with the aggravated criminal sexual assault sentences. Finally, he was sentenced to a term of 3 years’ imprisonment for each of the counts of aggravated unlawful restraint, to be served concurrently with the aggravated criminal sexual assault sentences.² Judge Wilson, in his oral pronouncement, stated the following:

“The Court has further considered the defendant’s age, his remorse, rehabilitation, as well as the gravity of the offenses. The Court has further considered the imposition of

²The aggregate of these sentences was 45 years’ imprisonment.

concurrent and/or consecutive terms of imprisonment in accordance with 730 ILCS 5/5-8-4.

In addition, the Court has considered the cumulative effects of a consecutive term sentence or sentences balancing the seriousness of the offenses with an objective of restoring the offender to useful citizenship.”

¶ 6 On direct appeal, this court, noting that defendant did not challenge the sufficiency of the evidence supporting his convictions of aggravated criminal sexual assault and aggravated unlawful restraint, affirmed defendant’s conviction for home invasion as to sufficiency of the evidence. *People v. Waldrup*, 317 Ill. App. 3d 288 (2000). Pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), we concluded that the imposition of consecutive sentences was improper, and we modified the sentences, ordering that the three 15-year terms of imprisonment for aggravated criminal sexual assault run concurrently with each other rather than consecutively. *Waldrup*, 317 Ill. App. 3d at 301. The State then filed with our supreme court a petition for leave to appeal from this decision. Subsequently, our supreme court entered a supervisory order vacating our judgment and directing this court to reconsider in light of *People v. Wagener*, 196 Ill. 2d 269 (2001). On December 10, 2001, this court reinstated the consecutive sentences in a summary order. See *People v. Waldrup*, No. 2-99-0242 (2001) (unpublished order under Supreme Court Rule 23).

¶ 7 On April 25, 2001, before appeal No. 2-99-0242 had been decided, defendant filed *pro se* a postconviction petition. Subsequently, on May 15, July 20, and September 17, 2001, and on January 29, 2002, he filed *pro se* amendments to the postconviction petition. On October 1, 2002, defendant’s petition for postconviction relief and its amendments were summarily dismissed as frivolous and patently without merit. Defendant appealed the dismissal, and, on November 7, 2003, this court reversed the dismissal and remanded the cause for a hearing because the trial court had failed to act within the statutory 90-day period as required by section 5/122-2.1(a) of the Code of

Criminal Procedure (725 ILCS 5/122-2.1(a) (West 2000)). *People v. Waldrup*, No. 2-02-1110 (2003) (unpublished order under Supreme Court Rule 23).

¶ 8 On July 7, 2004, the Kendall County public defender's office was appointed to represent defendant for the post-conviction proceedings. In August 2004, Assistant Public Defender John McAdams appeared for defendant on a motion for appointment of an investigator, which was denied. In April 2005, after receiving an amended post-conviction petition from McAdams, defendant informed the court that he intended to fire McAdams. On June 3, 2005, after defendant filed a "motion to object and fire counsel," the trial court ruled as follows:

"For the record your motion to object and fire counsel will be denied then because he is doing what he is supposed to be doing and he is preserving for the record the issues that you wish to raise but that he believes as an attorney licensed to practice law in the State of Illinois he has to represent to the court whether [*sic*] he thinks are the good faith issues as opposed to ones that he does not think as an attorney he can bring in good faith without waiving your position and objecting to them [*sic*]."

On the same day, McAdams filed the "Amended Post Conviction Petition" and informed the court that defendant wished to preserve the issues raised in his *pro se* petitions.

¶ 9 On October 25, 2005, after a September 6 hearing, Judge Wilson issued a written order addressing defendant's "Pro Se Post Conviction Petition" filed April 25, 2001; defendant's "Amended Pro Se post Conviction Petition," filed May 15, 2001; defendant's "Amended Pro Se Post Conviction Petition," filed July 20, 2001; defendant's "Amended Pro Se Post Conviction Petition," filed September 17, 2001; defendant's "Amended Pro Se Post Conviction Petition," filed January 29, 2002; and the "Amended Post Conviction Petition" filed through counsel on June 3, 2005. The trial court denied all of the above motions in a seven page order addressing all points raised in the

petition. However, the court agreed with defendant's assertion that the concurrent sentence originally imposed for home invasion was void, and ordered the sentences modified so that the sentences for home invasion and the sex offenses would run consecutively.³

