

2013 IL App (1st) 111544-U

THIRD DIVISION
November 6, 2013

No. 1-11-1544

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.
)	
v.)	No. 79 C 193
)	
EARL JOHNSON,)	Honorable
)	Maura Slattery-Boyle,
Defendant-Appellant.)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Justices Hyman and Pucinski concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where 1) defendant's extended term sentence was not void, 2) defendant raised the issue of his extended term sentence both on direct appeal and in a 2-1401 petition, and 3) defendant could have, but failed to raise the issue in an earlier post-conviction petition, trial court did not err in denying leave to file successive post-conviction petition.
- ¶ 2 Defendant Earl Johnson appeals the circuit court's order denying him leave to file a successive post-conviction petition. He contends his 80-year extended term sentence for murder is void because the evidence at his sentencing hearing did not establish the offense was exceptionally brutal or heinous and indicative of wanton cruelty. We affirm.

¶ 3 Following a jury trial in 1980, Johnson was convicted of murder, attempted murder, attempted armed robbery and armed violence for a 1978 shooting that occurred when Johnson and two other men tried to rob a grocery store in Chicago. At trial, Suleiman (Steve) Matariyeh testified that he and his two brothers, Walid and Nabil, worked in the family's store and that at 6:30 p.m. on December 4, 1978, Johnson entered the store with Earl Peterson and Reginald Burks, his two co-defendants.¹ According to Steve, Johnson had been in the store about 15 minutes earlier and had told Steve's father, Khalil Matariyeh, the store owner, he would be "back later."

¶ 4 When the three men entered the store, Johnson entered first and pointing a gun, said, "This is a hold up." Steve testified he was about two feet away from Johnson. After Johnson spoke, Walid, who stood about six feet away from Johnson said, "You can get hurt playing like that." Johnson then shot Walid in the head. Steve testified that Walid had nothing in his hand and made no movements prior to being shot. Steve struck Johnson on the hand with a broom, and Johnson dropped the gun. After the Matariyehs converged on Johnson, Peterson picked up the gun and fired several shots at Steve, who was not injured.

¶ 5 A medical examiner testified that Walid was fatally wounded in the right eye and had bullet fragments in his brain. Johnson told police that he was present at the shooting, but did not fire a weapon.

¶ 6 After the jury returned its guilty verdicts, Johnson waived a jury for purposes of his sentencing hearing. At the time of the offense, Johnson was on parole for a robbery conviction, having been released from the penitentiary 7 months earlier. He did not express remorse for the victim's murder. The trial court found Johnson eligible for the death penalty because the

¹ Johnson and Peterson were tried in a simultaneous but severed jury trial. Peterson was ultimately sentenced to 40 years. Burks pled guilty and was sentenced to 20 years.

evidence established that Walid was killed intentionally by Johnson in the course of a felony. After hearing testimony as to factors in aggravation and mitigation, the court declined to impose the death penalty. The court found that the State had established beyond a reasonable doubt that Johnson was the shooter and that the crime "was committed in a manner that is indicative of wanton cruelty." The court's sentencing ruling continued as follows:

"The crime was exceptionally brutal and heinous. The Court is mindful that the victim had no signal that he might be killed by virtue of the comment he made. He may have thought that it was a game. What caused the defendant to pull the trigger as he did is something the Court cannot account for and that is what bothers this Court substantially. That is what makes the offense especially cruel. The offense qualifies for the sentence of an extended term and the Court considers it to be necessary to do so in this case in order to serve the ends of justice and protect this society."

¶ 7 The court sentenced Johnson to an extended term of 80 years in prison for the murder based on its finding of that aggravating factor. Ill. Rev. Stat. 1979, ch. 38, par. 1005-8-2(a); Ill. Rev. Stat. 1979, ch. 38, par. 1005-5-3.2(b)(2). Johnson was also sentenced to concurrent sentences of 20 years for attempted murder and 15 years for attempted armed robbery.

