

2012 IL App (2d) 110567-U
No. 2-11-0567
Order filed December 20, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 09-CF-2522
)	
EDGAR SALGADO-ORTIZ,)	Honorable
)	Fred L. Foreman,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's MSR term of three years to life was not void: although the factual basis for his guilty pleas, which determined the applicable sentencing range, set out a range of dates that encompassed the effective date of the statute that authorized the MSR term of three years to life, the factual basis thus did not establish that the offenses occurred only before the effective date.

¶ 2 Defendant, Edgar Salgado-Ortiz, pleaded guilty to two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2002)) and was sentenced to 10 years in prison on each count, to be served consecutively. This issue on appeal is whether subsection (d)(4) of section 5-8-1 of the Unified Code of Corrections (the Code) (730 ILCS 5/5-8-1(d)(4) (West 2008)),

which mandates that a three-year-to-life term of mandatory supervised release (MSR) be imposed on a defendant who commits the offense of predatory criminal sexual assault of a child, applies to defendant, where the occurrence dates alleged in the factual basis of the pleas encompass the effective date of the provision. For the reasons that follow, we find that defendant is subject to the three-year-to-life MSR term.

¶ 3

I. BACKGROUND

¶ 4 Following his arrest on June 25, 2009, defendant was indicted on 10 counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2002)), 2 counts of criminal sexual assault (720 ILCS 5/12-13(a)(4) (West 2008)), and 4 counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(b), (d) (West 2008)).

¶ 5 Each of the 10 counts of predatory criminal sexual assault alleged a “separate and distinct act” committed against F.S. during the same time period, *i.e.*, between March 2, 2003, and March 1, 2008. Counts I through V alleged that defendant touched the vagina of F.S., who was under the age of 13, with his penis. Counts VI through X alleged that defendant placed his finger inside the vagina of F.S., who was under the age of 13.

¶ 6 The two counts of criminal sexual assault and the four counts of aggravated criminal sexual abuse were alleged to have occurred between March 2, 2008, and June 22, 2009 (presumably after F.S. turned 13). Count XI alleged that defendant touched the vagina of F.S., who was under the age of 18, with his penis. Count XII alleged that defendant placed his finger inside the vagina of F.S., who was under the age of 18. Counts XIII and XIV alleged that defendant touched the buttock of F.S., who was at least 13 years of age but under 17 years of age. Count XV alleged that defendant touched the vagina of F.S., who was at least 13 years of age but under 17 years of age, with his penis.

Count XVI alleged that defendant placed his finger inside the vagina of F.S., who was at least 13 years of age but under 17 years of age.

¶ 7 On January 19, 2010, defendant pleaded guilty to counts I and II of the indictment in exchange for a 15-year sentencing cap on each count and the dismissal of the remaining charges. The court admonished defendant as to the sentences he faced and that he was subject to a lifetime MSR term. The State recited the factual basis for the pleas as follows:

“If called to testify witnesses would testify that between March 2nd, of 2003, and March 1st of 2008 here in Lake County, the defendant placed his penis inside the vagina of [F.S.] who was under the age of 13.”

¶ 8 On May 4, 2010, following a sentencing hearing, the court sentenced defendant to 10 years in prison on each count, to be served consecutively. Although the sentencing order did not indicate that an MSR term was imposed, the Illinois Department of Corrections website reflects that defendant faces MSR of “3 YRS TO LIFE - TO BE DETERMINED.”¹

¶ 9 Following the denial of his motion to withdraw his pleas and his motion to reconsider his sentence, defendant timely appealed.

¶ 10 II. ANALYSIS

¶ 11 Defendant argues that the statute authorizing a three-year-to-life term of MSR cannot be applied to him, because neither the pleadings nor the factual basis of the pleas indicate that the offenses occurred after the statute’s effective date. In response, the State first argues that defendant has forfeited his argument by failing to raise it below. Notwithstanding forfeiture, the State

¹We may take judicial notice of the contents of the Department of Corrections website. *People v. Young*, 355 Ill. App. 3d 317, 321 n.1 (2005).

maintains that the record supports a finding that defendant committed the offenses after the effective date of the statute.

