

2013 IL App (1st) 110065-U

FIRST DIVISION  
DATE: APRIL 22, 2013

Nos. 1-11-0065 and 1-11-3338  
(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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 92 CR 28979
	)	
ALBERT LEE,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.  
Justices Rochford and Delort concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Defendant's petitions for relief from judgment were properly dismissed as untimely.
- ¶ 2 Defendant Albert Lee appeals *pro se* from the dismissal of two petitions for relief from judgment filed pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)). On appeal, defendant contends that the trial court erred when it dismissed his petitions, because an unverified complaint was insufficient to invoke the circuit court's jurisdiction in his felony prosecution and because he was subjected to consecutive sentences in violation of the relevant sentencing statute. We affirm.

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¶ 3 The record reveals that on November 26, 1992, the State filed a complaint for preliminary examination charging defendant with having committed the offense of murder. Defendant was then charged by indictment with unlawful restraint, armed robbery and three counts of first degree murder. Following a bench trial, defendant and codefendant Guy Wilhoite were convicted of first degree murder and armed robbery. Defendant was sentenced to life in prison for murder and to a concurrent 50-year sentence for armed robbery. On appeal, this court found that defendant's jury waiver was involuntary and remanded for a new trial. See *People v. Lee*, No. 1-94-3621 (1996) (unpublished order under Supreme Court Rule 23).

¶ 4 On remand, a jury trial was held and defendant was again convicted of first degree murder and armed robbery. The trial court found that the offenses were the result of "exceptionally brutal or heinous conduct" and sentenced defendant to natural life in prison for the first degree murder conviction and to a concurrent extended-term sentence of 50 years for the armed robbery. Defendant then appealed contending that his sentence was excessive. During the pendency of defendant's appeal, the Supreme Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Subsequently, this court held that the imposition of a natural life sentence based on the trial court's finding that the murder was "exceptionally brutal and heinous" violated *Apprendi*, and that the extended-term 50-year sentence for armed robbery was improper because a defendant should only be sentenced to an extended-term sentence for the most serious class of felony of which he is convicted. See *People v. Lee*, 318 Ill. App. 3d 417, 423-24 (2000). Consequently, this court affirmed defendant's convictions, vacated his sentences, and remanded the cause for resentencing. *Lee*, 318 Ill. App. 3d at 424.

¶ 5 In March 2005, defendant was sentenced to 60 years in prison for the first degree murder conviction and to a consecutive term of 30 years for the armed robbery. On appeal, defendant contended that the trial court erred by imposing consecutive sentences when the court had previously imposed concurrent sentences. In other words, defendant argued that because the

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factual question of whether the offenses at issue were committed as a single course of conduct with no change in the nature of the criminal objective had been resolved in his favor twice before, the court was not free to impose consecutive sentences at resentencing.

¶ 6 In rejecting defendant's contentions on appeal, this court determined that it was within the trial court's power to sentence defendant to consecutive sentences, that the trial court's finding of a single course of conduct was not against the manifest weight of the evidence, and that the trial court did not abuse its discretion in determining defendant's sentence. *People v. Lee*, 1-05-1359, Order at 9-13 (2007) (unpublished order under Supreme Court Rule 23). Defendant then filed several unsuccessful collateral attacks upon his convictions. See *People v. Lee*, Nos. 1-07-0974 (2009), 1-08-2330 (2010) (unpublished orders under Supreme Court Rule 23).

¶ 7 In September 2010, defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Code alleging, *inter alia*, that the circuit court's jurisdiction was never invoked because an unverified complaint is an insufficient charging instrument for a felony. In 2011, defendant filed a second petition for relief from judgment alleging that his sentences were void because consecutive sentences were not authorized under section 5-8-4(a) of the Unified Code of Corrections (730 ILCS 5/5-8-4(a) (West 1992)), and that relief pursuant to section 2-1401 was not foreclosed by the two-year time limit because the judgment at issue was void. The court dismissed both petitions, and the defendant now appeals.

