FIRST DIVISION
June 29, 2015

Nos. 1-13-1014 and 1-13-3256
(CONSOLIDATED)

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. 08 CR 6681
	)	
BRUCE GILES,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's negotiated guilty plea and 14-year sentence were void where defendant was not sentenced under the applicable law in effect at time of the offense.

¶ 2 Pursuant to a negotiated guilty plea in 2010, defendant Bruce Giles was convicted of the Class 2 felony offense of aggravated driving under the influence (aggravated DUI) (625 ILCS 5/11-501(a)(1), (d)(1)(F), (d)(2) (West 2008)). Based on defendant's two prior Class 2 felony convictions, the circuit court sentenced defendant as a Class X offender to 14 years in prison

under the Class X recidivist provision (730 ILCS 5/5-5-4.5-95(b) (West 2010)). On appeal, defendant contends his plea and sentence are void because, at the time he committed the offense, the sentencing statute exempted DUI offenders from the Class X recidivist provision, thus subjecting him to a lower sentencing range, and he was not advised of the right to elect which sentencing statute should be applied in his case. For the reasons that follow, defendant's guilty plea and 14-year sentence are vacated, and we remand to allow defendant to withdraw his plea and proceed to trial should he so elect.

¶ 3 Defendant was charged with aggravated DUI in connection with a February 10, 2008, car accident that killed Oscar Salgado, a passenger in defendant's car. The version of aggravated DUI under which defendant was convicted is a Class 2 felony. 625 ILCS 5/11-501(d)(1)(F), (d)(2) (West 2008).

¶ 4 On May 25, 2010, defendant entered a guilty plea to aggravated DUI, in exchange for which the State nol-prossed six remaining counts against defendant. The court admonished defendant that he was charged with aggravated DUI in which an accident occurred resulting in death. The court stated that version of aggravated DUI was a Class 2 felony subject to a sentencing range of 3 to 14 years in prison; however, the court admonished defendant that due to his previous convictions, he would be sentenced as a Class X offender and thus was subject to a sentencing range of 6 to 30 years in prison. After accepting defendant's jury waiver, the court heard the factual basis for defendant's plea.

¶ 5 Defendant was sentenced under the Class X recidivist provision, which imposes mandatory Class X sentencing status upon defendants who are convicted of a Class 1 or Class 2 felony who have at least two prior convictions classified as Class 2 or greater felonies. 730 ILCS 5/5-4.5-95(b) (West 2010) (formerly 730 ILCS 5/5-3(c)(8) (West 2008)). The parties stipulated

that defendant had two previous Class 2 convictions: (1) possession of a stolen motor vehicle, and (2) aggravated unlawful use of a weapon, based on defendant's possession of an uncased, unloaded and immediately accessible weapon while not on his own land or place of business, and having previously been convicted of a felony (720 ILCS 5/24-1.6(a)(1),(a)(3)(A), (d) (West 2002)). Pursuant to the plea agreement, the court imposed a sentence of 14 years in prison. Defendant filed neither a motion to withdraw his guilty plea nor a direct appeal.

¶ 6 In 2011, defendant filed a *pro se* motion for *habeas corpus* relief, raising various constitutional challenges to his sentence. Among those assertions, defendant argued his indictment was void and invalid and the court erroneously used his prior convictions to both enhance the class of his offense and also to impose a sentence beyond the minimum term for a Class X offense. The circuit court denied defendant's motion. On appeal, this court granted defense counsel's motion to withdraw and affirmed. *People v. Giles*, No. 1-12-1440 (2013) (unpublished summary order under Supreme Court Rule 23).

¶ 7 On December 7, 2012, defendant filed a *pro se* petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2010)), in which he alleged his conviction violated the one-act, one-crime doctrine, he was denied a speedy trial, and he did not receive the effective assistance of counsel. On February 8, 2013, the court summarily dismissed defendant's petition. Defendant appealed that ruling to this court in case no. 1-13-1014. On March 1, 2013, defendant filed a motion for reconsideration, which the court denied on May 31, 2013. Defendant has appealed that ruling to this court in case no. 1-13-3256. We granted defendant's motion to consolidate those appeals.