¶ 8 In Johnson's direct appeal, he raised six arguments, including that the trial court abused its discretion in imposing an 80-year extended term sentence for murder. *People v. Johnson*, 121 Ill. App. 3d 358, 374-76 (1984). This court reviewed the findings of the trial court set out above and the court addressed defendant's contention that the term "exceptionally brutal and heinous behavior indicative of wanton cruelty" must be carefully considered. *Id.* at 375. While this court

agreed with Johnson "that a construction of the extended term statute which qualified every murder for the imposition of an extended term sentence would be improper," the court noted the Illinois Supreme Court had considered the definitions of the terms "brutal" and "heinous" and concluded that the statute's application was not limited only to murders "involving torture or the infliction of unnecessary pain." *Id.* at 375-76, quoting *People v. LaPointe*, 88 Ill. 2d 482, 501 (1982).

¶ 9 Observing that the imposition of any sentence, including an extended term, was a matter of judicial discretion, this court held:

"Given the definitions that our supreme court has adopted for the words 'heinous' and 'brutal,' we cannot conclude that the trial court abused its discretion by imposing an extended term sentence of imprisonment of 80 years for the murder of Walid Matariyeh. From our review of the record, the trial judge imposed the extended term sentence because of the specific facts of this case, and not merely because he thought the murder was 'irrational and unjustified.'" *Johnson*, 121 Ill. App. 3d at 376.

Johnson did not appeal to the Illinois Supreme Court.

¶ 10 On April 19, 1988, Johnson filed a *pro se* petition seeking relief under the Post-Conviction Hearing Act (the Act) (Ill. Rev. Stat. 1987, ch. 38, par. 122-1 *et seq.* (now 725 ILCS 5/122-1 *et seq.* (West 2008))). In that filing, Johnson raised a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), alleging that blacks were systematically excluded from his jury. The circuit court summarily dismissed that petition on May 24, 1988. Johnson filed an addendum to his petition claiming that his trial counsel was ineffective for failing to call co-defendant Burks, who attested in an attached affidavit that he was the shooter in the robbery. The circuit court declined

to consider the matters raised in the addendum and denied Johnson's motion for reconsideration of the dismissal of his petition.

¶ 11 This court reversed the summary dismissal of the petition, noting the circuit court did not rule on the petition within 30 days of its filing. *People v. Johnson*, No. 1-88-2157 (1992) (unpublished order under Supreme Court Rule 23). This court also directed the circuit court to consider the issues in the addendum to Johnson's petition.

¶ 12 In 1997, the State moved to dismiss Johnson's post-conviction claims. There was a substantial delay in addressing the State's motion while the parties attempted to determine whether the jury cards from the jury selection in defendant's trial could be located. It was ultimately determined that the cards had been destroyed. In 2006, the circuit court held a hearing on both the *Batson* and ineffective assistance claims raised in Johnson's post-conviction petition and granted the State's motion to dismiss the petition. At no time between 1992, when his post-conviction petition was remanded, and 2006, when the circuit court granted the State's motion to dismiss the petition did Johnson seek leave to assert any argument relating to the imposition of an extended term sentence. In particular, Johnson failed to raise any issue regarding the effect of the decision in *People v. Andrews*, 132 Ill. 2d 451 (1989). Johnson appealed the dismissal of his petition to this court.

¶ 13 On appeal, this court affirmed the petition's dismissal, rejecting Johnson's claims that his trial counsel was ineffective for not calling Burks and Peterson at his sentencing hearing to testify that he was not the gunman. *People v. Johnson*, No. 1-06-1963 (2008) (unpublished order under Supreme Court Rule 23). This court reasoned that Johnson's counsel would have had no indication at the time of Johnson's 1980 sentencing hearing that his co-defendants were willing to so testify. *Id.* at 10. Further, this court observed that Burks' and Peterson's affidavits were directly rebutted by the evidence presented at Johnson's trial.

¶ 14 Johnson also argued on appeal that the circuit court erred in imposing an extended term sentence based upon a finding that the murder was accompanied by exceptionally brutal and heinous behavior indicative of wanton cruelty. *Id.* at 11-12. This court refused to consider that issue because Johnson had not raised it in his post-conviction petition. *Id.*

¶ 15 In July 2009, Johnson filed a petition requesting relief from a void judgment pursuant to section 2-1401(f) of the Code of Civil Procedure (735 ILCS 5/2-1401(f) (West 2008)). In that filing, Johnson asserted the facts did not establish that his behavior was exceptionally brutal or heinous or that he acted with wanton cruelty. On October 19, 2009, the circuit court dismissed Johnson's petition, stating in a written order that Johnson's argument was barred by *res judicata* because he had previously raised it in another proceeding. Furthermore, the court rejected Johnson's argument, raised under *Andrews*, 132 Ill. 2d at 465-66, that his extended term sentence was void because his actions did not fall in the narrow parameters of behavior that could be considered exceptionally brutal or heinous. Johnson did not appeal that ruling to this court.

