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2012 IL App (3d) 100869-U

Order filed May 8, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

| | | |
|--------------------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the Circuit Court |
| |) | of the 12th Judicial Circuit, |
| Plaintiff-Appellee, |) | Will County, Illinois, |
| |) | |
| v. |) | Appeal No. 3-10-0869 |
| |) | Circuit No. 99-CF-551 |
| |) | |
| TIMOTHY J. CUNNINGHAM, SR., |) | Honorable |
| |) | Robert P. Livas, |
| Defendant-Appellant. |) | Judge, Presiding. |

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Schmidt and Justice Holdridge concurred in the judgment.

ORDER

- ¶ 1 *Held:* The cause is remanded for the trial court to enter a sentence on defendant's conviction for home invasion.
- ¶ 2 Following a jury trial, defendant, Timothy J. Cunningham, Sr., was convicted of first degree murder (720 ILCS 5/9-1(a)(2) (West 1998)), felony first degree murder (720 ILCS 5/9-1(a)(3) (West 1998)), home invasion (720 ILCS 5/12-11(a)(2) (West 1998)), and attempted murder (720 ILCS 5/8-4(a), 9-1(a)(2) (West 1998)). The trial court merged the home invasion conviction and the felony

murder conviction into the first degree murder conviction and sentenced defendant to a term of natural life for first degree murder and a consecutive term of 25 years' imprisonment for attempted murder.

¶ 3 On appeal, we vacated defendant's felony murder conviction and otherwise affirmed. *People v. Cunningham*, No. 3-01-0514 (2003) (unpublished order under Supreme Court Rule 23). Defendant then filed a postconviction petition which was dismissed. Thereafter, defendant filed a motion to file a successive postconviction petition which was denied by the trial court. Defendant appeals that denial and argues that his sentence is void because the trial court did not impose a sentence on his home invasion conviction. We agree and remand the cause to the trial court for the imposition of a sentence on the home invasion conviction.

¶ 4 ANALYSIS

¶ 5 Defendant argues that his sentence is void because the trial court failed to sentence him on his home invasion conviction. We note that defendant brings this argument following the trial court's order denying him leave to file a successive postconviction petition; however, it is well established that a void order can be attacked at any time. *People v. Gutierrez*, 2012 IL 111590. An order is void where the court that entered it lacked jurisdiction, while a voidable judgment is one entered in error by a trial court acting within its jurisdiction. *People v. Welch*, 392 Ill. App. 3d 948 (2009). Whether a sentence is void is a question of law subject to *de novo* review. *People v. Thompson*, 209 Ill. 2d 19 (2004).

¶ 6 Here, prior to sentencing, the trial court merged defendant's conviction for home invasion with his conviction for first degree murder and, therefore, failed to sentence defendant on the home invasion conviction. However, the merger was error. See *People v. McLaurin*, 184 Ill. 2d 58 (1998).

In addition, a circuit court lacks authority to fail to impose any sentence on a properly entered judgment of conviction. *People v. Robinson*, 267 Ill. App. 3d 900 (1994). Thus, the trial court's failure to impose a sentence on defendant's conviction for home invasion renders that part of the order void.

¶ 7 Defendant argues that upon a finding that the sentence was void, we must remand the cause for resentencing on all counts. We disagree. Where a reviewing court affirms a circuit court's judgment of conviction, but the judgment remains incomplete because no sentence has been entered upon it, the reviewing court should order the judgment be made final by the imposition of sentence. *Id.* However, remand for resentencing is only necessary for the conviction that the trial court failed to sentence upon. See *People v. Scott*, 69 Ill. 2d 85 (1977). Therefore, we affirm defendant's convictions but remand the cause to the trial court for the imposition of a sentence on the home invasion conviction only.

¶ 8 CONCLUSION

¶ 9 The judgment of the circuit court of Will County is affirmed and remanded for a sentencing order on defendant's conviction for home invasion.

¶ 10 Affirmed and remanded.