¶ 12 Subsection (d) of section 5-8-1 of the Code provides that, except in cases where a sentence of natural life is imposed, every prison sentence shall include a term of MSR. 730 ILCS 5/5-8-1(d) (West 2008). The version of subsection (d) of section 5-8-1 of the Code in effect between June 28, 2001, and July 10, 2005, provided the following:

“(d) *** Subject to earlier termination under Section 3-3-8, the parole or mandatory supervised release term shall be as follows:

(1) for first degree murder or a Class X felony, 3 years;

(2) for a Class 1 felony or a Class 2 felony, 2 years;

(3) for a Class 3 felony or a Class 4 felony, 1 year;

(4) if the victim is under 18 years of age, for a second or subsequent offense of criminal sexual assault or aggravated criminal sexual assault, 5 years, at least the first 2 years of which the defendant shall serve in an electronic home detention program ***;

(5) if the victim is under 18 years of age, for a second or subsequent offense of aggravated criminal sexual abuse or felony criminal sexual abuse, 4 years, at least the first 2 years of which the defendant shall serve in an electronic home detention program ***.” 730 ILCS 5/5-8-1(d) (West 2002).

¶ 13 On July 11, 2005, subsection (d) was amended, in pertinent part, to provide as follows:

“(4) for defendants convicted of predatory criminal sexual assault of a child, aggravated criminal sexual assault, or criminal sexual assault, on or after July 1,

2005, the term of mandatory supervised release shall range from a minimum of 3 years to a maximum of the natural life of the defendant[.]” Pub. Act 94-165, § 5, (eff. July 11, 2005) (amending 730 ILCS 5/5-8-1(d) (West 2002)).

¶ 14 Shortly thereafter, subsection (d) was again amended (see Pub. Act 94-715, § 5, (eff. Dec. 13, 2005)), in pertinent part, to read:

“(4) for defendants *who commit the offense* of predatory criminal sexual assault of a child, aggravated criminal sexual assault, or criminal sexual assault, *on or after the effective date of this amendatory Act of the 94th General Assembly*, the term of mandatory supervised release shall range from a minimum of 3 years to a maximum of the natural life of the defendant[.]” (Emphasis added.) 730 ILCS 5/5-8-1(d)(4) (West 2008).

¶ 15 Defendant argues that, because the State cannot establish that he committed the offenses after January 1, 2006, he cannot be sentenced to a three-year-to-life term of MSR.² Defendant maintains that he can be sentenced to only a three-year MSR term. Defendant concedes that he did not raise this issue in his motion to reconsider his sentence. Generally, the issue would be deemed forfeited. See, e.g., *People v. Reed*, 177 Ill. 2d 389, 394 (1997). However, a trial court may impose only a sentence that is authorized. Any unauthorized aspect of a sentence is void and may be attacked at any time. See *In re T.E.*, 85 Ill. 2d 326, 333 (1981) (“The established rule is that where a court having jurisdiction over both the person and the offense imposes a sentence in excess of what the statute permits, the legal and authorized portion of the sentence is not void, but the excess portion

²Both parties assert that the amendatory language became effective as of January 1, 2006; however, it became effective as of December 13, 2005. See Pub. Act 94-715, § 5, (eff. Dec. 13, 2005).

of the sentence is void.”). Here, defendant argues that, because that portion of the MSR term exceeding three years is unauthorized, it is void. Thus, we determine whether that portion of the MSR term exceeding three years is unauthorized.

¶ 16 We find our recent decision in *People v. Hubbard*, 2012 IL App (2d) 120060, to be instructive. In *Hubbard*, the defendant pleaded guilty to aggravated criminal sexual assault and was sentenced to 47½ years in prison. On appeal, the defendant argued that the sentence, the plea agreement, and the conviction were void, because under the recidivist sentencing provision of section 12-14(d)(2) of the Criminal Code of 1961 (720 ILCS 5/12-14(d)(2) (West 2004)), the only statutorily authorized sentence was a life sentence due to his having a prior conviction of predatory criminal sexual assault of a child. We disagreed. We found that, although the defendant did have a prior conviction, and although the parties advised the court of the conviction (in a preplea conference pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 1997)), the parties did not formally present the conviction to the court at the plea proceedings. We noted that the parties to a plea agreement are the State and the defendant. We stated:

“[T]he terms that the parties negotiate include not only the sentence, but the facts that the State will present to the court. The parties set out the agreement by means of the plea hearing; they introduce the facts through the factual basis (and those counts of the charging instrument to which the defendant pleads guilty). Those facts determine the validity of the sentence.” *Hubbard*, 2012 IL App (2d) 120060, ¶ 21.

