2013 IL App (1st) 102888-U

FIFTH DIVISION
April 26, 2013

Nos. 1-10-2888, 1-10-2889, 1-10-2890, 1-10-2891, and 1-10-2892, Consolidated

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).

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.
	)	
	)	Nos. 08 CR 1685
	)	08 CR 1686
v.	)	08 CR 1687
	)	08 CR 1688
	)	08 CR 3470
	)	
DWAYNE MORROW,	)	Honorable
	)	Noreen Valeria-Love,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Taylor concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's sentence pursuant to a negotiated guilty plea was void where it did not include the applicable mandatory firearm enhancement. Because defendant's sentence cannot be modified to comply in the aggregate with the plea agreement, his plea itself is also void.

¶ 2 Pursuant to a negotiated guilty plea, defendant Dwayne Morrow was convicted of three counts of armed robbery and one count each of attempted armed robbery and escape, and was sentenced to four concurrent 15-year prison terms for the armed robberies and attempted armed robbery, to be served consecutively to four years for escape for an aggregate sentence of 19 years. Defendant now appeals from orders of the circuit court denying his motion to withdraw his guilty plea and summarily dismissing his post-conviction petition. He contends on appeal that his plea agreement is void because his armed robbery convictions are subject to a 15-year firearm enhancement (720 ILCS 5/18-2(a)(2), (b) (West 2010)), so that his aggregate sentence is less than the statutory minimum for armed robbery committed with a firearm. The State concedes that if the firearm enhancement applies, defendant's sentence is void and he should be allowed to withdraw his plea. Our supreme court recently determined that the firearm enhancement at issue is valid. *People v. Blair*, 2013 IL 114122. For the reasons stated below, we conclude that the firearm enhancement applies here, that defendant's sentence and guilty plea are void, and that this case must be remanded to the circuit court where defendant may withdraw his guilty plea.

¶ 3 Defendant was charged in relevant part with three separate armed robberies committed in December 2007, with each charge alleging that he was armed with a firearm during the offense. Defendant was also charged with attempted armed robbery committed on December 12, 2007, for displaying a gun with the intent to commit armed robbery. Defendant was charged with escape for fleeing a police station on or about December 15, 2007.

¶ 4 On May 10, 2010, following a conference pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 2012), defendant entered a plea of guilty to the counts mentioned above – one count for each of his five cases – in exchange for the dismissal of all other counts and the sentence mentioned above. As required by Rule 402, the court admonished defendant of the sentencing

range he was facing and rights he was relinquishing by pleading guilty. However, the court described armed robbery as a Class X felony punishable by 6 to 30 years' imprisonment, with no mention of a firearm enhancement. The parties stipulated to the factual basis for each count of the plea in detail. In relevant part, a gun was put to the victim's head in two of the robberies and was show to the victim in the third. The court sentenced defendant in accordance with the plea agreement and admonished him as to his appeal rights pursuant to Supreme Court Rule 605(c) (eff. Oct. 1, 2001). The mittimus in at least two of the armed robbery cases states the offense as armed robbery while armed with a firearm.

¶ 5 In late June 2010, defendant filed a *pro se* motion to withdraw his guilty plea, claiming that his sentence was too long and that he was innocent and thus wanted a trial. The court denied the motion as untimely filed on July 9, 2010. Defendant filed a *pro se* motion to reconsider the denial in September 2010, which he styled an appeal from that decision.

¶ 6 Also in September 2010, defendant filed a *pro se* post-conviction petition, alleging that he had been indicted for only two armed robberies rather than three, and that the State made false statements during the Rule 402 conference and guilty plea hearing regarding the factual basis for the plea, without defense counsel objecting. He alleged that his three line-up identifications were tainted and that the gun which was allegedly his was not linked to him by fingerprints or DNA.

¶ 7 On September 24, 2010, the court summarily dismissed the petition and directed the entry of a notice of appeal from the denial of the withdrawal motion. The resulting five appellate cases were consolidated here.

¶ 8 Our supreme court has issued a supervisory order directing us to consider these notices "as validly filed notices of appeal from the judgment *** of September 24, 2010, denying post-

conviction relief, as well as the judgment of July 9, 2010, denying a motion to withdraw a guilty plea." *Morrow v. Connors*, No. 113940 (April 3, 2012).

¶ 9 On appeal, defendant contends that his plea agreement is void because his armed robbery convictions are subject to a 15-year firearm enhancement, so that his aggregate sentence is lower than the statutory minimum for armed robbery committed with a firearm.[1] The State concedes that if the firearm enhancement applies herein, defendant's sentence is void and he should be allowed to withdraw his plea.