¶ 10 On November 10, 2005, defendant filed *pro se* a "Motion for Rehearing" and a "Motion to Reconsider Sentence." The State filed answers to these motions on December 9. On January 18, 2006, defendant requested that a public defender be reappointed to represent him on the two motions. The Kendall County public defender's office was reappointed on January 20. On July 6, 2006, McAdams filed a "Supplemental Motion To Reconsider [Sentencing]" which re-alleged and re-affirmed paragraphs one through nine of the *pro se* motion to reconsider the sentence, and also incorporated a new due process claim alleging error relating to defendant's rejection of the State's pre-trial plea offer. The prayer for relief in the supplemental motion asked that defendant's "motion to reconsider his sentence be granted." On July 28, 2006, McAdams stated to the trial court: "This matter comes up on our supplemental motion to reconsider sentence. *** we're prepared to argue today if the court is prepared." McAdams proceeded to argue the "Motion to Reconsider [Sentencing]." McAdams addressed the points regarding defendant's sentencing issues as raised in the "Motion To Reconsider [Sentencing]." McAdams did not argue any of the points raised in defendant's *pro se* "Motion For Rehearing."

¶ 11 On September 29, 2006, a new public defender, Victoria Chuffo, appeared with defendant and asked for a continuance to "review the file." The trial court continued the matter to November 1, 2006. On that date, with Chuffo representing defendant, Judge Wilson denied the "motion to reconsider [Sentencing]." The following exchange was had between defendant and the trial court:

³The aggregate of these sentences was 65 years' imprisonment.

“The Defendant: Your Honor, this is regarding both motions, the supplemental and the *pro se* motion?”

The Court: Yes. They were all combined in one. So, therefore, it will all be included for purposes of the appeal.

The Defendant: Okay. The appeal includes the order that was issued October 25th?

The Court: Of ‘05, yes.

The Defendant: Okay. Thank you.”

On the same day, on defendant’s behalf, Chuffo filed a notice of appeal from the “Post-Conviction Petition and Motion to Reconsider Sentence.” She did not file a notice of appeal including the motion for rehearing. Apparently she was either unaware of the motion or unaware that defendant had previously indicated he wanted to preserve the issues set forth in the motion. Thereafter, this court ordered that the cause be remanded for a ruling on the *pro se* motion for rehearing. *People v. Waldrup*, No. 2-06-1127 (March 11, 2009) (unpublished order under Supreme Court Rule 23).

¶ 12 On May 21, 2009, defendant filed *pro se* a “Supplemental Motion for Rehearing” in which he again asserted that the State failed to prove an element of home invasion beyond a reasonable doubt. He further asserted that the trial court’s original sentencing order, which stated that the sentences for two counts of aggravated unlawful restraint should be served concurrently with his sex offense sentences, was erroneous and, therefore, the sentencing order was void. He requested that all of his sentences be vacated and remanded for a new sentencing hearing. He also argued that the trial court erred when it modified the sentence for home invasion to run consecutively to the sex offense sentences, instead of vacating all of the sentences and holding a new sentencing hearing.

¶ 13 Additionally, defendant argued that postconviction defense counsel McAdams was ineffective when, without objection, he accepted the court's order modifying the sex offense sentences and home invasion sentence to run consecutively. Defendant maintained that McAdams should have argued, instead, that all the sentences were void and a new sentencing hearing was necessary. Finally, he argued that postconviction counsel was "unreasonable for not raising the Ineffective assistance claims on both trial counsel and Appellate counsel in his post-conviction petition *** filed June 3, 2005."

¶ 14 Defendant's affidavit attached to this motion asserted that he was not advised at the time he rejected a plea deal was offered that, if convicted, he faced mandatory consecutive sentences on the home invasion and aggravated criminal sexual assault counts. He asserted that the plea deal was for a sentence of 15 years' imprisonment on one aggravated criminal sexual assault charge, and, in return, the other charges would be dismissed.

¶ 15 On July 29, 2009, Chuffo filed a "Second Supplemental Motion for Rehearing" which adopted the assertions in defendant's original and supplemental motions for rehearing, including his claim that all of the sentences should be vacated and a new sentencing hearing should be held. This motion added a claim that defendant was denied due process of law when he rejected a favorable pre-trial plea offer based on "inaccurate information" from both the trial court and defense counsel regarding whether his sentences would be served consecutively or concurrently. Defendant asserted that he was under the impression, both from the trial court and his own counsel, that consecutive terms would not be imposed if the evidence did not show that the home invasion and aggravated criminal sexual assault charges were committed as part of a single course of conduct.