¶ 16 On March 29, 2011, Johnson filed a motion for leave to file a successive post-conviction petition. Pointing to the accounts of Burks and Peterson that Burks was the gunman, Johnson argued, *inter alia*, that he raised a claim of actual innocence because he did not shoot the victim and that his trial counsel was ineffective for failing to challenge his extended term sentence. The circuit court denied Johnson leave to file the petition, finding that Johnson had not shown cause and prejudice for filing a successive petition. Johnson now appeals that ruling.

¶ 17 On appeal, Johnson contends his extended term sentence is "void" because the circuit court lacked the authority to impose it. Johnson asserts the Illinois Supreme Court held in *Andrews* that, as a matter of law, the evidence in this case did not establish the offense constituted exceptionally brutal or heinous behavior indicative of wanton cruelty.

¶ 18 The Act allows prisoners to collaterally attack a prior conviction and sentence where there has been a substantial violation of constitutional rights. It is defendant's burden to demonstrate a substantial deprivation of federal or state constitutional rights. *People v. Morgan*, 187 Ill. 2d 500, 528 (1999).

¶ 19 However, the Act contemplates the filing of only one post-conviction petition without leave of court. 725 ILCS 5/122-1(f) (West 2010). The Act also expressly provides that all issues actually decided on direct appeal or in an original post-conviction proceeding are barred by *res judicata* (725 ILCS 5/122-3 (West 2010)), and leave to file a successive petition may be granted only if defendant demonstrates cause for his failure to raise the claim in his initial petition and prejudice resulting from that failure. 725 ILCS 5/122-1(f) (West 2010). The required showing of cause and prejudice is excused where the defendant raises a claim of actual innocence. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009). Our review of the circuit court's denial of leave to file a successive post-conviction petition is *de novo*. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 25.

¶ 20 Johnson does not address the cause and prejudice requirements, presumably because he attempts to raise in the instant petition a claim of "actual innocence." Yet, Johnson's claim is not that he was innocent of the murder, but rather that although he was part of the robbery and helped to plan it, he did not shoot the victim. Even assuming the truth of this assertion (which is inherently suspect given that the affidavits attached to the successive petition are from Johnson's co-defendants who cannot be retried because double jeopardy has attached), Johnson is liable for the murder on an accountability theory. Indeed, in the argument before the trial court on his first petition, Johnson's counsel conceded as much. Further, in connection with its review of the denial of Johnson's first petition, this court observed that Johnson's claim that he was not the shooter did not constitute a free-standing claim of actual innocence. *Johnson*, No. 1-06-1963.

Thus, because Johnson does not raise a claim of actual innocence, he is not excused from demonstrating cause and prejudice.

¶ 21 Further, it is obvious that Johnson cannot establish cause here given his failure to raise his "voidness" argument in the 14 years his initial post-conviction petition was pending. *Andrews*, upon which Johnson bases his argument that his sentence was void, was decided in 1989, 17 years prior to the dismissal of his initial petition. There is thus no reason why Johnson could not have advanced this argument sooner.

¶ 22 Furthermore, even if we concluded that Johnson was not barred from pursuing the claim raised in his successive post-conviction petition, either because it is barred by *res judicata* (having been considered and rejected on direct appeal and in connection with his 2-1401 petition) or because he has failed to make the required showing of cause, we would nevertheless reject his contention on the merits. Johnson relies on the proposition that a void sentence, meaning a sentence imposed without statutory authority, may be attacked at any time. See *People v. Thompson*, 209 Ill. 2d 19, 23 (2004) (State conceded that the extended term sentence imposed by the court was improper); *People v. Arna*, 168 Ill. 2d 107, 113 (1995). Whether a sentence is void is a question of law that we review *de novo*. *People v. Hauschild*, 226 Ill. 2d 63, 72 (2007).