Thus, we concluded that, because the defendant’s prior conviction was not placed before the court as part of the defendant’s guilty plea, the mandate of section 12-14(d)(2) for a life sentence did not apply.

¶ 17 Under *Hubbard*, it is the factual basis for the guilty plea that sets the applicable sentencing range. Here, the factual basis for defendant's pleas established that "between March 2nd, of 2003, and March 1st of 2008 here in Lake County, the defendant placed his penis inside the vagina of [F.S.] who was under the age of 13." The factual basis does not establish that defendant committed the offenses only before December 13, 2005. Thus, the factual basis does not establish that the three-year-to-life MSR term is void.³

¶ 18 Although the factual basis controls, we observe that the presentence investigation report⁴ (PSI) included in the record indicates that the conduct charged in counts I and II occurred after December 13, 2005. The PSI refers to a statement made by defendant the day following his arrest:

"[Defendant] wrote that when [F.S.] was twelve years old, he started touching her sexually. He indicated that he touched her buttocks and vagina with [his] hands and with his penis.

³On November 30, 2012, defendant filed a motion seeking leave to cite *People v. Vlahon*, 2012 IL App (4th) 110229, as additional authority. The motion is granted. Nevertheless, we note that *Vlahon* does not apply, because it involved a defendant's right to elect the MSR term in effect when he committed the offense. In that case, there was no question concerning the date of the offense. We agree that, here, if defendant's offense did not occur after December 13, 2005, then he would be entitled to relief. The only question before us is whether there was a factual basis to support the three-year-to-life MSR term. In addition, we note that *Vlahon* involved a jury trial, not a plea agreement.

⁴In its brief, the State cites to a "'Limited Inquiry Report' prepared by Lake County Adult Court Services on February 15, 2010." However, it is actually a Presentence Investigation Report.

He estimated that he abused [F.S.] tent [*sic*] times in the previous two years, with the last time being only a couple of days before his arrest.”

Defendant admitted that he started touching F.S. sexually when she was 12 years old and that he touched her buttocks and vagina with his hands and his penis. Based on the dates alleged in the various counts, we can assume that F.S. turned 13 on March 2, 2008. Therefore, according to defendant’s admission, he began abusing F.S. on March 2, 2007, and did so about 10 times within two years of his arrest on June 25, 2009, *i.e.*, between June 25, 2007, and June 25, 2009. This admission puts conduct within the requisite dates—between December 13, 2005, and March 1, 2008.

¶ 19 Defendant argues that we should look at counts I through XVI as if they alleged conduct in chronological order, since the conduct alleged in the last 6 counts occurred after the conduct alleged in the first 10 counts. According to defendant, under this interpretation, it would follow that the conduct alleged in counts I and II occurred earlier than the other counts and thus before the effective date of the MSR statute at issue. We reject this argument as mere speculation. Although counts XI through XVI alleged conduct occurring after the victim turned 13, we find no basis upon which to conclude that counts I through X, which alleged conduct occurring when the victim was under 13, were alleged in chronological order.

¶ 20 Finally, defendant argues that we should apply section 5-8-1(d)(4) of the Code “so as to favor his interest” based on the “rule of lenity.” We note that the rule of lenity requires us to construe statutes in favor of the accused only where there is ambiguity. See *People v. Haissig*, 2012 IL App (2d) 110726, ¶¶ 20-22. There is no ambiguity in the statute. It applies to “defendants who commit the offense of predatory criminal sexual assault of a child, aggravated criminal sexual assault, or

criminal sexual assault, on or after [December 13, 2005].” 730 ILCS 5/5-8-1(d)(4) (West 2008).

Thus, the rule of lenity does not apply.

¶ 21 Accordingly, based on the foregoing, we find that the three-year-to-life term of MSR was authorized and, as such, is not void.

¶ 22

III. CONCLUSION

¶ 23 For the reasons stated, we affirm defendant’s convictions and sentences.

¶ 24 Affirmed.