¶ 16 On December 21, 2009, the trial court, Judge Clint Hull presiding, heard arguments on the "Second Supplemental Motion for Rehearing." On March 5, 2010, the trial court issued a written

order denying all relief requested by defendant. Specifically, the trial court found that (1) defendant's claim that he was not proved guilty of home invasion had been addressed in his original postconviction petition and rejected by the trial court; (2) defendant's sentences were not void because statute and case law mandated that the terms be consecutive; (3) a new, full sentencing hearing was not required because defendant's aggregate sentence of 65 years' imprisonment was within the statutory range of sentences allowable by law at the time of the original sentencing; and (4) defendant's claim that postconviction counsel was ineffective had not been raised in the original or amended postconviction petitions, nor was it argued before Judge Wilson. Therefore, this claim would not be considered because it was outside the scope of a motion for rehearing.

¶ 17 On March 9, 2010, defendant filed a notice of appeal from the trial court's orders dated October 25, 2005; November 1, 2006; and March 5, 2010.

¶ 18 II. ANALYSIS

¶ 19 Whenever a postconviction petitioner makes a substantial showing of a violation of constitutional rights, a hearing is required. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). At the second stage proceeding, all well-pleaded facts set forth in the petition and its accompanying affidavits are taken as true. *People v. Hobley*, 182 Ill. 2d 404, 429 (1998). If the trial court finds that the petitioner has made a substantial showing of a violation of a constitutional right, the court must hold an evidentiary hearing pursuant to section 122-6 of the Code of Criminal Procedure of 1963 (725 ILCS 5/122-6 (West 2002)). The trial court's ruling at the second stage presents a legal question and we conduct a *de novo* review. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005).

¶ 20 A. Ineffective Assistance of Counsel

¶ 21 Defendant argues that because he made a "substantial showing of constitutional error, his case should be remanded for an evidentiary hearing on his claim that he was denied due process of

law and effective assistance of trial defense counsel when he chose to reject a favorable plea offer due to having been misinformed that consecutive terms for his four Class X convictions were not mandatory, when, in fact, they were.” We disagree and deny defendant’s request for an evidentiary hearing.

¶ 22 On June 17, 2005, the State filed an “Answer to Defendant’s Amended Post-Conviction Petition” agreeing with defendant that the sentence for home invasion was void and asking that it be modified so that it would run consecutively to the sex offense sentences. On October 25, 2005, Judge Wilson denied defendant’s petition but summarily modified the sentence as requested by the State, thereby increasing the aggregate term of imprisonment from 45 years to 65 years. Defendant then filed *pro se* a “Motion to Reconsider” and a “Motion for Rehearing.” Subsequently, on July 6, 2006, his postconviction attorney filed a “Supplemental Motion to Reconsider” which raised, for the first time, the plea bargain claim that is at issue in this appeal, asserting that he was denied due process of law and his trial counsel was ineffective. Judge Hull’s March 5, 2010, order declined to consider this ineffectiveness of counsel claim because it had not been raised in the original or amended postconviction petitions nor was it argued before Judge Wilson.

¶ 23 We review ineffective assistance of counsel claims under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). That test requires a defendant to show both that: (1) as determined by prevailing professional norms, counsel’s performance fell below an objective standard of reasonableness; and (2) the defendant was prejudiced by counsel’s deficient performance. *People v. Guerrero*, 2011 IL App. 2d 090972, ¶60.

¶ 24 The original sentencing order specifically found that the home invasion offense and the three separate offenses of aggravated criminal sexual assault were “part of a single course of conduct during which there was no substantial change in the nature of the criminal objective” and also found

that there was no severe bodily injury. The trial court then sentenced defendant to three consecutive terms of 15 years' imprisonment for each of the three counts of aggravated criminal sexual assault, for a total of 45 years, and to a term of 20 years' imprisonment for home invasion, to be served concurrently with the aggravated criminal sexual assault sentences.

¶ 25 Defendant, in his reply brief, admits that defendant was informed “that he could only receive a consecutive term for home invasion if that offense and the three sex offenses all were committed as part of a single course of conduct ***.” Defendant’s next point, that “consecutive terms were mandatory regardless of that factor,” is only true if defendant was convicted of both home invasion and the sex offenses. Defendant apparently refused the plea offer on the theory that the State could not prove a continuous course of conduct. Defendant’s claim that he was misinformed sidesteps the point that the trial court’s “single course of conduct” finding was the basis for the original sentences. He cannot now complain that he was misinformed by his attorney about a different basis for the imposition of consecutive sentences. This was a gamble that defendant was apparently willing to take since he went to trial before a jury. Under the two-prong test of *Strickland*, defendant has shown neither incompetence nor prejudice, and, thus, has not sustained his claim. *Strickland*, 466 U.S. at 687-88.

