2015 IL App (1st) 130124-U

FIFTH DIVISION
June 19, 2015

No. 1-13-0124

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. 02 CR 32024
	)	
CARLTON COLEMAN,	)	Honorable
	)	Thomas V. Gainer,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justice Reyes concurred in the judgment.
Justice Gordon specially concurred.

O R D E R

¶ 1 ***Held:*** Summary dismissal of defendant's post-conviction petition affirmed over his claim that an extended term sentence was improperly entered on the lesser offense.

¶ 2 Defendant Carlton Coleman appeals from an order of the circuit court of Cook County summarily dismissing his petition for relief under the Post-Conviction Hearing Act (Act) (725

ILCS 5/122-1 *et seq*. (West 2012)). On appeal, defendant does not contest the propriety of that dismissal, but raises a new issue that the extended term sentence entered on his negotiated guilty plea was void.

¶ 3 On April 8, 2011, four years after a mistrial was declared in his jury trial, defendant entered a negotiated plea of guilty to armed robbery in exchange for 24 years' imprisonment, and aggravated battery with a deadly weapon (which was reduced from first degree murder) in exchange for an extended-term sentence of 10 years' imprisonment. The parties agreed that these concurrent sentences were to run consecutive to the aggregate sentence of 18 years' imprisonment imposed in three other cases.

¶ 4 Defendant did not file a motion to withdraw his guilty plea or attempt to perfect an appeal from the judgment entered on it. Instead, on September 6, 2012, he filed a *pro se* post-conviction petition solely alleging that his 24-year sentence for armed robbery was void because it was imposed under the sentencing enhancement statute declared unconstitutional in *People v. Hauschild*, 226 Ill. 2d 63 (2007). He thus claimed that he was entitled to be resentenced on a reduced charge of simple robbery.

¶ 5 Defendant's petition was considered by the same court that presided over his guilty plea proceeding, and summarily dismissed as without merit. In doing so, the court stated that the record of the plea proceeding shows that the 24-year sentence imposed on the armed robbery did not include the 15-year gun enhancement, which was deemed unconstitutional in *Hauschild.* The court observed that *Hauschild* was entered prior to the plea and that the sentence imposed was a "straight up 24 years." The court also found that the concerns in *Hauschild* were not present

where defendant's sentence involved no error in applying any relevant sentencing statute, and his sentences were not consecutive. The court concluded that there was no misapprehension or misapplication of the law, and that defendant's sentence was entirely proper.

¶ 6 On appeal, defendant raises no issue with regard to the allegation made in his petition, and has thus waived that issue for review. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006); *People v. Snow*, 2012 IL App (4th) 110415, ¶11; Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Rather, defendant maintains for the first time that his 10-year extended term sentence for aggravated battery with a deadly weapon, which was a Class 3 offense, was void because extended term sentences can only be imposed on the most serious class offense, and in this case, armed robbery, a Class X offense, was the more serious offense of which he was convicted. Defendant acknowledges that he has not previously raised the issue, but, relying on *People v. Arna*, 168 Ill. 2d 107 (1995), he maintains that he can raise a void sentencing claim at any time.

¶ 7 Although any claim of violation of constitutional rights not raised in an original or amended petition is waived (725 ILCS 5/122-3 (West 2012)), an attack on a void judgment may be made at any time (*Arna*, 168 Ill. 2d at 113). Whether a sentence is void is a question of law subject to *de novo* review. *People v. Donelson*, 2011 IL App (1st) 092594, ¶7.

¶ 8 In *People v. White*, 2011 IL 109616, ¶20, the supreme court held that a sentence entered without statutory authority is void. The parties have noted that what constitutes a void, as opposed to a voidable, judgment is currently pending before the supreme court in *People v. Castleberry*, No. 116916 (Jan. 29, 2014*) leave to appeal allowed*. However, we need not decide whether an unauthorized sentence is void or voidable because we find no sentencing error in this

case.

¶ 9 Defendant asserts that an extended term sentence could only be imposed on the most serious offense, which in this case was armed robbery, and not on the lesser offense of aggravated battery with a deadly weapon. Consequently, he claims that the extended term imposed on his lesser offense was void. The State responds that an extended-term sentence may be imposed on a lesser offense if the greater offense arose from unrelated courses of conduct. Defendant replies that the convictions did not arise from an unrelated course of conduct where there was no substantial change in the nature of the criminal objective. He further asserts, in his reply brief, that the State ignores the fact that the plea court did not make a specific factual finding on the record that the two offenses were part of separate courses of conduct, and therefore, this court is foreclosed from making that determination for the first time on appeal, citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

¶ 10 We observe that defendant elected not to proceed to trial in this matter, but, rather, chose to enter a negotiated plea of guilty. Under the terms of the agreement, defendant pleaded guilty to armed robbery in exchange for 24 years' imprisonment, and to a charge of aggravated battery with a deadly weapon, reduced from first degree murder, in exchange for an extended-term sentence of 10 years' imprisonment. In doing so, defendant waived any *Apprendi*-based sentencing objections on appeal. *People v. Townsell*, 209 Ill. 2d 543, 548 (2004); *People v. Jackson*, 199 Ill. 2d 286, 295 (2002).