¶ 23 Johnson argues his sentence exceeded the circuit court's statutory authority because the facts of his case did not support an extended term sentence. He argues that his crime consisted of a "single shot fired during an attempted armed robbery," which he contends did not constitute exceptionally brutal or heinous conduct. Johnson compares the facts of his case to *Andrews*, where the victim died from a single gunshot wound to the head. *Andrews*, 132 Ill. 2d at 454-55. Remanding the case for resentencing, the supreme court held the circuit court abused its discretion in imposing an extended term based on a finding that the murder was accompanied by exceptionally brutal or heinous conduct indicative of wanton cruelty. *Id.* at 466. Johnson argues

that, as in *Andrews*, the imposition of an extended term sentence in his case was erroneous because "the circumstances of the crime did not allow for it."

¶ 24 However, the court in *Andrews* did not find that the extended term sentence was void. As was the case in *Andrews*, here the court that sentenced Johnson had the statutory authority to impose an extended term if it found his actions constituted exceptionally brutal and heinous behavior indicative of wanton cruelty. The fact that Johnson disagrees with the court's decision does not negate the court's statutory authority to impose the sentence based on the court's factual findings and discretion. See *People v. Acosta*, 331 Ill. App. 3d 1, 8-9 (2001) (rejecting defendant's voidness argument by noting that court acted within statutory authority in making determination that defendant displayed exceptionally brutal or heinous behavior indicative of wanton cruelty). This circumstance is distinguishable from a case in which a court's power to render a particular judgment is limited. See *Arna*, 168 Ill. 2d at 113; see also *People v. Rodriguez*, 355 Ill. App. 3d 290, 296 (2005) (court could not impose criminal sanctions for offense that did not take place on public way when that was a requirement of applicable statute).

¶ 25 The purpose of post-judgment review is not to relitigate matters that were or could have been raised on direct appeal, but rather is limited to matters relating to evidence that did not appear in the record of the trial court's original proceedings and that was discovered after the trial was completed. *People v. Burrows*, 172 Ill. 2d 169, 187 (1996). Still, Johnson maintains the bar of *res judicata* should be relaxed because the law on this issue has changed. Johnson argues that *Andrews* "implicitly" overrules the decision in Johnson's direct appeal because his case was cited in *Andrews* as an example of a case in which an extended term sentence had been affirmed. However, the supreme court's reversal of the extended term sentence in *Andrews* clearly did not expressly or impliedly represent a reversal of all the cases cited therein.

¶ 26 Johnson next asserts that the doctrine of *res judicata* can be relaxed where dictated by fundamental fairness. He argues that a court should not apply *res judicata* where it would be fundamentally unfair to do so. *Dookeran v. County of Cook*, 2013 IL App (1st) 111095, ¶ 43.

¶ 27 A review of the entire record of the proceedings reveals that Johnson received a sentencing hearing at which he had the opportunity to present evidence and the court imposed his extended term sentence after considering the evidence unique to his circumstances. Johnson asks this court, more than 30 years after he committed the offenses, to remand for a new sentencing hearing and require the trial court to reweigh the aggravating and mitigating evidence in the record. Fundamental fairness does not require this court to allow Johnson to revisit this issue. We note that a disparity in sentences for the same offenses is not, standing alone, a violation of fundamental fairness. See *People v. Caballero*, 179 Ill. 2d 205, 216 (1997); compare *People v. Whitfield*, 217 Ill. 2d 177 (2005) (supreme court agreed with defendant's assertion that fundamental fairness was violated when he pled guilty in exchange for a specific sentence but received a greater sentence than that to which he agreed). The doctrine of fundamental fairness does not require this court to consider a modification of Johnson's extended term sentence.

¶ 28 We reject Johnson's contention that his sentence is void and may be considered in a successive post-conviction filing, especially given that this court has already addressed these arguments. Moreover, fundamental fairness does not require that we allow Johnson to proceed with a successive post-conviction petition despite the procedural bars in this case.

¶ 29 Accordingly, for all of the reasons stated herein, the judgment of the circuit court is affirmed.

¶ 30 Affirmed.