¶ 26 B. Void Sentences

¶ 27 Next, defendant contends that the trial court’s original written sentencing order is void because all of the sentences should have been consecutive. The State contends that no legal basis exists for disturbing the validly imposed consecutive 15-year terms for aggravated criminal sexual assault. We agree with the State that the trial court properly imposed consecutive terms for the triggering offenses of aggravated criminal sexual assault. However, the concurrent sentence for

home invasion was improper under sections 5/5-8-4(a) and (b) of the Unified Code of Corrections (Code) (720 ILCS 5/5-8-4(a), (b) (West 1998)).

¶ 28 Our supreme court has held that section 5-8-4(b) of the Code imposes specific requirements upon the trial court with respect to the imposition of mandatory consecutive sentences, and the trial court is responsible under the statute for enforcement of these sentencing requirements and imposing the appropriate sentence. *People ex rel. Waller v. McKoski*, 195 Ill.2d 393, 401-02 (2001) (where trial court's judgment vacated as void and remanded for resentencing with sentences to run consecutively, “[i]t remains within the discretion of the circuit court to determine, within the permissible statutory sentencing range [citations], the length of each sentence to be imposed”).

¶ 29 Our supreme court in *People v. Harris* stated that “[c]onsecutive sentencing is mandatory in this case under section 5-8-4 of the Code *whether the actions arose from separate courses of conduct or a single course of conduct.*” (Emphasis added.) *People v. Harris*, 203 Ill. 2d 111 (2003). In this case, as in *Harris*, defendant was convicted of a Class X felony and aggravated criminal sexual assault in violation of section 12-14(a)(1) of the Code. Since defendant’s convictions are among the triggering offenses listed in both subsections (a) and (b) of section 5-8-4 of the Code, the trial court should have imposed consecutive sentences for the home invasion as well as the aggravated criminal sexual assault convictions. See 720 ILCS 5/5-8-4(a), (b) (West 1998). In other words, if the offenses are among the listed triggering offenses, consecutive sentencing is mandatory.

¶ 30 In this case, the record reveals that the trial court did not apply the law as specified in section 5-8-4(b). We are constrained to follow our supreme court’s ruling in *People v. Arna*, 168 Ill. 2d 107 (1995), that “[a] sentence which does not conform to a statutory requirement is void.” *Id.* at 113. In *Arna*, the sentencing order imposing concurrent terms was invalid because the sentence did not conform to the statutory requirement of section 5-8-4. *Id.* at 113 (“Because the concurrent sentences

imposed upon defendant by the circuit court were not authorized by section 5-8-4(b), those sentences are void.”). See also *People v. Garcia*, 179 Ill.2d 55, 73 (1997) (trial court's imposition of concurrent sentences in certain instances where consecutive sentences were mandated rendered defendants' sentences void).

¶ 31 Judge Wilson’s sentencing order stated the law correctly but then imposed concurrent sentences. We are not able to determine whether this was a miscomprehension of the law or an unintentional error. Later, after defendant filed his postconviction petition and amendments thereto, the trial court recognized that the original sentence was void and, without a hearing, modified the sentences to run consecutively. We find that a new sentencing hearing is necessary for the trial court to consider the appropriate parameters of the sentence and impose sentences in conformity with the section 5-8-4 of the Code. Such a remand “will provide the trial court an opportunity to determine, within the statutory sentencing range, the length of the sentence for each offense while considering defendant's sentence in its totality.” *People v. Hauschild*, 226 Ill. 2d 63, 80-81 (2007). The record demonstrates that at the original sentencing hearing, Judge Wilson properly “considered the cumulative effects of a consecutive term sentence or sentences balancing the seriousness of the offenses with an objective of restoring the offender to useful citizenship.” However, the record does not reflect that the October 25, 2005, order imposing consecutive sentences for all four convictions did involve any such considerations. Defendant is entitled to have the effects properly considered. Therefore, we remand for a proper resentencing.

¶ 32 III. CONCLUSION

¶ 33 For these reasons, the judgment of circuit court of Kendall County is affirmed; sentences vacated and cause is remanded for resentencing.

¶ 34 Affirmed; sentences vacated and cause remanded.