¶ 8 On appeal, defendant asserts his guilty plea and sentence are void. He contends the Class X felony sentencing range under which his punishment was imposed was greater than the

sentencing range that applied to his offense at the time it was committed, in violation of the prohibition against *ex post facto* laws. Defendant argues he was not informed of those disparate ranges and given the right to elect under which statute his sentence should be determined, and thus, without being informed of those disparate sentencing ranges, his plea was not knowing and voluntary.

¶ 9 At the outset, we address the State's position that defendant did not file a motion to withdraw or vacate his plea and did not raise his voidness claim in a direct appeal or in his post-conviction petition and has thus waived the ability to raise this issue now. As a general rule, the filing of a timely motion to withdraw a guilty plea is a "condition precedent" to an appeal from that plea. *People v. Skyrd*, 241 Ill. 2d 34, 40 (2011); Ill. S. Ct. R. 604(d) (eff. Feb. 10, 2006). Another general rule of waiver states that a party may not raise an issue for the first time on appeal from the dismissal of a post-conviction petition. See *People v. Jones*, 211 Ill. 2d 140, 148 (2004); 725 ILCS 5/122-3 (West 2010) (claims that are not raised in the original or amended petition are waived).

¶ 10 Our supreme court has held, however, that a defendant has the right to be sentenced under either the law in effect at the time the offense was committed or the law in effect at the time of sentencing. *People v. Horrell*, 235 Ill. 2d 235, 242 (2009). The supreme court has placed an affirmative duty on the trial court to advise a defendant of his right to elect the provision under which he should be sentenced, noting that in the absence of a showing that a post-conviction petitioner was advised of that right of election and an express waiver of that right, the petitioner "was denied due process of law." *People v. Hollins*, 51 Ill. 2d 68, 71 (1972). Because the court in this case did not advise defendant of that choice, we cannot conclude that defendant has waived this argument by failing to present it earlier. *People v. Strebin*, 209 Ill.

App. 3d 1078, 1081 (1991), citing *People v. Anderson*, 93 Ill. App. 3d 646, 656 (1981). Moreover, a void judgment may be attacked "at any time or in any court, either directly or collaterally" and is not subject to waiver. *People v. Thompson*, 209 Ill. 2d 19, 25-27 (2004). An attack on a void judgment may be raised at any time, and such a claim "does not depend on the Post-Conviction Hearing Act for its viability." *People v. Brown*, 225 Ill. 2d 188, 199 (2007).

¶ 11 Proceeding to the substance of defendant's claim, defendant contends that the application of the Class X recividist provision in his case violated the *ex post facto* doctrine because it constituted an additional punishment that was not in effect at the time of the offense. We agree.

¶ 12 The *ex post facto* laws under the United States and Illinois Constitutions prohibit the retroactive application of laws that inflict greater punishment than the law in effect at the time a crime was committed. U.S. Const., art. I, § 10; Ill. Const. 1970, art. I, § 16; *Smith v. Doe*, 538 U.S. 84, 92 (2003); *People v. Cornelius*, 213 Ill. 2d 178, 207 (2004). Those *ex post facto* clauses serve "both to restrain legislatures from arbitrary and vindictive lawmaking and to provide individuals with fair notice of acts that give rise to criminal sanctions." *McGee v. Snyder*, 326 Ill. App. 3d 343, 348 (2001). A law is an impermissible *ex post facto* law if it is both retroactively applied and disadvantageous to a defendant. *Id*., citing *People v. Franklin*, 135 Ill. 2d 78, 107 (1990). For a law to be *ex post facto*, "it must be more onerous than the prior law." *Dobbert v. Florida*, 432 U.S. 282, 292 (1977).