¶ 10 The State's concession is correct. In *People v. White*, 2011 IL 109616, our supreme court considered the question: "When the factual basis entered for a guilty plea makes it clear that a defendant is subject to a mandatory sentencing enhancement, may the trial court enter judgment imposing a sentence that does not include the enhancement on the basis that the enhancement was excluded by the parties from the plea agreement?" *White*, ¶ 1. The supreme court concluded that omission of the mandatory sentencing enhancement renders the sentence and plea void, and remanded to the circuit court to allow the defendant to withdraw his plea. In doing so, the supreme court expressly rejected an argument that the parties agreed to a conviction for the unenhanced offense and that said agreement should govern. " 'Even when a defendant, prosecutor, and court agree on a sentence, the court cannot give the sentence effect if it is not authorized by law.' " *White*, ¶ 23, quoting *United States v. Greatwalker*, 285 F. 3d 727, 730 (8th Cir. 2002). The *White* court acknowledged that the State has discretion whether and upon which charges to prosecute, and to enter into plea agreements in which the firearm enhancement to armed robbery is negotiated away. *White*, ¶ 25, and cases cited therein. However, the *White*

[1]As a threshold matter, we note that defendant did not raise this claim in his motion to withdraw his plea or post-conviction motion. However, a voidness claim may be properly raised by a defendant for the first time on appeal. *People v. Petrenko*, 237 Ill. 2d 490, 503 (2010).

defendant was charged with first degree murder, and unlike the separate offenses of robbery and armed robbery, first degree murder is a single offense with no separate offense of "armed murder" or the like, so that our legislature eliminated any discretion the State and trial court had to craft a sentence that does not include the mandatory firearm enhancement. *White*, ¶ 26. The *White* court did not reject the State's argument that, in negotiating the guilty plea, it could concede a version of the facts that would not mention the use of a firearm in the offense so that sentencing could be based on that version of the facts. However, it found the argument irrelevant once the State agreed to a version of facts, and presented it to the court in the factual basis for the plea, establishing that a firearm was used in the commission of the offense. *White*, ¶ 27.

¶ 11 Our supreme court recently clarified the *White* effect of a void negotiated sentence upon the voidness of the plea itself. *People v. Donelson*, 2013 IL 113603. The *Donelson* court considered the issue of the appropriate remedy when "the State and the defendant, parties to a fully negotiated plea agreement, are mutually mistaken as to the manner in which sentences of imprisonment must be served, but otherwise agree upon the maximum number of years to be served." *Donelson*, ¶ 1. Specifically, in a case where consecutive sentencing was mandatory, the concurrent sentencing in the plea agreement rendered the agreed sentence void. However, the *Donelson* court concluded that the plea agreement taken as a whole was not void because statutorily-valid sentences could be fashioned for the pled offenses that would result in an aggregate sentence equal to the aggregate sentence in the plea agreement, thus effectuating the parties' overall intent. Allowing the defendant to withdraw his plea under such circumstances would deprive the State of the benefit of its bargain, while remanding the case for resentencing with the same aggregate sentence for the same offenses as in the plea agreement would allow both parties to retain the benefit of their bargain. In other words, "pursuant to contract principles,

contracting parties' mutual mistake may be rectified by recourse to contract reformation [citation] where they are in actual agreement and their true intent may be discerned." *Donelson*, ¶ 20.

¶ 12 However, *Donelson* does not apply here, a fact defendant hints at by arguing that the minimum sentence for armed robbery with the firearm enhancement exceeds his aggregate agreed sentence. Specifically, his aggregate sentence is 19 years' imprisonment while the minimum prison sentence for armed robbery with the firearm enhancement is 21 years. Thus, there is no possible sentence for the pled offenses that would give defendant his agreed aggregate sentence. The State correctly concedes that, as in *White*, once the factual basis for defendant's plea acknowledged that he was armed with a firearm during the armed robberies, the firearm enhancement must be imposed here if it is a valid statutory provision. In sum, defendant's sentence and plea without the enhancement are void unless the enhancement itself is void.

¶ 13 Our supreme court very recently (on March 21, 2013) determined that the 15-year enhancement to armed robbery for commission of the offense while armed with a firearm is valid since our legislature adopted Public Act 95-688 (eff. Oct. 23, 2007), which our supreme court found to have remedied the enhancement's disproportionate-penalties invalidity. *People v. Blair*, 2013 IL 114122.

¶ 14 Accordingly, we reverse the order of the circuit court denying defendant's motion to withdraw his plea and remand for further proceedings in which defendant may withdraw his guilty plea.

¶ 15 Reversed and remanded with directions.