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).

2012 IL App (4th) 100359-U

Filed 1/23/12

NO. 4-10-0359

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
ANTHONY GAY,	)	No. 03CF146
Defendant-Appellant.	)	
	)	Honorable
	)	Robert M. Travers,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court erred in sentencing defendant to an extended term on his lesser-class-felony offense because it was part of the same course of conduct as the greater-class offense.

¶ 2 (2) Where defendant failed to demonstrate a substantial deprivation of his constitutional right to due process by claiming that he was not notified that his conduct could be subject to the filing of a criminal charge, the circuit court properly dismissed his postconviction petition.

¶ 3 Defendant, Anthony Gay, appeals from the circuit court's order dismissing his postconviction petition upon the State's motion. He poses two arguments in this appeal. First, he claims his sentence for aggravated battery, to which he pleaded guilty, should not have been subject to an extended term and is void. Second, he contends that his liberty interests were violated when the Illinois Department of Corrections (DOC) failed to notify him that engaging in certain conduct in prison which would subject him to internal disciplinary measures could also subject him to

criminal charges. We agree with defendant's first contention and vacate the extended-term portion of his sentence for aggravated battery and remand with directions. However, we affirm the court's dismissal on defendant's second contention because he failed to allege a substantial violation of his constitutional rights.

¶ 4 I. BACKGROUND

¶ 5 Defendant, a DOC inmate, while proceeding *pro se*, pleaded guilty to one count of aggravated battery (720 ILCS 5/12-4(b)(6) (West 2002) (a Class 3 felony)) and one count of unlawful possession of a weapon by an inmate (720 ILCS 5/24-1.1(b) (West 2002) (a Class 1 felony)). A grand jury returned indictments on both charges, superseding the two-count information filed by the State. In exchange for his plea, the State agreed to recommend two sentences of seven years on each count to run concurrently. According to the factual basis for these charges, on or about July 30, 2000, defendant intentionally threw feces on Jeffrey Moore, a DOC officer, though he had intended to hit another inmate, not Moore. During the assault, defendant had in his possession a 17-inch long weapon, or shank, sharpened to a point.

¶ 6 The trial court sentenced defendant, pursuant to the terms of the plea agreement, to two concurrent extended-term sentences of seven years to be served consecutively to all of his prior undischarged prison terms. The extended terms were based on defendant's prior convictions within 10 years. Defendant subsequently moved to withdraw his plea, claiming it was not knowing and voluntary. The court denied his motion and he appealed. This court affirmed, finding that defendant's claim that he was suffering from "extreme emotional and mental duress" at the time he pleaded guilty, was without merit. See *People v. Gay*, No. 4-06-1044 (October 3, 2007) (unpublished order under Supreme Court Rule 23). Specifically, this court noted that the trial court

had properly admonished defendant regarding the nature of the charges, the applicable sentencing factors, and the rights he would be waiving by pleading guilty. Defendant acknowledged he understood the admonitions and proceeded to plead guilty. See *Gay*, No. 4-06-1044, slip order at 7.

¶ 7 In December 2008, defendant filed a *pro se* postconviction petition. He labeled his motion as "amended," however this was the first postconviction petition filed in this case. In his petition, he claimed (1) his due-process rights were violated when he was "never put on written notice [he] violated state law and would be prosecuted" rather than being subject only to internal discipline before he committed his offenses, (2) the State engaged in tactical pre-indictment delay in order to circumvent his speedy-trial rights, (3) the trial court circumvented his speedy-trial rights by ordering him to undergo a fitness examination that was not promptly accomplished, (4) his trial counsel was ineffective for acquiescing to the court's request for a fitness determination, (5) the court erred by denying his motion to substitute judge, (6) his extended-term sentence on his aggravated-battery conviction was void, and (7) his appellate counsel was ineffective for failing to raise these issues on direct appeal.

¶ 8 The State filed a motion to dismiss and the circuit court conducted a hearing on February 19, 2010. After considering the parties' arguments, the court took the matter under advisement. On April 15, 2010, the court issued a written order granting the State's motion and dismissing defendant's petition. This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 A. Extended Term

¶ 11 First, defendant claims the trial court erred in sentencing him to an extended-term on his aggravated-battery conviction when it arose from the same criminal objective as the more serious

weapons charge. Because the weapons charge was a Class 1 felony, while the aggravated-battery charge was a Class 3 felony, and both arose out of the same course of conduct, defendant contends, the extended-term sentence for the aggravated-battery conviction was void pursuant to statutory authority. See 730 ILCS 5/5-8-2 (West 2002).