¶ 8 Section 2-1401 of the Code provides a statutory mechanism by which a final order or judgment may be vacated or modified more than 30 days after its entry. 735 ILCS 5/2-1401 (West 2010). The petition must be filed no later than two years following the entry of judgment, excluding the time during which the defendant was under a legal disability or duress or the ground for relief was fraudulently concealed. *People v. Nitz*, 2012 IL App (2d) 091165, ¶ 9. The final judgment in a criminal case is the sentence. *People v. Jake*, 2011 IL App (4th) 090779, ¶ 24. However, a petition challenging a judgment as void is not subject to the limitations period or

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the due diligence requirements of section 2-1401. *People v. Morfin*, 2012 IL App (1st) 103568, ¶ 30; see also *People v. Raczkowski*, 359 Ill. App. 3d 494, 496-97 (2005) (if the circuit court lacked jurisdiction over the parties or the subject matter or exceeded its statutory power to act, the judgment is void and may be attacked at any time).

¶ 9 Initially, this court notes that defendant has not shown that he acted with due diligence. In the instant case, defendant's section 2-1401 petitions were filed five and six years after his resentencing in 2005. Defendant offers no explanation for his delay in filing, rather, he contends that he is not barred from seeking relief because he is attacking a void judgment, and is not subject to the due diligence, meritorious defense and two-year time requirements of section 2-1401. See 735 ILCS 5/2-1401(c) (West 2010). While it is certainly true that a defendant may attack a void judgment at any time (*Raczkowski*, 359 Ill. App. 3d at 496-97), the judgment must actually be void in order to overcome the two-year time limit (*People v. Harvey*, 196 Ill. 2d 444, 447 (2001)). Defendant contends that his convictions are void because he was prosecuted for murder based upon an unverified complaint, which was insufficient to begin a felony prosecution and failed to invoke the circuit court's jurisdiction.

¶ 10 In Illinois, felony prosecutions may occur by either grand-jury indictment or a prompt preliminary hearing. Ill. Const. 1970, art. I, § 7 (no one "shall be held to answer for a crime punishable \* \* \* by imprisonment in the penitentiary unless either the initial charge has been brought by indictment of a grand jury or the person has been given a prompt preliminary hearing to establish probable cause"); 725 ILCS 5/111-2(a) (West 2010) (felony prosecutions "shall be by information or by indictment"). A complaint alleging a felony does not commence a prosecution for statute of limitations purposes. *People v. Macon*, 396 Ill. App. 3d 451, 456 (2009). Rather, the date that an indictment is filed or an information is found marks the "commencement of a felony prosecution." *Macon*, 396 Ill. App. 3d at 456.

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¶ 11 Here, the record reveals that the State first filed a complaint for preliminary examination charging defendant with having committed the offense of murder, and that defendant was then charged by indictment with unlawful restraint, armed robbery and first degree murder. It was then, at the filing of the indictment, that the felony prosecution against defendant commenced. *Macon*, 396 Ill. App. 3d at 456. Accordingly, defendant's claim that he was prosecuted for murder based upon a complaint must fail.

¶ 12 Defendant next contends that he was improperly subjected to consecutive sentences because first degree murder was not an offense which "triggered" consecutive sentencing at the time of the offense. However, in a prior appeal, we upheld defendant's consecutive sentences. See *Lee*, No. 1-05-1359, order at 9-13. Because defendant's sentences were not improper, they cannot be void.

¶ 13 Accordingly, because defendant has failed to establish that he was the subject of a void judgment, he cannot overcome the two-year time period in which he could have filed his section 2-1401 petitions (*Harvey*, 196 Ill. 2d at 447), and the petitions were properly dismissed (*Nitz*, 2012 IL App (2d) 091165, ¶ 9).

¶ 14 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 15 Affirmed.