

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).

2013 IL App (4th) 120970-U

NO. 4-12-0970

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 13, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Vermilion County
KENNETH A. GRAY, JR.,)	No. 05CF554
Defendant-Appellant.)	
)	Honorable
)	Michael D. Clary,
)	Judge Presiding.

PRESIDING JUSTICE STEIGMANN delivered the judgment of the court.
Justices Knecht and Holder White concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court affirmed the trial court's denial of defendant's petition for relief from judgment.
- ¶ 2 In October 2006, a jury returned separate guilty verdicts against defendant, Kenneth A. Gray, Jr., for the offense of first degree murder (720 ILCS 5/9-1(a) (West 2004)) and for the statutory firearm enhancement of personally discharging the firearm that was the proximate cause of death (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2004)). In March 2007, the trial court sentenced defendant to 31 years' imprisonment for first degree murder and a consecutive term of 25 years' imprisonment pursuant to the mandatory firearm enhancement. The court ordered defendant to serve both portions of the sentence at 100%. In July 2012, defendant filed his third petition for relief from judgment pursuant to section 2-1401 of the Code of Civil

Procedure (Civil Code) (735 ILCS 5/2-1401 (West 2012)), which the trial court denied in September 2012.

¶ 3 Defendant appeals, arguing for the first time that his sentence is void because the trial court improperly ordered him to serve 100% of the 25-year firearm enhancement, which defendant contends is subject to day-for-day credit under section 3-6-3(a)(2.1) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/3-6-3(a)(2.1) (West 2004)). We disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 In October 2006, a jury convicted defendant of first degree murder (720 ILCS 5/9-1(a) (West 2004)) for the September 2005 shooting death of his wife. The jury also returned a verdict finding that, during the commission of the offense, defendant personally discharged the firearm that was the proximate cause of death (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2004)).

¶ 6 In March 2007, the trial court sentenced defendant to 31 years' imprisonment for first degree murder and a consecutive term of 25 years' imprisonment pursuant to the mandatory firearm enhancement of section 5-8-1(a)(1)(d)(iii) of the Unified Code. The court ordered defendant to serve 100% of the 56 years imposed.

¶ 7 In April 2008, this court affirmed defendant's conviction and sentence on direct appeal. *People v. Gray*, No. 4-07-0233 (April 1, 2008) (unpublished order pursuant to Supreme Court Rule 23).

¶ 8 In July 2012, defendant filed the instant petition for relief from judgment (his third since his conviction) pursuant to section 2-1401 of the Civil Code. In his petition, defendant alleged a variety of trial and sentencing errors which he argued rendered his conviction

and sentence void. In September 2012, the trial court denied defendant's petition.

¶ 9 This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 In this appeal, defendant does not advance any of the claims contained in his petition for relief from judgment. Instead, he argues for the first time that his sentence is void on the grounds that the trial court was without authority to order him to serve 100% of the 25-year firearm enhancement because the enhancement is subject to day-for-day credit under section 3-6-3(a)(2.1) of the Unified Code.

¶ 12 The State asserts that defendant forfeited this contention of error by failing to raise it in his motion to reconsider sentence or in the instant petition for relief from judgment. However, we reach the merits of defendant's claim because a void sentence may be challenged at any time and in any court. *People v. Thompson*, 209 Ill. 2d 19, 25, 805 N.E.2d 1200, 1203 (2004).

¶ 13 Because defendant's challenge to his sentence calls for interpretation of the provisions of the Unified Code, our review is *de novo*. *People v. Davis*, 2013 IL App (4th) 110785, ¶ 26, 990 N.E.2d 910.

¶ 14 A. Day-For-Day-Good-Conduct Credit Under Section 3-6-3 of the Unified Code

¶ 15 Section 3-6-3(a)(2.1) of the Unified Code provides that "[f]or all offenses, other than those enumerated ***, the rules and regulations shall provide that a prisoner who is serving a term of imprisonment shall receive one day of good conduct credit for each day of his or her sentence of imprisonment ***." 730 ILCS 3-6-3(a)(2.1) (West 2004).