¶ 12 Initially, we acknowledge the State's argument that defendant forfeited this claim by failing to preserve the issue for appeal by not objecting in the trial-court proceedings. However, our supreme court has held that "[a]n argument that an order or judgment is void is not subject to waiver." *People v. Thompson*, 209 Ill. 2d 19, 27 (2004). Therefore, we excuse defendant's procedural default and, finding the issue has not been forfeited, address whether defendant's extended-term sentence is void.

¶ 13 Section 5-8-2 of the Unified Code of Corrections (730 ILCS 5/5-8-2 (West 2002)) provides that a sentencing court may impose an extended term only "for the class of the most serious offense of which the offender was convicted." However, our supreme court determined that an exception to this general rule applies if the charges arose from "unrelated courses of conduct." *People v. Coleman*, 166 Ill. 2d 247, 257 (1995). Here, the parties present dichotomous arguments as to whether the two offenses were part of the same course of conduct.

¶ 14 Defendant contends he committed both offenses while responding to threats by certain inmates on his cell block. He was armed with the semi-solid substance and a 17-inch weapon for that purpose. The State contends defendant's act of throwing a cup of feces on the correctional officer was completely unrelated to defendant's possession of the 17-inch shank.

¶ 15 We must determine then whether these multiple offenses arose from the same course of conduct. Addressing this issue, our supreme court has concluded that:

> "in determining whether a defendant's multiple offenses are part of an 'unrelated course of conduct' for the purpose of his eligibility for an extended-term sentence under section 5-8-2(a), courts must consider whether there was a substantial change in the nature of the defendant's criminal objective. *People v. Bell*, 196 Ill. 2d 343, 354 (2001).

If a substantial change in the nature of a defendant's criminal objective is present, then the offenses are considered unrelated and the defendant can be sentenced to an extended term on each charge. *Bell*, 196 Ill. 2d at 354-55.

¶ 16 In making this determination, we look to the factual circumstances supporting these charges. According to the grand jury testimony of Jack Libby, the correctional officer who had investigated the incident, both charges stemmed from the same course of conduct. Apparently, on the day in question, DOC officer Jeffrey Moore was escorting inmates to the shower facilities. Defendant was already in the shower area when Moore brought in another inmate. Libby said: "It was at that point that [defendant] threw a cup of fecal matter on Officer Moore and the inmate that was being escorted, Inmate Johnson. And then he pulled out a weapon approximately 17 inches long and tried to stab the inmate that was being escorted by Officer Moore."

¶ 17 Additionally, for the factual basis presented at the March 2006 plea hearing, the State offered the following:

> "Your Honor, back on July 30, 2000, at a time when [defendant] was housed at the Pontiac Correctional Center, that day there was an incident occurring near the shower portion of the North

> Cell House. [Defendant] had some ill will, I guess you could say, toward certain inmates in the institution who he believed had disrespected him, had in his possession a weapon, a padded, hard-handled object with a sharpened point on an end that was approximately 16, 17 inches long, made an effort to use that with respect to one of those fellows who had disrespected him, not a correctional officer. The weapon was later recovered with some direction, retained, and we've kind of recited at various points along the way, and I'd ask the court to take notice of those, what ultimately happened with that weapon.
>
> In terms of the throwing of the substance, [defendant], although purporting to seek to strike again one of those who disrespected him, managed to rather squarely hit Correctional Officer Moore, who was in his, at that time, [uniform]. And it, having examined the uniform shirt and trousers today, suffice it to say that it left a brownish, at the time, fecal[-]matter smelling material on Correctional Officer Moore[,] who was, as a reasonable person would be in the circumstances, insulted and provoked by it."

¶ 18 Given the factual circumstances of the incident, as relayed by the witness and the prosecution, calling these two offenses unrelated would be "unrealistic." See *People v. Peacock*, 359 Ill. App. 3d 326, 337 (2005). Defendant's overall objective—his ultimate purpose behind both offenses—was to retaliate against this particular inmate. Apparently believing the showers would

be an opportune time to attack, he did so first with the cup of fecal material and then with the weapon. The record contains no evidence of a substantial change in the nature of defendant's criminal objective, as there did not appear to be a break between the separate attacks. Apparently, Moore was a victim of circumstance in the first attack and was hit with the substance intended for Johnson.