¶ 11 In arriving at that conclusion, the supreme court recognized that facts which expose a defendant to a punishment greater than that otherwise legally prescribed are by definition

elements of a separate legal offense (*Jackson*, 199 Ill. 2d at 295-96, citing *Apprendi*, 530 U.S. at 483, n. 10), and, as such, fall within the constitutional right of a jury trial and proof beyond a reasonable doubt, made applicable to the states by due process clause of the fourteenth amendment (*Jackson*, 199 Ill. 2d at 296). However, the court emphatically observed that by pleading guilty defendant *waives exactly those rights*, for a knowing relinquishment of the right to a jury trial is the *sine qua non* of a guilty plea. (Emphasis in original.) *Jackson*, 199 Ill. 2d at 296. It therefore follows that by pleading guilty in this case, defendant elected to relieve the State of its burden of proving *any* element of the crime, and thus waived any *Apprendi*-based sentencing objections on appeal. (Emphasis in original.) *Jackson*, 199 Ill. 2d at 295-97. Given defendant's voluntary relinquishment of this known right, we have no authority to reach the merits of defendant's *Apprendi* claim. *Townsell*, 209 Ill. 2d at 548.

¶ 12 We next consider defendant's claim that the extended term imposed on his aggravated battery conviction is void because it is a less serious offense than armed robbery. We observe that a sentencing court may generally impose an extended term pursuant to section 5-8-2(a) of the Unified Code of Corrections (730 ILCS 5/5-8-2(a) (West 2014)) only on the offense with the most serious class. *People v. Collins*, 366 Ill. App. 3d 885, 900 (2006). However, an exception to this rule applies where differing classes are separately charged and arise from unrelated courses of conduct. *Collins*, 366 Ill. App. 3d at 900.

¶ 13 In this case, defendant pleaded guilty to a charge of armed robbery based on a factual basis showing that at 7 a.m. on June 7, 2002, Deraold White was outside in the area of 7130 South South Chicago Avenue in Chicago, when defendant approached him, produced a handgun,

pointed it at his body, and demanded his property. White turned over his money and jewelry to defendant, thus establishing that offense. Defendant also pleaded guilty to a reduced charge of aggravated battery with a deadly weapon based on facts showing that after defendant received the proceeds from the armed robbery of Deraold White, Frank Norwood exited a building, and yelled, "[w]hat's going on." Defendant then walked over to Norwood, wrestled with him over the gun, and when defendant retained control of the gun, he fatally shot Norwood.

¶ 14 Where, as here, defendant pleads guilty, the quantum of proof necessary to establish a factual basis for the plea is less than that necessary to sustain a conviction after a full trial; all that is required to appear on the record is a basis from which the judge could reasonably reach the conclusion that defendant actually committed the acts with the intent, if any, required to constitute the offense to which he is pleading guilty. *People v. Barker*, 83 Ill. 2d 319, 327-28 (1980). In this case, the factual basis presented at the plea hearing provided sufficient proof for the court to reasonably reach the conclusion that the offenses arose out of unrelated courses of conduct to allow for extended-term sentencing. Defendant argues to the contrary that the facts show that Norwood intervened in the armed robbery, and, accordingly, that the offenses did not arise out of separate courses of conduct.

¶ 15 The test for determining whether the convictions arose from unrelated courses of conduct is whether there was a substantial change in the nature of defendant's criminal objective. *People v. Bell*, 196 Ill. 2d 343, 354 (2001). Where a lesser and greater offense are not committed as a part of a single course of conduct, an extended term may be imposed on the lesser offense. *Collins*, 366 Ill. App. 3d at 900.

¶ 16 Here, we find that the stipulated facts show two different criminal objectives and the commission of two separate offenses against two separate individuals. Defendant's first objective was to rob White of his property, which he did. At that point, Norwood came outside and asked what was going on. Defendant promptly left White and confronted Norwood, wrestled with him over the gun, and fatally shot him, thus exhibiting a change in his criminal objective, and eligibility for extended-term sentencing on the reduced weapons offense.

¶ 17 In reaching that conclusion, we find this case analogous to *Collins*, 366 Ill. App. 3d at 900, 902, where the evidence showed that defendant's first offense was to steal a van without being seen and drive off, but when the owner of the van caught up with him and entered the van, his goal changed from avoiding detection to violently confronting the victim to obtain his money. On these facts, this court concluded that defendant's actions arose from an unrelated course of conduct, thereby allowing an extended term sentence on his attempted robbery conviction. *Collins*, 366 Ill. App. 3d at 902. We find this reasoning persuasive and applicable here where defendant's objective changed from robbing White to eliminating Norwood as a witness by fatally shooting him.