¶ 16 Section 3-6-3(a)(2)(i) of the Unified Code provides that "a prisoner who is serving a term of imprisonment for first degree murder *** shall receive no good conduct credit and shall serve the entire sentence imposed by the court." 730 ILCS 5/3-6-3(a)(2)(i) (West 2004).

¶ 17 B. The Mandatory Firearm Enhancement of
Section 5-8-1 of the Unified Code

¶ 18 Section 5-8-1(a)(1)(d)(iii) of the Unified Code provides as follows:

"(a) Except as otherwise provided ***, a sentence of imprisonment for a felony shall be a determinate sentence set by the court under this Section, according to the following limitations:

(1) for first degree murder,

* * *

(d) *** (iii) if, during the commission of the offense, the person personally discharged a firearm that proximately caused *** death to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2004).

¶ 19 C. The 25-Year Firearm Enhancement Is Not Subject to
Day-For-Day-Good-Conduct Credit

¶ 20 Defendant argues that because the 25-year firearm enhancement is not one of the offenses specifically enumerated in the truth-in-sentencing provisions of the Unified Code (730 ILCS 5/3-6-3 (West 2004)), it is by default subject to day-for-day sentencing credit under section

3-6-3(a)(2.1) of the Unified Code. We disagree.

¶ 21 Initially, we reject defendant's contention that the mandatory 25-year firearm enhancement is an "offense" within the meaning of section 3-6-3(a)(2.1) of the Unified Code. Defendant argues that, although the Unified Code contains no definition of "offense," the firearm enhancement falls within the definition contained in the Criminal Code of 1961 (720 ILCS 5/2-12 (West 2004) (" 'Offense' means a violation of any penal statute of this State.")). However, as the State points out, a person cannot be convicted of "violating" the firearm enhancement alone. Instead, as with all sentencing enhancements, the firearm enhancement is a directive to the trial court regarding the term of imprisonment applicable to certain criminal offenses when certain conditions are met. The firearm enhancement exists as law only within the sentencing provisions of the Unified Code, and it is not an "offense" within the meaning of the Unified Code.

¶ 22 The State cites the recent case of *People v. Alvarado*, 2013 IL App (3d) 120467, 993 N.E.2d 1122, in support of its argument that the 25-year firearm enhancement is not subject to day-for-day credit. In that case, the court addressed the same issue presented here and held that "the plain and ordinary meaning of section 5-8-1(a) [of the Unified Code] is that the enhancements provided therein are to be considered part of the sentence." *Id.* ¶ 21. In interpreting the statutory command that the 25-year firearm enhancement "be added to the term of imprisonment" (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2004)), the *Alvarado* court noted that the "word 'add' means 'to unite or join so as to increase the *** size.' The Random House Dictionary of the English Language 22 (2d ed. 1987)." *Alvarado*, 2013 IL App (3d) 120467, ¶ 21, 993 N.E.2d 1122. Because the mandatory firearm enhancement of section 5-8-1(a) of the Unified Code is to be added to defendant's sentence, it becomes "part of defendant's sentence for murder"

and "subject to the requirements of section 3-6-3(a)(2)(i) [of the Unified Code]." *Id.* We agree with the court's reasoning and conclusion in *Alvarado*.

¶ 23 We also note that section 5-8-1(a)(1) of the Unified Code, which creates the firearm enhancement at issue, applies *only* to sentences for first degree murder. Because the legislature deemed it appropriate for all first degree murder sentences to be served at 100% (730 ILCS 5/3-6-3(a)(2)(i) (West 2004)), it would make no sense to then confer day-for-day credit on an enhancement that applies *only* to those sentences. We conclude that the legislature did not intend such a result. The 25-year firearm enhancement is not subject to day-for-day credit.

¶ 24 Because the sentencing court properly ordered defendant to serve 100% of the 25-year firearm enhancement, defendant's sentence is not void and the trial court did not err by denying his petition for relief from judgment.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we affirm the trial court's denial of defendant's petition for relief from judgment.

¶ 27 Affirmed.