¶ 19 With no change in defendant's criminal objective between the two offenses, it follows that the extended-term portion of the sentence on the conviction of aggravated battery is void. Therefore, we vacate the extended-term portion of that sentence, thereby reducing the sentence to the maximum nonextended term of imprisonment authorized by the Unified Code: five years for aggravated battery, a Class 3 felony (730 ILCS 5/5-8-1(a)(6) (West 2002)). See *Thompson*, 209 Ill. 2d at 29 (on appeal after a guilty plea, the court reduced the defendant's sentence to the maximum nonextended term).

¶ 20 We reject defendant's claim that he should be allowed to withdraw his plea given the error. Because the two sentences were ordered to run concurrently, and his seven-year extended-term sentence for possession of a weapon by an inmate remains, we find no basis to allow defendant leave to withdraw his plea, as the error in this case in no way affected the voluntariness of his plea.

¶ 21 B. Defendant's Claimed Protected Liberty Interests

¶ 22 Defendant next contends that he made a substantial showing in his postconviction petition that, through the implementation of administrative rules, the State of Illinois had created a protected liberty interest by promulgating prison rules and procedures, one of which required DOC to notify an inmate when certain proscribed conduct could potentially expose him to criminal charges in addition to being subject to internal DOC disciplinary actions. Defendant claimed DOC interfered

with that liberty interest by not advising him accordingly at the time he committed the acts in question.

¶ 23 In his petition, defendant alleged that, beginning in July 2000, when he was transferred to Pontiac Correctional Center, he began to crave the attention of the psychologist he had met at Tamms Correctional Center so badly that he "started throwing liquid substances with a conscious reckless disregard of correctional officers" hoping to "force a transfer" back to Tamms. By doing so, he was issued numerous disciplinary citations as well as being charged in 21 separate criminal proceedings for this conduct. In this case, in particular, defendant was issued a disciplinary ticket for an offense no. "102 assault," but was not issued a disciplinary ticket for a violation of prison regulation offense no. 501—committing any act that would constitute a violation of state or federal law. He insisted that by not notifying him of the potential of criminal charges being filed against him, the State of Illinois and DOC in particular have violated his due-process rights.

¶ 24 At the second stage of postconviction proceedings when the circuit court is considering the State's motion to dismiss, the court must accept all factual allegations not otherwise rebutted by the record as true. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). The court should not engage in any fact-finding determination. *Id.* "Due to the elimination of all factual issues at the dismissal stage of the post-conviction proceeding, a motion to dismiss raises the sole issue of whether the petition being attacked is proper as a matter of law." *Id.* Thus, our review at this stage is *de novo*. *Id.* at 389.

¶ 25 Acknowledging that a voluntary guilty plea generally waives all non-jurisdictional errors, defendant claims that this issue should not be subject to waiver, as it falls within the fundamental-fairness exception. That is, defendant argues, this court should find that the issue

should be decided and thus, not waived, because fundamental fairness dictates that a determination on the merits be made in these postconviction proceedings. We fail to see how this purported error "so infected the entire trial" so as to violate defendant's due process. See *People v. Flores*, 153 Ill. 2d 264, 279 (1992).

¶ 26 As defendant freely admits in his petition, he engaged in conduct substantially similar to the conduct for which he was charged in this case approximately 20 other times. He therefore, cannot sincerely allege that he was not aware that throwing fecal matter on a correctional officer would subject him to potential criminal charges. He cannot sincerely allege that DOC violated his due-process rights by failing to notify him that his conduct "was criminally, as well as administratively, proscribed." He cannot sincerely allege that he had no fair warning or opportunity to know that his behavior was not only proscribed within the confines of DOC but that it was unlawful as well. Based on defendant's admitted patterned behavior and his guilty plea to such behavior in this case, we find that he failed to allege a substantial deprivation of his constitutional rights. Thus, we affirm the circuit court's order dismissing defendant's postconviction petition.

¶ 27 III. CONCLUSION

¶ 28 For the foregoing reasons, we vacate the extended-term portion of defendant's sentence for aggravated battery and remand for issuance of an amended sentencing judgment so reflecting. Otherwise, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 29 Affirmed in part and vacated in part.