¶ 18 We also find support for this in *People v. Ingram*, 84 Ill. App. 3d 495, 496 (1980), where defendant killed the attendant at a gas station, and when a customer arrived at the gas station, defendant told him that they were out of regular gas and the premium was locked so he would have to return later. This person then entered the gas station, and when he saw the attendant's body on the ground, defendant forcefully struck him with an unknown object. *Ingram*, 84 Ill. App. 3d at 496-97. The Second District found that the attempted murder of this person was

independently motivated from defendant's obvious criminal objective of armed robbery of the gas station to conceal his crime by getting rid of the witness. *Ingram*, 84 Ill. App. 3d at 501. Accordingly, the court found that the two offenses of armed robbery and attempted murder were not committed as part of a single course of conduct, and allowed for consecutive sentencing. *Ingram*, 84 Ill. App. 3d at 498, 501. Similarly here, once defendant robbed White, and Norwood came outside and asked what was going on, defendant's criminal objective of robbing White changed to confronting Norwood. As such, the agreed-upon extended-term sentence for the lesser offense was permissible.

¶ 19 Defendant disagrees, claiming that the situation here is akin to that in *People v. Arrington*, 297 Ill. App. 3d 1, 5 (1998), a decision in which the Second District found that defendant's criminal objective did not change. In *Arrington*, 297 Ill. App. 3d at 2, defendant entered a store with a nonfunctioning replica of a pistol and asked for money, and when he turned to leave, the manager told him to stop, blocked his path, and defendant struck him on the head. The reviewing court found that defendant's criminal objective was to rob the store, and that inherent in any plan to rob a store is also an intention to escape the premises with the purloined proceeds, and that defendant's motivation for striking the manager was not a newly conceived intention to harm him, but an attempt to complete his plan, *i.e.*, robbery and escape from the store. *Arrington*, 297 Ill. App. 3d at 5.

¶ 20 The Third District disagreed with the court's conclusion in *Arrington*, that any act committed while defendant was attempting to escape from the scene of the robbery is necessarily part of the same overarching criminal objective. *People v. Hummel*, 352 Ill. App. 3d a269, 272

(2004). The court in *Hummel*, found that one must look to the circumstances of the occurrence to determine whether the objective changed when the use of force became necessary to effectuate the escape. *Hummel*, 352 Ill. App. 3d at 272.

¶ 21 In *Hummel*, 352 Ill. App. 3d at 270, defendant was driving the getaway car for his accomplices who were robbing stores. Once his cohorts were discovered and the store employees gave chase, defendant's objective changed from avoiding detection to avoiding apprehension. *Hummel*, 352 Ill. App. 3d at 273. The court found that when an employee placed herself in front of defendant's car, and refused defendant's command to let him pass, defendant's actions were directed specifically at that individual, rather than the store he had intended to rob. *Hummel*, 352 Ill. App. 3d at 270, 273. Therefore, his course of conduct in committing the battery was unrelated to the objective of burglarizing the store and the extended term imposed on his aggravated battery conviction was proper. *Hummel*, 352 Ill. App. 3d at 270, 273.

¶ 22 We reach the same result here on the circumstances presented, and reject defendant's claim that the extended-term sentence imposed on the lesser offense of aggravated battery with a deadly weapon was void. Having so found, we affirm the summary dismissal of defendant's post-conviction petition by the circuit court of Cook County.

¶ 23 Affirmed.

¶ 24 PRESIDING JUSTICE GORDON, specially concurring.

¶ 25 The majority holds, in part, that defendant negotiated a plea and that he received what he bargained for. *Supra* ¶¶ 11, 13. I write separately to emphasize that I concur on that basis.

¶ 26 Defendant chose to plead guilty to a stipulated set of facts supporting two separate offenses as a way to avoid a first-degree murder charge. *Supra* ¶ 13. Although defendant engaged in one continuous course of conduct when he robbed someone at gunpoint and then killed a security guard during the ensuing struggle (*People v. Klebanowski*, 221 Ill. 2d 538, 547 (2006) (a plan to commit armed robbery, which did not include a plan "to kill any person attempting to apprehend them *** would be inane and child-like"); *People v. Arrington*, 297 Ill. App. 3d 1, 5-6 (1998)), I nonetheless concur because defendant negotiated a specific plea and sentence and received exactly what he bargained for. *People v. Townsell*, 209 Ill. 2d 543, 545 (2004) ("It is well established that a voluntary guilty plea waives all non-jurisdictional errors or irregularities, including constitutional ones.").