¶ 13 To establish an *ex post facto* violation, a defendant must show: (1) a legislative change; (2) the change imposed a punishment; and (3) the punishment is greater than the punishment that existed at the time the crime was committed. *People v. Vlahon*, 2012 IL App (4th) 110229, ¶ 17. A sentence that violates the prohibition against *ex post facto* laws is void and may be challenged at any time. *People v. Carreon*, 2011 IL App (2d) 100391, ¶ 12; *People v. Dalton*, 406 Ill. App.

3d 158, 162 (2010). In the present case, the 2009 change in the recidivist sentencing provision increased the sentencing range applicable to defendant from the time he committed the crime in 2008.

¶ 14 Here, defendant pled guilty to aggravated DUI in 2008. 625 ILCS 5/11-501(d)(1)(F) (West 2008). Pursuant to section 11-501 of the Vehicle Code, an aggravated DUI that resulted in the death of one person was a Class 2 felony and was subject to an extended-term sentencing range of between 3 and 14 years in prison. 625 ILCS 5/11-501(d)(1)(F), (d)(2) (West 2008).

¶ 15 Also in 2008, the Illinois sentencing statute included a Class X recidivist provision, which stated as follows:

> "When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, after having twice been convicted of any Class 2 or greater Class felonies in Illinois, and such charges are separately brought and tried and rise out of different series of acts, such defendant shall be sentenced as a Class X offender. This paragraph shall not apply unless (1) the first felony was committed after the effective date of this amendatory Act of 1977; and (2) the second felony was committed after conviction on the first; and (3) the third felony was committed after conviction on the second." 730 ILCS 5/5–5–3(c)(8) (West 2008).

A Class X sentence ranged between 6 and 30 years. 730 ILCS 5/5-8-1(a)(3) (West 2008). However, when defendant committed the offense on February 10, 2008, section 5-5-3(a) of the recidivist sentencing statute expressly exempted DUI offenders from the Class X recidivist provision, stating that every person convicted of an offense shall be sentenced under that section

"except as provided in Section 11-501 of the Illinois Vehicle Code." 730 ILCS 5/5-5-3(a) (West 2008).

¶ 16 Effective July 1, 2009, the Class X recidivist provision was retained in substance but moved as part of a larger reorganization of the criminal sentencing statutes. The Class X recidivist provision was newly codified in section 5-4.5-95(b) of the sentencing statute. 730 ILCS 5/5-4.5-95(b) (West Supp. 2009). The language of section 5-4.5-95(b) mirrors the language in section 5-5-3(c)(8). Compare 730 ILCS 5/5-4.5-95(b) (West Supp. 2009) with 730 ILCS 5/5-5-3(c)(8) (West 2008). However, the exemption for DUI offenders from the Class X recidivist provision was eliminated in the 2009 version. Accordingly, the 2009 legislative revision increased the punishment for defendant's aggravated DUI committed in 2008.

¶ 17 At sentencing in 2010, the court admonished defendant that due to the prior Class 2 felonies in his background, he would "have to be sentenced as a Class X offender" to a range of between 6 and 30 years in prison. In contrast, the law in effect when defendant committed the crime did not subject him to a Class X sentence based on his criminal background, because section 5-5-3(a) removed DUI offenses from the purview of the general criminal sentencing statutes. Defendant's potential sentencing range under the DUI sentencing statute at the time he committed the crime was a Class 2 extended-term sentence of between 3 and 14 years in prison. 625 ILCS 5/11-501(d)(1)(F), (d)(2) (West 2008). Therefore, at the time of his sentencing in 2010, defendant agreed to a guilty plea based on a potential 30-year maximum sentence that was more than twice as long as the 14-year maximum sentence to which he was subject when he committed the offense in 2008. We thus conclude that the imposition of a Class X sentence range in this case violated the prohibition against *ex post facto* laws.

¶ 18 The State concedes that the exception in section 5-5-3(a) exempting DUI offenses from the Class X recidivist provision had been removed by the time of defendant's sentencing. Still, the State maintains defendant's sentence should be upheld because he stipulated to the imposition of a Class X sentencing range based upon his criminal record. We do not find the State's arguments persuasive.

¶ 19 A defendant is not estopped from challenging his sentence merely because he agreed to it as part of a negotiated plea agreement. *People v. Douglas*, 2014 IL App (4th) 120617, ¶ 32; see also *Brown*, 225 Ill. 2d at 199 (a "guilty plea does not preclude a defendant from challenging a circuit court's judgment as void *ab initio*"). To the contrary, "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." *People v. White*, 2011 IL 109616, ¶ 23, quoting *United States v. Greatwalker*, 285 F.3d 727, 730 (8th Cir. 2002). The fact that defendant's 14-year sentence rests within the permissible range of 3 to 14 years for a Class 2 extended-term sentence does not cure any error. The *ex post facto* clause "looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed." *In re R.T.*, 313 Ill. App. 3d 422, 432 (2000), citing *Lindsey v. Washington*, 301 U.S. 397, 401 (1937). Even if a sentence imposed under a wrong sentence range in fact fits within a correct sentencing range, the sentence must be vacated due to the trial court's reliance on the wrong sentencing range in imposing the sentence. *People v. Owens*, 377 Ill. App. 3d 302, 305-06 (2007).

¶ 20 Having found that the application of a Class X sentencing range in this case was the unconstitutional application of an *ex post facto* law, we next consider the appropriate remedy. Defendant contends that under *White*, 2011 IL 109616, ¶ 21, the court's failure to admonish him

as to the correct sentencing range of 3 to 14 years invalidates his entire plea agreement to a 14-year sentence.

¶ 21 As noted above, a sentence that violates the prohibition against *ex post facto* laws is void. *People v. Carreon*, 2011 IL App (2d) 100391, ¶ 12; *People v. Dalton*, 406 Ill. App. 3d 158, 162 (2010). Even though defendant's 14-year sentence is facially valid, because it fits within the sentencing range of 3 to 14 years that could have been applied, and even though that 14-year term did not fall below a statutory minimum or exceed a statutory maximum, the sentence is void from its inception because it was issued in violation of defendant's constitutional protections. U.S. Const., art. I, § 10; Ill. Const. 1970, art. I, § 16; *Brown*, 225 Ill. 2d at 203-04.

¶ 22 Moreover, the circuit court's failure to properly admonish defendant as to the applicable sentencing range renders his entire plea agreement void. *White*, 2011 IL 109616, ¶ 21. Our conclusion that defendant's plea agreement is void is not based solely on the voidness of his sentence. It is because defendant could not have knowingly and voluntarily entered a plea when he was not aware of the variance in the sentencing laws from the time he committed the offense to the time of his sentencing. More specifically, defendant could not have knowingly and voluntarily agreed to a 14-year sentence when he was not told that he could be subject to a sentencing range of between 3 and 14 years under the law as it existed at the time he committed the crime. The withdrawal of a guilty plea is appropriate where the plea was entered through a misapprehension of the facts or of the law. *People v. Hughes*, 2012 IL 112817, ¶ 32; see also *People v. McRae*, 2011 IL App (2d) 090798, ¶ 20 (defendant's sentence and plea agreement void where trial court failed to properly admonish defendant of mandatory sentence). Where a defendant is not advised of the proper range of penalties he might face, his entire plea agreement is void, and the case must be remanded to allow defendant to withdraw his guilty plea and begin

anew. *White*, 2011 IL 109616, ¶ 31; see also, *e.g.*, *People v. Strom*, 2012 IL App (3d) 100198, ¶¶ 9-10; *McRae*, 2011 IL App (2d) 090798, ¶¶ 20, 41.

¶ 23 Accordingly, we vacate defendant's guilty plea and sentence, and remand this case to the circuit court with directions to allow defendant the opportunity to withdraw his guilty plea and start over should he choose to do so. Because we are vacating defendant's guilty plea sentence in its entirety, we do not address his remaining arguments challenging either his sentence or the fines and fees that were imposed upon the circuit court's judgment.

¶ 24 Plea and sentence vacated; remanded with directions.